Neutral Citation Number: [2021] EWCA Civ 680

Case No: A3 2020/1796/1797 AND 1798

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION (FINANCIAL LIST)
THE HONOURABLE MR JUSTICE SNOWDEN
FL-2016-000017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2021

Before :

LADY JUSTICE ASPLIN
LADY JUSTICE ANDREWS
and
LORD JUSTICE BIRSS

- -

Between:

(1) NATWEST MARKETS PLC
(2) MERCURIA ENERGY EUROPE TRADING LTD **Appellants**

- and -

BILTA (UK) LTD (IN LIQUIDATION) AND OTHERS **Respondents**

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John Wardell QC and Michael Ryan (instructed by **Pinsent Masons LLP**) for the **First Appellant**
Kenneth MacLean QC, Steven Elliott QC and Tamara Kagan (instructed by **Slaughter and May**) for the **Second Appellant**
Christopher Parker QC, Orlando Gledhill QC and Oliver Butler (instructed by **Rosenblatt Limited**) for the **Respondents**

Hearing dates: 22-26 March 2021

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Approved Judgment

Lady Justice Asplin, Lady Justice Andrews and Lord Justice Birss:

INTRODUCTION

1. This is the judgment of the Court, to which all three members have contributed.

2. Whenever a situation creates the opportunity for large amounts of money to be obtained dishonestly, especially at the expense of the Revenue, criminals will be swift to take advantage of it. The phenomenon known as missing trader intra-community VAT fraud ("MTIC fraud") is a good example of this. This appeal concerns a large MTIC fraud which took place in the summer of 2009. The loss to the Revenue was in excess of £44 million. Snowden J (hereafter, "the Judge") held that the first and second defendants were jointly and severally liable for dishonest assistance of the fraudsters from Friday 26th June 2009 to Monday 6th July 2009, by participating in transactions which facilitated their wrongdoing, and turning a blind eye to the fraud. They appeal to this Court with the permission of the Judge himself.

3. The claimants cross-appeal on the basis that the Judge ought to have found that the dishonest assistance occurred over a longer period, commencing on 17th June 2009. There is a discrete appeal by the second defendant against the Judge's finding that it was vicariously liable for the wrongdoing of the individuals concerned.

4. The criminals involved in MTIC fraud exploit the fact that imports and exports of goods between Member States of the EU are VAT-free. Like all successful forms of fraud, the essential mechanics are simple. A trader ("the defaulter") imports goods from State A into State B, and sells them on within the latter State. No VAT would be payable on the goods when imported, but the onward sale (and any sales further down the chain within State B) would attract a liability to VAT until such time as the goods are exported to another Member State (which could be State A or State C). The final link in the chain will be the person who exports the goods, who is often an accomplice of the defaulter. The intervening sales and purchases are known as "buffer transactions".

5. The initial buyer in the chain in State B will pay the price of the goods plus VAT to the defaulter, or sometimes to a third party nominated by the defaulter (often, ostensibly, the person from whom he purchased the goods). The buyer would then be able to offset the VAT he had paid to the defaulter against any liability which he had to account to the revenue authority in State B for VAT received on the price of the goods he sold on. The exporter at the end of the chain can claim back from the revenue authority in State B the VAT that he has paid to the person from whom he purchased the goods, because the goods have now been exported to another EU State in a zero-rated transaction. Meanwhile, the defaulter would pay the price of the goods to its supplier in State A, syphon off the VAT (or pay it to an associate) and then vanish or, if a company, go into liquidation without accounting to the revenue authority in State B for the VAT.

6. A "carousel fraud" is an MTIC fraud in which the same goods, having been exported, are then re-imported into State B and the process described above is repeated using the same or a different sales chain. There are a number of variants on this theme, with different layers of sophistication and subterfuge, some of which were described by Christopher Clarke J in *Red 12 Trading Ltd v HMRC* [2010] STC 589 at [2]–[9]. However, as he made clear at [6] the fact that there are a series of sales in a chain does not necessarily mean that everyone in the chain is a party to the fraud. The more

innocent "buffers" there are, the harder it may be for the fraud to be detected. Carousel frauds often involve the criminals using an innocent exporter at the end of one chain to mask the involvement of an accomplice exporter at the end of another chain.

7. The aim of the defaulter is plainly to accumulate sizeable VAT liabilities and to get paid as quickly as possible, so as to avoid detection before he absconds with the funds. Spot markets for trading in commodities are ideal cover for MTIC fraudsters, as they enable numerous back to back trades (often in significant quantities of goods) to take place in a very short space of time. The goods themselves may not need to be physically delivered, but remain in the custody of a warehouse keeper or broker whilst documents of title are exchanged.

8. However, MTIC frauds are not confined to tangible assets. The fraud at the heart of the present case concerned a particular type of carbon credit issued under the EU Emissions Trading Scheme ("ETS"), known as EU Allowances or "EUAs". These allowances act as an incentive to industrial sectors to reduce their emissions of greenhouse gases. Companies covered by the scheme – typically, the larger utility companies and other industrial conglomerates who are responsible for the largest quantities of greenhouse gas emissions - are obliged to report their annual emissions. Each year, they are pre-allocated a fixed quantity of EUAs (or similar carbon credits) by the Member State in which they are situated; one EUA represents the right to emit one metric tonne of carbon dioxide or other greenhouse gas. The companies (known as "compliance companies") must surrender sufficient EUAs or similar to cover their annual emissions; if they do not, they face financial penalties and have to make up the shortfall in allowances surrendered for the following year.

9. It is possible to buy and sell EUAs. Each EUA exists in digital form, is individually numbered and is readily transferable via accounts held on an electronic registry system. A compliance company which has more EUAs than it needs to cover its annual emissions can sell the surplus either directly to a compliance company which needs additional EUAs, or to traders in the carbon trading market. The ability to profit from such sales acts as an incentive to the compliance company to lower its annual emissions so as to create a tradeable surplus.

10. At all material times, spot trades in EUAs (and other carbon credits) within the UK attracted a liability to VAT, whereas futures trades did not.

11. Participants in the trading of carbon credits included banks, trading houses and hedge funds. The big compliance companies would often have a dedicated EUA trading desk which would trade on a daily basis, typically via brokers. Alternatively, they would trade via investment banks. As a general rule, medium sized and small compliance companies would trade less frequently; when they did, it made sense for them to use a "boutique" broker who could bundle their EUAs together to try to get a better price.

12. Although the trade in carbon credits began as purely over the counter ("OTC") dealing, by 2009 a number of dedicated exchanges had been established. The largest of these by far was BlueNext, a French exchange. In order to achieve membership of an exchange, a trader would need to undergo various checks and controls, which any prospective fraudster would need to overcome. One way of doing this would be to sell the EUAs to a bona fide company which was already a member of the exchange.

13. Between the end of 2008 and the first half of 2009, the carbon credits market grew rapidly and significantly, both in terms of overall volumes (especially on the BlueNext exchange) and in terms of market players, with many new entrants. There was a significant acceleration in the growth of overall volumes traded in the first half of 2009. Spot prices fell to a low point on 8th February 2009 and then steadily grew.

14. In around 2008, the first defendant, then known as the Royal Bank of Scotland plc ("RBS"), entered into a joint venture with Sempra Energy which operated through a limited liability partnership, RBS Sempra Commodities LLP ("RBS Sempra" or "the LLP"). In 2009, pursuant to that joint venture, the second defendant, a subsidiary of RBS Sempra then known as RBS Sempra Energy Europe Ltd ("RBS SEEL") traded carbon credits, including EUAs, on behalf of RBS, through its EU Emissions trading desk ("the Desk"). The relevant arrangements, described in more detail later in this judgment, were governed by a "Commodities Trading Activities Master Agreement" dated 1st April 2008 to which RBS, RBS Sempra and a group of companies listed in a Schedule to the agreement, including RBS SEEL, were parties ("the CTAMA").

15. The Desk was manned by two traders ("the Traders") employed by RBS SEEL but seconded to RBS under the terms of the CTAMA: Mr Andrew Gygax, who took up his employment as Senior Energy Trader in May 2009, and Mr Jonathan Shain, the junior trader. The two men sat next to each other in an open plan office. The bulk of the Desk's business relevant to this case was so-called "customer flow" trading in which RBS would buy EUAs or other forms of carbon credit from its clients and sell them in the market, or vice versa, making a profit on the difference in price. In order to minimise risk, RBS would aim to carry out each side of the transaction in quick succession. If this was not possible, RBS would hedge its exposure.

16. The ten claimant companies were all incorporated in England and Wales and were registered traders under the Value Added Tax Act 1994. None of them had any history of emissions trading prior to April 2009 (and most of them began such trading later than that). Almost all of them operated a Danish emissions trading account, though some had trading accounts in other parts of the EU. Some of them operated from virtual offices or serviced offices, whilst others used the address of an accountancy firm as their business address. They used gmail, googlemail or live.co.uk addresses as their contact addresses. Their customers were instructed to make payments to offshore bank accounts, mostly located in Cyprus or Hong Kong. In one case, customers were also directed to make third party payments to companies based in Switzerland and Dubai.

17. In the summer of 2009, all ten companies were used by their directors as vehicles for MTIC frauds involving spot trades in EUAs; some were carousel frauds. This was common ground at the time of the trial. The chains of transactions which began with the defaulter companies ended up with the EUAs being traded via a broker called CarbonDesk Ltd ("CarbonDesk"). The EUAs were mostly sold directly to CarbonDesk, but sometimes one or more of five other companies (all of which had similar features to the ten defaulters) were used as buffers. The directors made off with, or diverted, the VAT received by (or payable to) the companies, which of course was a breach of fiduciary duty. In some cases, the money was diverted by the first line buffer company instead of being paid to the claimant. The upshot was that each claimant company was left without assets, defaulted on its obligations to account to HMRC for the VAT, and went into insolvent liquidation. The underlying claims for dishonest assistance were brought by the insolvent companies and their respective liquidators.

18. There was no direct contact between the claimant companies and the defendants. The Desk bought increasingly substantial amounts of EUAs from CarbonDesk through OTC trades, and then sold them on the BlueNext exchange in France or to established counterparties such as Vertis (in Hungary) or STX (in the Netherlands). RBS thereby became the exporter at the end of the chain.

19. At the time of the transactions linked to the MTIC fraud, the trading relationship between CarbonDesk and RBS was still relatively new. CarbonDesk had made an unsolicited approach to RBS Sempra in March 2009, through their trader, Jay Ward. CarbonDesk provided RBS Sempra with information which satisfied its credit and legal departments, and the so-called "onboarding" process was completed on 1st April 2009. Trading between RBS and CarbonDesk via the Desk commenced on the following day.

20. RBS Sempra decided against extending a credit line to CarbonDesk and therefore payment was only made after delivery of the EUAs had been verified. In the initial stages of the trading relationship there were relatively few spot trades; 8 in total prior to 23rd April 2009. There were a further 14 trades between 23rd April and 14th June 2009, with RBS purchasing a total of 740,500 EUAs in that period.

21. Also in the period, on 8th June 2009 the BlueNext market closed. This closure occurred amid rumours of VAT fraud. The Traders' knowledge of those rumours was in issue. The BlueNext market reopened on 10th June, and after that its trading volumes fell drastically.

22. On and after 15th June 2009 (coincidentally, the day that Mr Shain returned from a holiday) the number and frequency of spot trades in EUAs between CarbonDesk and RBS increased suddenly and dramatically. In the 3 weeks from 15th June, RBS acquired around 44 million EUAs from CarbonDesk; 14.5 million in the week of 22nd June, and 21.5 million in the week of 29th June. The EUA trading by RBS during the period from 8th June to 6th July 2009 shifted in such a way that it accounted for a substantial percentage of the total EUA sales on the BlueNext exchange (37.5%). This prompted BlueNext to send a letter on 30th June asking RBS SEEL for an explanation of the volumes it was trading on the exchange. It was only after this happened that RBS Sempra's compliance officer, Christopher Savage, submitted an Internal Suspicious Activity Report ("SAR") to RBS Global Banking & Markets' Anti-Money Laundering team in respect of CarbonDesk on 1st July 2009.

23. Mr Savage also told the Traders to continue with "business as usual" in order to avoid committing the offence of "tipping off" their counterparties under s.333A of the Proceeds of Crime Act 2002. The Traders complied with those instructions until they received oral instructions to cease trading with CarbonDesk in the afternoon of 6th July 2009.

24. The claimants' pleaded case was that "from 15 June 2009 and at all material times thereafter" the Traders would have been aware that the nature and pattern of RBS's EUA trading with CarbonDesk was suspicious and such as to call for inquiry "as to whether the trade was legitimate or whether there was a substantial chance that it was part of a VAT fraud…". By the end of the trial, the inception date of relevant knowledge had been amended to 17th June 2009. It was alleged that in failing to raise the trading as a matter of concern with Compliance (Mr Savage) or to seek a satisfactory explanation from CarbonDesk, the Traders were wilfully shutting their eyes to the

obvious, which was "that there was no legitimate explanation for the trades and/or that they were connected with VAT fraud...".

25. The defendants denied that Mr Gygax and Mr Shain had acted dishonestly or turned a blind eye to an MTIC fraud; their case was that neither of them fully understood the nature or extent of the risk of VAT fraud in the EUA market or in the UK market. Indeed, the evidence of Mr Gygax, which the Judge rejected, was that until 1st July 2009 he was unaware that VAT was chargeable on the spot trading of EUAs that they were carrying out with CarbonDesk. The defence case was that the increase in volumes of EUAs had caused the Traders no concerns except as regards CarbonDesk's business model, and Mr Gygax had raised questions about that with Mr Ward at a business dinner on 25th June 2009 ("the CarbonDesk dinner") and received an explanation with which he was satisfied. Mr Gygax also claimed that a continuing sense of unease had led him to speak to Mr Savage before the BlueNext letter was received on 30th June 2009.

THE FINDINGS OF THE JUDGE

26. The trial took place over five weeks in June and July 2018. There was a very lengthy delay in handing down of the reserved judgment, which eventually took place on 10th March 2020, some 19 months after the closing submissions at trial. There was then a further delay of 6 months in dealing with consequential matters, including permission to appeal.

27. The Judge found that much of the evidence of the Traders was not credible. He held that, contrary to their evidence, the Traders were well aware at all times that VAT was chargeable on their spot trades of EUAs with CarbonDesk [435]. He also held that at the time Mr Gygax was aware of market commentaries attributing the closure of BlueNext to VAT fraud.

28. Nevertheless, the Judge decided there was no dishonesty at the start of the relevant period of trading with CarbonDesk [495]. However, as things developed the volumes sold by CarbonDesk continued to increase significantly, so that by the end of trading on 24th June 2009 the trading had reached levels that would have been regarded as wholly exceptional even for a much larger and more established emissions trading operation than RBS (sic – he may have meant CarbonDesk) [441]. Any reasonably attentive trader would have had "the most acute suspicions" about CarbonDesk's business and how it was obtaining a seemingly unending source of large volumes of EUAs to sell to RBS [442].

29. The Traders reached a "fork in the road" on 24th June 2009 when they still had no answers to the obvious question of where CarbonDesk was getting its huge volumes of EUAs from. The trading had reached an all-time high on that day with almost 4 million EUAs sold by CarbonDesk. They faced a choice of whether or not to report what was happening to Mr Savage, or ask questions of CarbonDesk to try to get answers. They had the opportunity to ask those questions at the CarbonDesk dinner on 25th June but although they had that chance, they took the wrong turn in the road. They decided it would be better not to report their suspicions or ask questions in case they might learn the inconvenient truth [449]-[451]. Their evidence to the contrary, including Mr Gygax's claim that unease led him to speak to Mr Savage before the BlueNext letter, was untrue and designed by them to conceal their dishonesty [452]. By the time they went to that dinner they had deliberately decided to ignore the obvious risk that

CarbonDesk's trading was connected with VAT fraud, and by continuing to trade with CarbonDesk thereafter (from 26th June 2009), they acted dishonestly [496]-[497].

30. The Judge found that the "business as usual" instruction changed nothing, because if the Traders had deliberately been turning a blind eye to the fact that the trading with CarbonDesk was part of a VAT fraud, an instruction from Mr Savage, to whom they had not made full disclosure, and who did not know the full facts, could not possibly legitimise the continuation of that impropriety [432]-[433].

31. Having considered the terms of the CTAMA, the Judge decided that RBS SEEL "remained, in law and in fact, the employer of the Traders, and retained an obligation to exercise some supervision and control over the way in which the Traders were to perform their trading activities" [210]. He went on to conclude that the circumstances were the paradigm for the imposition of dual vicarious liability. The Traders were still recognisable as the employees of RBS SEEL by whom they were legally employed, paid and supervised, but they were also operating within the RBS sphere of operations. Taking all of the factors into account, the Judge decided that it was appropriate to regard the Traders as employees of RBS as well as RBS SEEL and that as a result, both RBS and RBS SEEL were vicariously liable for the Traders' misconduct [214]-[216].

32. Consequently, both defendants were held liable for dishonest assistance and knowingly being a party to fraudulent trading for the period from 26th June to 6th July 2009 (inclusive).

THE GROUNDS OF APPEAL AND CROSS-APPEAL

33. RBS (supported by RBS SEEL) initially advanced 7 grounds of appeal, 6 of which were essentially different facets of the same complaint, and were grouped together under "Ground A". However, in opening the appeal, Mr Wardell QC, who appeared with Mr Ryan on behalf of RBS, realistically accepted that in the light of the way in which the claim had been pleaded, he could not sustain the argument that the Judge had "improperly adopted his own narrative that was materially different from the way that [the claimants] put their case." That aspect of Ground A was therefore not pursued.

34. The surviving elements of Ground A were that:

    i) the delay, whilst in itself not a sufficient basis for appeal, gave rise to the very real risk that the Judge had failed to take proper advantage of being the trial judge, with the result that his findings needed to be carefully examined by the Court of Appeal;

    ii) the key finding that the Traders acted dishonestly in continuing to trade with CarbonDesk on and after 26th June 2009 was "plainly wrong" because the Judge ignored the inherent probabilities; failed to consider material evidence and documents (or quoted selectively from the documents, ignoring aspects which were inconsistent with his case theory); compartmentalised his analysis; placed undue reliance on oral evidence when it was unsafe to do so; relied on points that were unsupported by evidence; misquoted or misunderstood extracts from the transcripts; and ignored the evidence of RBS's market expert Mr Radov.

    iii) the Judge misdirected himself by failing to look at the evidence as a whole;

iv) the Judge failed to address the appellants' arguments in their written and oral closings or to explain why they were rejected;

v) in any event, the facts found by the Judge were insufficient to satisfy the test for "blind-eye" knowledge as formulated in *Manifest Shipping v Polaris* [2003] 1 AC 469 because the Traders did not have a firmly grounded suspicion of fraud targeted on specific facts.

35. Although it was put in different and inter-related ways, the complaint at the heart of RBS's appeal was that, when making his findings of dishonesty, and in particular when making the key finding that the Traders did not ask questions about CarbonDesk's business model at the CarbonDesk dinner, the Judge failed to refer to what were said to be key documents or evidence pointing in the other direction, or corroborating the Traders' account of events, and did not address the submissions made by the Appellants about that evidence. Mr Wardell made the further forensic point that, because of the way in which the judgment was structured, the Judge had already made his mind up that the Traders were dishonest and that they had given untruthful evidence (at [451]-[453]) before he turned to consider any of the defence submissions to the contrary (at [461]-[494]).

36. Mr Wardell submitted that these criticisms would have been open to the claimants on appeal even if the judgment had been delivered within a reasonable time. However, because of the delay, it could not be assumed that the Judge had paid attention to these matters even though they were not mentioned in his lengthy (168-page) judgment. For example, the Court of Appeal could not be satisfied that he must have considered the further evidence relied on by the defence and discounted it as neutral or peripheral, or thought it was outweighed by other evidence, even if those views would have been open to a reasonable judge. In the light of the delay, on reviewing the findings of fact with special care, and bearing in mind the Judge's failure to address the documents or the submissions made about them, Mr Wardell submitted that the Court of Appeal could not be satisfied that the Judge had come to the right decision.

37. The seventh ground, "Ground B" related to the period of trading from 1st- 6th July 2009 after Mr Savage gave the "business as usual" order. It was contended that the Judge was wrong to find that the trading was dishonest on and after 1st July 2009. Mr MacLean QC, who appeared on behalf of RBS SEEL with Mr Elliott QC and Ms Kagan, took the lead in oral argument of this ground of appeal. In this context he challenged two specific fact-findings made by the Judge, namely:

i) the finding at [431] that (on 1st July 2009) Mr Savage "had no accurate idea of the rise in trading volumes" where this information was set out in the BlueNext letter itself (judgment [102]) and it was Mr Savage's own unchallenged evidence that he verified this information on 1st July 2009;

ii) the finding at [429] that Mr Savage gave the "business as usual" instruction *because* the Traders had not reported their concerns and suspicions to him. This was said to be inconsistent with the evidence and probabilities, and logically flawed, because in order to issue the instruction, Mr Savage must have considered the circumstances to be sufficiently suspicious that ceasing trading might tip off a wrongdoer and thereby constitute an offence. Therefore the instruction cannot have been prompted by any failure by the Traders to report

their suspicions to him. Moreover, if the Traders had told Mr Savage everything they knew and suspected, this would have strengthened his reasons for giving the instruction. Therefore the issuing of the instruction shed no light on whether they had done so.

38. Secondly, Mr MacLean submitted that the Traders' conduct in following that instruction from their compliance officer cannot have been dishonest, because it is not dishonest to act in accordance with what one genuinely believes to be the requirements of the criminal law. Thirdly, and in any event, the effective and practical control of and responsibility for the trading was assumed by Mr Savage and other senior officers, and the Traders were no longer the directing mind and will of RBS because they were no longer the responsible decision takers. Their conduct in following the orders given by their senior officers could not properly be said to have assisted in or perpetrated the MTIC fraud.

39. A discrete ground of appeal pursued by RBS SEEL alone, and which arises irrespective of the fate of the other grounds, is that the Judge was wrong to find that RBS SEEL was vicariously liable for the wrongdoing of the Traders alongside RBS, and therefore wrong to allow the claims against RBS SEEL. Mr MacLean submitted that the Judge misinterpreted the CTAMA, in particular Section 2.2, which did not apply to RBS SEEL, in finding at [210] that RBS SEEL retained an obligation to exercise some supervision and control over the way in which the Traders were to perform their trading activities. Instead, pursuant to Section 2.5, RBS SEEL was to make relevant personnel available to RBS to act as its representatives and in its name. The true effect of the CTAMA was that all of RBS SEEL's employees and officers were doing all their work for RBS. This was not a purely internal arrangement, but reflected the way in which the business was presented to the outside world.

40. RBS accepted that the Judge had misconstrued Section 2.2 of the CTAMA, and had also overlooked the fact that it was common ground that the Traders' supervising officers, Mr Walter and Mr Savage, had been appointed as "Section 2.5 Representatives". However, Mr Wardell contended that these mistakes were immaterial and that the conclusion that the Judge reached on vicarious liability was in accordance with the authorities and unassailable. RBS's submissions in this regard were supported by Mr Parker QC, who appeared for the claimants with Mr Gledhill QC and Mr Butler.

41. The claimants served a Respondent's Notice seeking to uphold the Judge's findings on additional grounds; the defendants objected on the basis that this was an attempt to bring in by the back door matters which Marcus Smith J had refused the claimants permission to raise by way of re-amendment. For reasons that will appear, it has proved to be unnecessary for us to consider those matters.

42. The claimants' cross-appeal raised two points, namely:

    i) in the light of his findings, particularly at [435]-[438], [441]-[442], [449]-[451] and [496], the Judge should have held the defendants liable for the trading which took place on 25th June 2009, the day of the CarbonDesk dinner;

    ii) the Judge should have found the defendants liable for dishonest assistance in respect of the trading from 18th June 2009 on the alternative basis that it was enough to establish dishonesty to show that, even though he did not suspect

> fraud at that juncture, Mr Gygax had questions and concerns about the trading with CarbonDesk that needed to be brought to the attention of his compliance officer, Mr Savage, and that he failed to do so.

THE EFFECT OF DELAY

43. The danger posed by a seriously delayed judgment in a case which involves assessments of fact and which depends at least in part on the oral evidence of witnesses, is that the delay may have so adversely affected the quality of the decision that it cannot be allowed to stand. In *Goose v Wilson Sandford & Co* [1998] TLR 85 the Court of Appeal ordered a retrial because some of the trial judge's conclusions were held to be unsafe as a result of a delay of some 20 months. Peter Gibson LJ said this at [112]:

> "A judge's tardiness in completing his judicial task after trial is over denies justice to the winning party during the period of the delay. It also undermines the loser's confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated."

44. As Sir Geoffrey Vos, then the Chancellor of the High Court, emphasised in the more recent case of *Bank St Petersburg v Arkhangelsky* [2020] EWCA Civ 408, the general, albeit unwritten, rule is that a judgment should be delivered within 3 months of the hearing. That rule should be adhered to even in long and complex cases because, as he put it at [84]:

> "Justice delayed is justice denied. The parties to civil and particularly commercial litigation are entitled to receive their judgments within a reasonably short period of time. That period should not be longer than three months. As has been repeatedly said any other approach will lead to a loss of public and business confidence in our justice system."

45. We respectfully agree. A delay of the magnitude in the present case, whatever the explanation may be, is plainly inexcusable. It should not have happened and should not have been allowed to happen, particularly in a case where there were allegations of dishonesty, and the reputations and future employment prospects of the individuals concerned were at stake. Nevertheless, it is quite clear from the authorities that delay alone will be insufficient to afford a ground for setting a judgment aside. However, the delay will be an important factor to be taken into account when an appellate court is considering the trial judge's findings and treatment of the evidence, and the appellate court must exercise special care in reviewing the evidence, the judge's treatment of that evidence, his findings of fact and his reasoning.

46. As Lord Mance JSC said in the course of adumbrating the relevant principles in *Central Bank of Ecuador and others v Conticorp SA and others* [2015] UKPC 11, at [5], an

appellate court must be extremely cautious about upsetting a finding of primary fact. Likewise, caution must be applied before overturning conclusions reached by the trial judge after an evaluation of different factors which have to be weighed against each other, on which it is possible for different judges to legitimately differ. (Of course, that assumes that the trial judge has taken all material factors into consideration when carrying out that balancing exercise. Failure to do so will amount to an error of law).

47. The correct approach to be adopted by the appellate court when the appeal is against findings of fact was succinctly summarised by Lord Reed JSC in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 at [67]:

> "In the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

48. In the ordinary case, where a party seeks to appeal fact-findings which are based on an assessment of credibility, it is well-established that the appeal court will show a considerable degree of deference to the trial judge, who has had the advantage of seeing and hearing the witnesses. The greater that advantage, the more reluctant the court should be to interfere. However, as Lord Mance went on to point out in *Central Bank of Ecuador* at [164] (referring to the "salutary approach" of Robert Goff LJ in *Armagas Ltd v Mundogas SA ("The Ocean Frost")* [1985] 1 Lloyd's Rep 1 at [56]-[57]), a failure by the judge to address the factors and issues that are really significant, or to test the witnesses' account against objective facts proved independently of their testimony, particularly by reference to the contemporaneous documents, or the inherent probabilities, may amount to an error of law such as to justify intervention.

49. In a case such as the present, where the events in question took place over 9 years before the trial and occurred in a narrow period of around 3 weeks, the salutary warnings about the recollections of witnesses in *Gestmin SGPS SA v Credit Suisse UK Ltd* [2015] EWHC 3560 at [22] and *Blue v Ashley* [2017] EWHC 1928 at [68] are pertinent. It was therefore of paramount importance for the Judge to test that evidence against the contemporaneous documents and known or probable facts if and to the extent that it was possible to do so.

50. We say, "if and to the extent that it was possible to do so", because it is important to bear in mind that there may be situations in which the approach advocated in *Gestmin* will not be open to a judge, or, even if it is, will be of limited assistance. There may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. The case could be one about an oral promise which turns entirely on the word of one person against another's, and the uncontested facts may well not point towards A's version of events being any more plausible than B's. Even in a case which is fairly document-heavy (as this one was) there may be critical events or conversations which are completely undocumented. The CarbonDesk dinner is a good example. Whilst there are documents from which inferences might be drawn about what was or was not said at

that dinner, there are no notes of the discussions and no memoranda or emails sent afterwards which appear on their face to record or report what was said on that occasion.

51. Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment.

52. Those are the matters that an appellate court must consider even before factoring in the impact of the delay in handing down judgment. How then does serious delay of the magnitude that occurred in this case affect the task of the appellate court when considering the criticisms made of the judgment? It is clear that any advantage enjoyed by the trial judge diminishes in importance as a consequence of the lengthy delay even if, as in the present case, he has the advantage of transcripts.

53. In *Goose v Sandford*, Peter Gibson LJ went on to explain the approach to be taken at [113]:

> "Because of the delay in giving judgment, it has been incumbent on us to look with especial care at any finding of fact which is now challenged. In ordinary circumstances where there is a conflict of evidence a judge who has seen and heard the witnesses has an advantage, denied to an appellate court, which is likely to prove decisive on an appeal unless it can be shown that he failed to use, or misused, this advantage. We do not lose sight of the fact that the judge had transcripts of the evidence, as well as very extensive written submissions from counsel. But the very fact of the huge delay in itself weaken the judge's advantage, and this consideration had to be taken into account when we reviewed the material which was before the judge. In a case as complex as this, it is not uncommon for a judge to form an initial impression of the likely result at the end of the evidence, but when he has come to study the evidence (both oral and written) and the submissions he has received with greater care, he will then go back to consider the effect the witnesses made on him when they gave evidence about the matters that are now troubling him. At a distance of 20 months, Harman J denied himself the opportunity of making this further check in any meaningful way."

54. These observations have been cited with approval in numerous subsequent authorities, including the *Bank St Petersburg* case. In that case at [80] the Chancellor also quoted what Lord Scott said in *Cobham v Frett* [2001] 1 WLR 1775 at p.1783 about what must be shown if excessive delay is to be relied on in attacking a judgment:

> "A fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant…" but
>
> "[i]t can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party."

55. Thus, as Lord Hodge JSC put it in *Pickle Properties Ltd v Plant (British Virgin Islands)* [2021] UKPC 6 at [28], "[t]here must be a basis for believing that there may have been a causal link between the excessive delay and the alleged errors or failings in the judgment."

56. In *Bond v Dunster Properties Ltd* [2011] EWCA Civ 455, a case of 22 months' delay, Arden LJ referred to the normal approach to be taken by an appellate court to an appeal on fact, namely, asking itself whether the judge was plainly wrong. She then said this at [7]:

> "… there is an additional test in the case of a seriously delayed judgment. If the reviewing court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment) it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it cannot be satisfied that the judge came to the right conclusion. This is the keystone of the additional standard of review on appeal against findings of fact in this situation. To go further would be likely to be unfair to the winning party. That party might have been the winning party even if judgment had not been delayed."

57. Although Arden LJ specifically referred to the situation in which the judge's recollection of the evidence was at fault, there is no material distinction to be drawn in this context between a mistaken recollection of, and a failure to recollect, or to address, material evidence. The *Bank St Petersburg* case, in which a lengthy judgment was delivered almost 22 months after trial, illustrates this. After quoting from Arden LJ's judgment in *Bond v Dunster Properties*, the Chancellor held at [82] that the trial judge in that case had meticulously re-read all the transcripts and this had mitigated the delay; he did not forget or omit consideration of any material parts of the evidence. The clear implication was that if he had done either of those things, the court would have adopted the approach indicated by Arden LJ. The Chancellor nevertheless went on to observe that the delay may have meant that the judge was less able to deal with findings he made in the round, perhaps because the findings on one part of the case were made at such a remove in time from other findings.

58. Although in that case both parties, and indeed the Chancellor, paid tribute to the comprehensive and meticulous nature of the first instance judgment, and to the judge's "sheer hard work", it was found that his overall determination of the counterclaim was

unreliable. The appeal was not determined solely on the basis that the judge had applied too high a standard of proof. It was also found that there were internal inconsistencies in the judgment and the judge had failed to consider how certain fact-findings made at an earlier stage of the judgment impacted on his assessment of the key question arising in the counterclaim, namely, whether there had been a dishonest conspiracy. He had compartmentalised the case, and failed to stand back and consider the effects and implications of the facts that he found taken in the round [59]. A similar criticism is made of the Judge in the present case.

59. The Court of Appeal in *Bank St Petersburg* rejected the respondents' submission that 16 key findings made by the judge made the outcome inevitable. At [69] the Chancellor went through each of those findings indicating which seemed reliable and unaffected by the problems he had identified earlier, and which findings or inferences drawn from primary facts he was not persuaded were safe, or were "thrown into doubt". The case was remitted for a re-trial on a limited basis, with certain findings of fact preserved. That course was open to the court because the judge's primary fact-findings were not challenged.

GROUND A

60. In order to address Ground A, the Judge's findings have to be seen in the context of the judgment as a whole. The first task therefore is to review the judgment. We will address Mr Wardell's structural criticism, referred to in paragraph 35 above, once the structure has been reviewed.

61. After an introductory section which summarises the background, MTIC fraud, the relevant market and relevant individuals, the judgment then contains an outline of the facts and the parties' pleaded cases. No error is alleged to be contained in these sections. The law is dealt with from [158]-[245]. In this section the Judge addressed the law on dishonest assistance, fraudulent trading, vicarious liability, and attribution. At [225] the Judge turned to the law on dishonesty, citing, amongst other cases, the leading authorities, *Ivey v Genting Casinos (UK) Limited* [2017] 3 WLR 1212 on dishonesty itself, and *Manifest Shipping* (above) on blind-eye knowledge.

62. Next, the Judge addressed aspects of the law on how dishonesty may be established [238]-[241], noting amongst other things that the burden of proof was on the claimant, the standard of proof was the civil standard, the court can take account of the inherent probabilities (citing Eder J in *Otkritie International v Urumo* [2014] EWHC 191), and the fact that while untruthfulness can be a powerful indicator of dishonesty it is not necessarily so. As the Judge put it, borrowing from directions given in crime (*R v Lucas* [1981] QB 720):

> "Juries are routinely directed that the fact that a defendant tells lies in the witness box does not necessarily mean that he is guilty. They are told that people tell lies for all sorts of reasons: to bolster a weak defence, to conceal discreditable conduct, or out of panic, distress or confusion. They are also told to have in mind that the fact that a witness tells lies about some things does not mean that he or she is telling lies about everything."

63. Finally, the Judge reminded himself of the observations in *Gestmin* (above) and the importance of contemporaneous documents [242]-[244]. No error in stating the law, relevant to Ground A, is said by the defendants to be found in this section, although Mr Parker contended in support of the claimants' cross-appeal that the Judge misinterpreted *Ivey*, or failed to apply the principles in that case correctly, when finding that there was no dishonesty in the period from 17th-24th June 2009.

64. The next section of the judgment addresses the Traders' states of mind, [246]-[434]. This starts with perceptions of the EUA market in 2009 [246]-[253] then turns to the Traders' knowledge of VAT and the risk of MTIC fraud in a detailed section from [254]-[328]. This section addresses Mr Gygax first [256]-[310] concluding:

> "[310] In my judgment, Mr. Gygax was, by no later than 11 June 2009, well aware that VAT was charged on any spot EUA trading which the Desk was and might do with a UK counterparty. I consider that he had also become well aware of the risk that spot trading in EUAs might be used as part of a VAT carousel or MTIC fraud. And I find that although the earlier problems had been seen on BlueNext and in France, Mr. Gygax was also well aware that there was a risk of similar MTIC frauds taking place in the future in the UK and affecting the emissions trading for which he was responsible at RBS."

65. Then the Judge turned to Mr Shain at [311]-[327], concluding:

> "[327] In summary, I do not believe Mr. Shain's evidence that he was unaware that VAT was payable on the spot EUA trading which he was conducting with CarbonDesk until some point in early July 2009. In my judgment, Mr. Shain was aware that VAT was payable on that trading at an earlier time. I also consider that after his return from holiday on 15 June 2009 he was made aware by Mr. Gygax that there was a risk that VAT fraud might affect the Desk's trading with counterparties in the UK."

66. The next part of the section dealing with states of mind addresses the Traders' beliefs about the trading with CarbonDesk. This part is further broken down chronologically into relevant periods:

i) The first period is the week commencing 15th June 2009 [334]-[362]. This included the important phone call between Mr Gygax and a trader at Hoare Capital called "Siv".

ii) Second is the week commencing 22nd June 2009 [363]-[378]. This included the fork in the road at the end of 24th June when, the Judge held, the trading volumes with CarbonDesk had grown so much that any reasonably attentive trader would have had the most acute suspicions.

iii) Third is the dinner with CarbonDesk on 25th June 2009 [379]-[408]. This section is the heart of the judgment and underpins the Judge's finding of dishonesty. Mr Gygax's evidence was that he had been keeping Mr Savage informed about the increase in trading volumes, had discussed with Mr Savage the idea of using

the CarbonDesk dinner to find out more about CarbonDesk's business model, had gone to the dinner and asked Mr Ward questions about the business model and had received reassuring answers. The Judge rejected this evidence, holding that Mr Savage had not been informed of the increasing volumes, that no such discussion with Mr Savage about the dinner had taken place, and that the Traders had decided not to ask questions at the dinner.

iv) Fourth are the events after receipt of the BlueNext letter on 30th June 2009 [409]-[429]. Mr Shain accepted that on receipt of the BlueNext letter "we" had realised that the "whole thing" might be related to VAT carousel fraud. The Judge's view was that in fact Mr Shain had already been aware of the implications of VAT for his trading for some time [415]. Another relevant event in this period was that on 1st July 2009 it was noticed that a VAT number which had been provided by CarbonDesk was invalid. The Judge regarded as revealing the fact that Mr Gygax's first thought on learning about this was not that there might be an innocent explanation, but that some sort of VAT fraud may be taking place [411]. In this section at [418] the Judge also examined an internal money laundering suspicion report ("IMLSR") prepared by Mr Savage, examining and rejecting a submission by the defendants that the content corroborates evidence from one of the Traders (Mr Shain). Also in this section, at [423]-[429], the Judge dealt with an email from Mr Gygax to Mr Walter asking him to instruct Mr Savage to provide an exculpatory email for the Traders. The Judge found that Mr Gygax's oral evidence on the topic was disingenuous and concluded at [429] that the Traders were between a rock and a hard place having plainly suspected the trade was connected with VAT fraud, not having previously reported any concerns to Mr Savage, but now having been given the "business as usual" instruction by Mr Savage to continue trading in the same way.

v) Fifth is the trading until 3rd July 2009 [430]-[433]. Here the Judge rejected the submission that the "business as usual" instruction changed anything relevant regarding the Traders' states of mind, because they had not given anything like a full and frank account of their dealings with CarbonDesk to Mr Savage.

67. The reason the "states of mind" section stops at Friday 3rd July 2009, even though the trading continued into Monday 6th July, is because on the Judge's approach, the status of the trading on the Monday 6th July depended on the instruction Mr Savage had already given to continue to trade as "business as usual". In fact, at lunchtime on Friday 3rd July a decision had been made to stop the trading, but then that decision was rescinded the same afternoon in order to continue the trading on to the Monday. This was done so as to secure from CarbonDesk amended VAT invoices which were worth £40 million to RBS (see judgment [120]–[126]). The claimants took a separate point about that Friday decision, which the Judge addressed much later in the judgment.

68. The next section is headed "Conclusions on Dishonesty". Here at [434]-[530] the Judge decided whether, in the light of his findings on states of mind and what happened, the claimants had proved their case that the Traders dishonestly turned a blind eye to the fact that their trading with CarbonDesk was part of a VAT fraud. The section again runs chronologically, starting by noting his finding that the Traders were well aware that VAT was chargeable, that Mr Gygax was aware of commentaries attributing the BlueNext closure to VAT fraud, and that when the French government removed VAT on the relevant trades, the volumes traded on BlueNext had fallen dramatically. The

trading volume started to rise significantly after 15th June and the Judge held that the conversation with Siv on 18th June showed that the Traders had been asking themselves, but were unable to answer, how a company like CarbonDesk was able to trade on that scale.

69. At [440] the Judge held that the premise of the discussions with Siv was CarbonDesk's business model as an explanation for the volumes then being traded. Mr Gygax understood that CarbonDesk's approach was to aggregate together credits available from numbers of smaller compliance companies. The Judge held that the tone and content of that conversation was one of "genuine bemusement," and the discussion with Siv was inconsistent with Mr Gygax suspecting VAT fraud and turning a blind eye to it at that stage. This is why the Judge rejected the claimants' case of dishonesty in the period 17th-24th June.

70. From [441] the Judge addressed the further increase in volumes such that by the end of 24th June they were wholly exceptional. At [442] the Judge found that by this stage any reasonably attentive trader who had already been questioning the significant but lower volumes that the Traders had been seeing at the start of the previous week, would have had the most acute suspicions about CarbonDesk's business, and how it was obtaining a seemingly unending source of large volumes of EUAs to sell to RBS.

71. From [443] the Judge addressed the evidence of certain of the experts (Mr Redshaw called by the claimants, and Mr Kanji called by RBS SEEL), which he regarded as supportive of that finding. Then at [449] the Judge turned to the question of the CarbonDesk dinner. His finding in [449], supported by the evidence of Mr Kanji, is that it would be natural and inevitable that the Traders would have thought to ask general questions at the dinner about the business model of CarbonDesk, even though they would recognise that enquiries of that kind were delicate.

72. At [450]-[452] the Judge made crucial findings, as follows:

> "[450] However, as I have explained, it is clear to me that neither of the Traders asked the questions at the dinner that it would have been entirely natural for them to ask. Given the unprecedented levels of trading that had been done, for the Traders not to have used the dinner that evening as the ideal opportunity to find out more about CarbonDesk's business, and in particular to identify, in general terms, the source of the very large numbers of EUAs that they were trading, can, in my judgment, not have been due to mere omission or inadvertent oversight. In my judgment it can only have been the result of a deliberate decision on their part not to do so.
>
> [451] I also consider that there can only be one plausible explanation for such a deliberate decision not to inquire. I find that the reason that the Traders did not ask questions of CarbonDesk at the dinner was that they had a clear suspicion that the EUAs that they were being sold were connected with VAT carousel fraud, but they decided together that it would be best not to ask and thereby risk learning the truth behind the

> extraordinary levels of very profitable trading that they were doing.
>
> [452] In my judgment, both of the Traders' evidence to me to the contrary was untrue and designed by them to conceal that fact. Specifically, I consider that the Traders' evidence that neither of them appreciated that the spot trading that they were doing with CarbonDesk incurred VAT was totally implausible, as was Mr. Gygax's evidence that he had discussed the events on BlueNext and the materials concerning VAT carousel fraud with Mr. Savage and others without either understanding even the basic concept or its potential relevance to the Desk's trading. In my judgment, that evidence was designed falsely to suggest that there was no reason why the Traders should have made the connection between the increased trading they were seeing and the possibility that it was connected to VAT fraud."

73. The Judge then turned to the evidence Mr Gygax had given about discussions with Mr Savage prior to the dinner, finding as follows:

> "[453] Likewise, Mr. Gygax's evidence that he had been given an assurance by Mr. Savage on 17 June 2009 that the UK emissions market was free of fraud, the evidence that the Traders had kept Mr. Savage regularly informed of their trading with CarbonDesk and had consulted Mr. Savage before the dinner on 25 June 2009 as to what questions to ask of CarbonDesk, the evidence that Mr. Gygax had asked questions of Mr. Ward at the drinks before dinner and had received a plausible explanation of CarbonDesk's business model and source of EUAs, and that he had reported this subsequently to Mr. Savage were all, in my judgment, a fabrication."

74. The judgment then refers to what the Judge regarded as the vagueness of both Traders' evidence relating to the dinner and what the Judge regarded as "total lack of any documentary evidence to support any of their story" [455].

75. At [456] the Judge noted an important feature of the case, namely, that counsel for each of the two defendants had accepted that certain parts of the evidence of Mr Gygax were unlikely to be correct. He said:

> "[456] In closing submissions, Mr. Wardell QC and Mr. MacLean QC accepted that it was unlikely to be correct that Mr. Gygax had been told by Mr. Savage that there was no fraud in the UK EUA market on 17 June 2009. Mr. MacLean QC also accepted that Mr. Gygax's evidence of remembering discussions with Mr. Savage and, in particular, of having discussions with Mr. Savage in the week of 22 to 26 June 2009 was not accurate. Both Defendants submitted, however, that such evidence had been honestly given by Mr. Gygax, who was simply mistaken in his recollection. They submitted, for example, that Mr. Gygax's evidence that he had received an assurance from Mr. Savage on 17 June 2009 that

> there was no fraud in the emissions market in the UK might have been a misinterpretation of a remark made by Mr. Savage during consideration of the materials circulated after the closure and re-opening of BlueNext. It was suggested that Mr. Savage might have made a remark of the type which was subsequently made by Mr. Winget at the legal and compliance meeting on 29 June 2009, and with which Mr. Savage concurred, to the effect that since the French authorities had removed VAT on spot trading, the problems which had been seen on BlueNext prior to its closure hopefully should no longer be a problem."

76. However, the Judge rejected the explanation that the Traders had given honest evidence about what were mistaken recollections. After reminding himself of *Gestmin* [458] the Judge noted that the evidence of the Traders he had found to be untrue was not limited to a few isolated events or a few issues, holding at [460]:

> "[460] There could also be no such attempted justification for the evidence which I received as to the Traders' ignorance that VAT was payable on their spot trades with CarbonDesk. It is unlikely in the extreme that both of the Traders had genuinely, but mistakenly, persuaded himself that he had no appreciation that VAT was payable on the spot trading with CarbonDesk. It is similarly implausible that they each had genuinely persuaded themselves that they only discovered the truth, but for different reasons, on or about 1 July 2009. And I do not consider that Mr. Shain's alteration of his evidence in that regard at trial could conceivably be attributed to a genuine misrecollection."

77. From [461] the Judge addressed matters on which the defendants had relied as being inconsistent with dishonesty. The first was a sequence of internal emails from 17th June in which the Traders sought to increase the trading credit limits to accommodate the increase in volume [462]-[467]. The second point was a conversation with Mr Ward of CarbonDesk on 29th June in which Mr Gygax offered to provide Mr Ward with details of a banking "guru" inside RBS [468]. Third was an email on 29th June from Mr Gygax to an account manager at BlueNext called Mr Paran, which made the point that by then RBS had become a major player in the BlueNext market.

78. The submission for all three of these points was that if Mr Gygax suspected fraud, none of them would make any sense. The Judge recognised the force in these points, but rejected them from [470]-[477]. Although there is an attempt to revive them on appeal, if the Judge's judgment were otherwise sound, there would be no basis for overturning this aspect of it on appeal. None of these points would be sufficient by itself or collectively to undermine his findings.

79. At [478] the Judge then commenced dealing with a further exculpatory point made by the defendants, about the approach of other institutions to VAT fraud and the experience of the expert Mr Redshaw in trading at Barclays with other market participants, Vertis and SVS. All this was addressed in detail by the Judge up to [491] and rejected.

80. At [492] the Judge then returned to the evidence of the Traders themselves, drawing an unfavourable comparison between their evidence and that of Mr Savage. The Judge then concluded on the question of dishonesty up to the 3rd July 2009 and made the crucial findings on that issue. It is worth setting out this section in full:

> "[493] Even allowing for the fact that the Traders' honesty was under direct attack and that the events that they were being asked to recall took place nine years earlier, in my judgment much of the evidence of the Traders appeared to have been constructed by them to cover up what they well understood, after the event, was what they should have done but had failed to do; and more particularly to cover up what, from no later than the time of the dinner on 25 June 2009, they had decided not to do.
>
> [494] I take into account the submissions of counsel for the Defendants that Mr. Gygax and Mr. Shain were men of good character who would not have taken the risk of acting dishonestly, particularly as regards Mr. Gygax who was new to his employment at RBS SEEL. But I do not think that such points can overcome the weight of documentary and other evidence.
>
> [495] In particular, it should be borne in mind that I have not found that the Traders were fundamentally dishonest men from the start. I accept that at the start of the trading with CarbonDesk, the Traders were genuinely motivated, as good traders are, to make money and prove themselves to their employers. That was particularly so with Mr. Gygax who was new to his job and doubtless wished to get off to a good start.
>
> [496] But the evidence is that by 24 June 2009, the Traders were making very significant sums of money from rapidly increasing and sustained trading with CarbonDesk and still had no answers to the obvious question which had stumped them a week earlier of where CarbonDesk was getting its huge volumes of EUAs from. At this fork in the road, and against a background of concerns about VAT fraud spreading to the market in the UK, the Traders faced a choice of whether or not to report what was happening to Mr. Savage or ask questions of CarbonDesk to try to get answers. I have found that the Traders took the wrong road and decided that it would be better not to report their suspicions or ask questions in case they might learn the inconvenient truth and have to cease such profitable trading. This was dishonest, but it was not the conduct of men who had acted throughout with dishonest intent.
>
> [497] It follows that I am satisfied that by, at the latest, the time that the Traders went to the dinner with CarbonDesk after trading had concluded on 25 June 2009, they had deliberately decided to ignore the obvious risk that CarbonDesk's trading was connected with VAT fraud; and that by continuing to trade with CarbonDesk thereafter they acted dishonestly."

81. The next section, [498]-[530], deals with the trading on Monday 6th July 2009. At [498] the Judge noted that on the basis of his approach, Mr Savage's "business as usual" instruction was sufficient to determine the question of dishonesty relating to the Monday trades. He considered the claimants' separate attack relating to the decision made on the Friday to go ahead with trading on the Monday in order to obtain corrected invoices (referred to in paragraph 67 above). It is rejected from [499]-[530].

82. Finally, the judgment has a section on remedies [531]-[537], decisions on principles about the transaction chains which relate to quantum and some other issues at [538]-[576] and a summary of the Judge's overall conclusions at [577]-[579].

The defendants' structural criticism

83. The defendants' criticism of the judgment's structure is that, by addressing their exculpatory points at [461]-[494] in the middle of the section dealing with dishonesty, after he had already made his views about the Traders clear and made important adverse findings of fact at [450]-[452], the judgment is unbalanced and unfair. Mr Wardell's point was that the sequence in which he addressed these matters indicated that the Judge had already made up his mind that there had been a deliberate decision not to ask questions at the CarbonDesk dinner, without taking into account the points made by the defendants that contradicted that scenario. We are not satisfied that this is a fair characterisation. As we have shown in the preceding section, the judgment is well structured. As long as the Judge's reasons why the exculpatory points are rejected are sufficient there is no rule of law about where in a judgment they must be found. If the Judge had not addressed matters which needed to be addressed, then that would be a different matter, but there is no basis for criticising this judgment on structural grounds.

84. The defendants also criticised the judgment for taking a compartmentalised approach which led to a failure to consider the evidence as a whole. This is another way of making a similar point about structure. We reject it for the same reason.

The defendants' submission about key documents and evidence

85. To recap, the defendants' submission at the heart of this appeal is that in making his findings about what happened at the CarbonDesk dinner on 25th June the Judge overlooked key documents and evidence. These are: a document known as the "hit list" and associated emails; a document called the ISK SAR dated 3rd July 2009; certain onboarding documents; and the testimony of Mr Ward. We will take them in turn.

The hit list

86. The point about the hit list is as follows. Mr Gygax's witness statement at [130]-[138] sets out what he says he was told at the CarbonDesk dinner by Mr Ward. There is no need to set it all out. For present purposes what matters is that at [WS 130] Mr Gygax said that Mr Ward told him during drinks before dinner that CarbonDesk had spent approximately 6 to 9 months speaking to compliance companies across Europe, particularly targeting those with the biggest long positions, biggest short positions and even those with balanced positions who might wish to trade carbon credits for risk management or financing reasons. Mr Gygax also said [WS 131] that this explanation made commercial sense to him because [WS 132] before the CarbonDesk dinner he had obtained a list of all the installations associated with end-users of EUAs. His

purpose was in order to target those entities to obtain business for the Desk. This is the hit list.

87. The list itself is an enormous spreadsheet with about 12,000 entries. Mr Gygax's evidence about the hit list is corroborated by contemporaneous emails between Mr Gygax and his team on 24th June 2009. Mr Gygax also said that he continued this strategy after the CarbonDesk dinner [WS 134]. He said that he recalled thinking after the dinner that CarbonDesk had beaten him to it and obtained large scale industrial flow directly and so he wanted to pursue his own strategy urgently in the week following the dinner. Mr Gygax's evidence that he was still pursuing the hit list after the dinner is corroborated by an email exchange on 1st July 2009 regarding updates to the hit list itself and in which he approved a cold-calling script for targeting end users.

88. There was no cross-examination of Mr Gygax on these documents and the Judge did not address them in the judgment.

89. The defendants submit on appeal that this material corroborates Mr Gygax's testimony which the Judge rejected, and the fact that the judgment does not mention the hit list or these emails is a fundamental flaw.

90. The claimants' submission to the contrary is that the hit list, prepared as it was before the dinner of 25th June, corroborates nothing more than that Mr Gygax thought industrials had some carbon credits to sell, which was never in dispute. Therefore, it was perfectly reasonable for the Judge not to have dealt with it. Mr Parker contended that the hit list and the emails do not show that Mr Gygax thought that the massive volumes from CarbonDesk were the result of industrial selling.

91. We agree with the defendants that the hit list, together with the 24th June emails, are clear evidence that Mr Gygax had, before the CarbonDesk dinner, thought of the strategy of targeting compliance companies as a way of getting carbon trading business. In our judgment, on its own this evidence lends supports to Mr Gygax's evidence that Mr Ward's alleged explanation of CarbonDesk's business model made sense to him, but it does not prove that the explanation was given at the dinner.

92. However, we also agree with the defendants that the emails on 1st July support the idea that even at that stage, which is after the dinner, after the BlueNext letter and on the same day as the concern was raised about the incorrect VAT number, Mr Gygax appeared to be working on the basis that the hit list approach still made sense and was worth pursuing. That is consistent with his evidence that the approach had been given a boost in his mind by what he had been told about CarbonDesk's business model a few days earlier, and it does not sit easily as the activity of someone who thinks CarbonDesk's high volumes are tainted with VAT fraud.

93. How, if at all, does the omission of the Judge to deal with these documents affect his judgment? First and foremost, it must be recognised that the Judge did have a basis in the evidence to reach the conclusions he did. He found, for reasons that he explained, that the Traders had lied about their knowledge of VAT; he was entitled to draw inferences about their motives for doing so. Mr Gygax's evidence that he had approached Mr Savage before the dinner was rejected on grounds plainly open to the Judge.

94. There were also contemporaneous documents which contradicted important parts of the Traders' evidence, such as the assertion that Mr Savage had been told about the increase in volumes. For example, the Judge referred at [352] to a document entitled "Lessons Learnt" which Mr Savage compiled in late October 2009 which expressly recorded that the compliance department was unaware of the significant change in trading by the Desk until receipt of the BlueNext letter. Another example, contradicting the evidence that the Traders believed CarbonDesk's clients to be industrials, is the recording of a telephone conversation on 24th June 2009 between Mr Shain and Mr Ward about the very high volume of trading, which the Judge considered at [376]-[378]. He concluded that it showed that Mr Shain well understood that at least one of CarbonDesk's clients was engaged in intraday buying and selling, and was obviously not an industrial compliance company simply selling EUAs allocated to it. As with so many other points in this case, the Judge had a clear basis on which to reach this conclusion.

95. Despite the defendants' submissions on this appeal, we are not satisfied there is any sound or sufficient basis for criticising the Judge's assessments of the coherence and credibility of the evidence of Mr Shain and Mr Gygax based on the matters that he did take into account. The test on appeal is not whether we would have made the same assessments; they cannot possibly be said to be outside the reasonable margins of appreciation afforded to a trial judge. The judgment shows that the Judge had *Gestmin* well in mind, as well as the fact that the case was about events in a short space of time 9 years before.

96. This is where the delay becomes a significant factor on this appeal. A judge is not required to address every point and, when a judge has evidence on which to base their findings of fact, the mere fact that there is evidence pointing the other way which the judgment does not address is not a justification for allowing an appeal. A judgment given in a timely fashion can be assumed to have been prepared with a full recollection of the relevant evidence. If it were possible to assume that the Judge had had the hit list and the relevant emails in mind when drawing the relevant conclusions, then an appellate court could take the view that he did not mention the evidence because he simply did not think it outweighed the other material before him which was supportive of his conclusions.

97. However, the 19 month delay means we cannot make that assumption. We are in no position to say that the Judge's finding that questions were not asked at the CarbonDesk dinner was plainly wrong, but in these circumstances, considering the significance of the evidence which was not referred to, that is not the test. The question is whether we can be satisfied that the finding is right (*Bond v Dunster Properties*). We regret to say that we cannot. These contemporaneous documents support a view of the facts very different from the one the Judge found. They do corroborate aspects of Mr Gygax's evidence and could, for example, lead one to conclude that he had not given false evidence about the dinner, even if he had lied about his knowledge of VAT on carbon trading.

98. Before leaving the point on the hit list, we draw attention to the fact that although the significance of the hit list and the 24th June emails was put to the Judge in closing, it appears that the point on the 1st July emails was not, or at least, not explicitly. In its written opening, addressing the events of the week of 22nd to 26th June 2009, including the CarbonDesk dinner, RBS SEEL made a more general reference to Mr Gygax continuing steps to implement the hit list strategy "the following week" (APP-

A2/3/403). RBS SEEL also stated in its written closing submissions that it continued to rely on the submissions made in its written opening (APP-A3/6/992). However, that passage in the written opening did not specifically refer to the 1st July emails and there was no footnote cross-referencing them. That will no doubt explain why the Judge did not mention them; but it does not explain why he did not mention the 24th June emails, and we do not regard these matters as a basis for minimising the significance of these submissions.

The ISK SAR of 3 July 2009

99. As the judgment explains at [105], in the morning of 1st July 2009 the issue of the erroneous VAT number on CarbonDesk's invoices arose. That afternoon Mr Savage prepared an IMLSR about CarbonDesk [107]. That report does not directly suggest that CarbonDesk itself is involved in VAT fraud. The Judge then explained at [108]:

> "[108] The IMLSR was forwarded by Ms. Aspinall to Ms. Brannigan at RBS, stating that although the issue relating to CarbonDesk's VAT number had been resolved, they still needed to submit a Suspicious Activity Report ("SAR") to the Serious Organised Crime Agency ("SOCA")"

100. On the same day (1st July), as the Judge explains in [109], another different SAR was submitted to SOCA by the RBS AML (anti-money laundering) Operations team. This was in respect of suspicious activity by another company called ISK Management Ventures. That 1st July SAR arose from an IMLSR prepared on 29th June 2009. As the Judge explained:

> "[109] […] The IMLSR relating to ISK was made due to an exceptionally high number of payments totalling over €40 million being recorded as passing through ISK's account since 23 June 2009. The IMLSR noted that the activity was unusual for ISK, as its usual business was property investment and development. The IMLSR recorded that all of the funds had been remitted to ISK by CarbonDesk, and all had been paid out in full to a company called Classic Mark International ("Classic Mark") with a Moscow bank account. Classic Mark is one of the Claimant companies in these proceedings."

101. As the judgment shows at [110], on the following morning, 2nd July, an internal bank email made the point that they had got "VAT fraud type activity" with CarbonDesk as the beneficiary.

102. However, in addition to the ISK SAR dated 1st July 2009, which is mentioned in the judgment, another later version was before the court which is *not* mentioned in the judgment. This is a further version of the same ISK SAR, but dated 3rd July 2009 [App-G/138]. The defendants' point on appeal is that this 3rd July version of the ISK SAR contains a summary description of CarbonDesk's business model. It is only necessary to quote one aspect as follows:

> "The business model CarbonDesk Ltd uses is to significantly undercut the present aggregators in the market as well as

> identifying those customers who may have emission certificates available. The effect is they have apparently signed up a substantial client base."

103. The text is not in the 1st July version of the ISK SAR. The defendants contend that this text is consistent with what Mr Gygax said he had been told at the CarbonDesk dinner, that there was no other obvious source for it, and so, for this text to appear in the 3rd July ISK SAR, it must have been put there by Mr Savage having come from the Traders. Thus it is supportive of the Traders' evidence that they were able to and did explain CarbonDesk's business model to Mr Savage. The defendants point out that the judgment does not deal with it.

104. Part of the claimants' answer to this point is to assert that there was no evidence as to how this 3rd July ISK SAR document came to be in the terms it was. However, it is quite clear that a plausible explanation was that the words had been added by Mr Savage, and if they had been, that they must have come from the Traders. This was all addressed in oral closing submissions at trial by counsel for RBS. It is true that drafting by Mr Savage was not the only conceivable explanation, but the difficulty on appeal is that the Judge did not enter into this at all.

105. There is also a debate on the pleadings. The claimants sought to rely on what was said in the RBS Defence, but we are not convinced this assists. In the Particulars of Claim (paragraph 50) the claimants pleaded various matters in support of their case that, contrary to Mr Gygax's denial, from 15th June 2009 the Traders were aware that the pattern of trading with CarbonDesk was suspicious. One of those matters was the ISK SAR, put as follows:

> (9) The contents of the SARs dated 1 July and 3 July 2009 and the suspicious transaction report of 21 July 2009 which were drawn up *on the basis of information provided by Mr Gygax or Mr Gygax and Mr Shain."* [Emphasis supplied.]

106. In response the RBS Defence at 50(j) pleads that:

> "…Neither Mr Gygax nor Mr Shain had any involvement in or knowledge of the contents of (i) the *[…]* SAR also dated 1 July 2009 *[…]* or (ii) the update to the *[…]* SAR – the 3 July SAR *[…]*. While Mr Gygax and Mr Shain assisted Mr Savage with his queries/investigations into the continued high trading volumes, neither Mr Gygax nor Mr Shain actually saw copies of the Internal SAR, the NatWest SAR or the 3 July SAR at any material time."

107. In other words, the claimants' positive pleaded case was that the 3rd July ISK SAR was drawn up based on information provided by the Traders (and the same point was made in opening at trial at [320] of the document).

108. As with the hit list, the problem here is the delay. This document does lend support to the Traders' evidence. At face value it supports the idea that information about CarbonDesk's business model, the signing up of a substantial client base of customers with emissions certificates available, was something which the Traders had acquired

before 3rd July 2009, i.e. at the dinner. The document does not demonstrate that the Judge's findings of fact are plainly wrong, but putting it at its lowest, it is not clear how we can be satisfied that the finding that the Traders were lying about what happened at the dinner was right.

Onboarding documents

109. In addition to the evidence about CarbonDesk's business model which Mr Gygax said in his witness statement he was given at the dinner (references above), at [WS 138] Mr Gygax said that during the dinner the CarbonDesk traders told him that one of the directors of CarbonDesk had been on the board of the South African futures exchange and that CarbonDesk was currently going through the process of FSA authorisation.

110. The term "onboarding documents" is a convenient shorthand for papers which relate to the onboarding process, when CarbonDesk became a client of RBS. Neither Trader was involved in that process; indeed Mr Gygax did not even work for RBS SEEL when CarbonDesk was onboarded. The defendants' point is that these documents, which Mr Gygax would not have seen, corroborate his account of what he was told by CarbonDesk at the dinner because they show the same information being put forward by CarbonDesk at an earlier stage.

111. The first document relied on was an email to Mr Metzler of RBS SEEL dated 9th March 2009 from Mr Ward of CarbonDesk. It provides a description of CarbonDesk's business which the defendants contend is consistent with what Mr Gygax says he was told about it, namely:

> "Our main business is looking after small to medium sized compliance buyers, and as such we do not wish to compete with the major brokers per se, however we do need the other side to our trades. We also have a couple of derivatives experts on the team and as such we are working on options strategies for a number of our clients and also putting out regular bespoke research depending on a client's needs."

112. The similarity between this and what Mr Gygax says he was told at the dinner is of a lesser degree than the point arising from the ISK SAR of 3rd July, but nevertheless what Mr Ward is here saying to Mr Metzler is consistent with what Mr Gygax says in his witness statement that he was told by Mr Ward at the dinner.

113. Next, there is an internal email dated 3rd April 2009 which Mr Shain was copied into relating to CarbonDesk. Mr Shain referred to it in his witness statement at [WS 77] where he explains that it is consistent with his recollection that CarbonDesk had told them at an early stage that they (CarbonDesk) were seeking FSA approval.

114. Finally, the other documents relied on are Know Your Client (KYC) documents which CarbonDesk provided for the onboarding checks, which also are said to accord with Mr Gygax's evidence that he was told by Mr Ward that CarbonDesk had carried out a campaign of targeting end-users. One of them is a listing notice for CarbonDesk's parent, Awabi Plc, which stated that CarbonDesk had "carried out a focused pre-marketing exercise by leveraging the established industry contacts of the Proposed Directors" and had "identified an initial pipeline of potential clients". In a description

of CarbonDesk's business strategy this includes the idea of "seeking business by targeting clients in the following key categories: compliance-driven buyers". The notice also highlighted that the CEO was one Brett Stacey, who had experience building a brokering business in South Africa.

115. The Judge did refer to the email to Mr Metzler in his chronology at [66] but did not refer to it nor the other Awabi Plc document in his treatment of the Traders' evidence about the CarbonDesk dinner.

116. In addition to the corroboration relating to the business model in general, the striking points are the corroborative detail of the South African link and the FSA. There was a dispute before us as to whether submissions about these were made to the Judge below. It is true that neither point was put to the Judge directly, but counsel for RBS did make the key submission about the consistency of CarbonDesk's explanations of the business model and did also, in that context, refer to the FSA in particular. There was also a cross-reference to the passage which related to Mr Stacey's connection with South Africa. In our judgment it is open to the defendants to take these points in this appeal.

117. Mr Parker submitted that there was evidence before the Judge whereby the FSA point and the South African connection via Mr Stacey could have come from somewhere else, and did not have to have been acquired by Mr Gygax at the dinner. Moreover, whilst there was no dispute that Mr Ward *may* have told Mr Gygax those two facts at the dinner, establishing that Mr Ward told Mr Gygax two true undisputed and irrelevant facts at the dinner would not corroborate his claim that Mr Ward told him an untrue and highly relevant fact, namely that CarbonDesk's clients were industrials.

118. Mr Parker's submission rather misses the point that the information suggests that CarbonDesk's business was a topic of conversation at the dinner, which does not sit easily with a deliberate decision by the Traders to ask no questions about it. It is true that the information could well have come from somewhere else. However, once again this issue bears out the difficulty when approaching findings of fact in a judgment on appeal when material evidence has not been referred to, and the correct test is not the one applicable to a judgment prepared in a timely fashion.

119. As with the previous evidence referred to, this material does not demonstrate to our satisfaction that the Judge's finding about what happened at the CarbonDesk dinner or his rejection of Mr Gygax's evidence was plainly wrong, but it is sufficiently cogent and lends sufficient ostensible support to Mr Gygax's testimony that we cannot be satisfied the Judge was right. The onboarding documents do corroborate aspects of Mr Gygax's evidence and could, for example, lead one to conclude that he had not given false evidence about the dinner. Of course it could be true that Mr Gygax acquired this information from somewhere else, or was given it at the dinner, even though he had also decided to turn a blind eye to the risk of VAT fraud, but that is not the basis on which the judgment was given, and on appeal an appellate court cannot remake such closely intertwined findings of fact.

The testimony of Mr Ward

120. Mr Ward did not give evidence at trial but the defendants rely on testimony he gave in the summer of 2015 in which he said he told Mr Gygax at the dinner that CarbonDesk's clients were industrials. Given the findings we have already made, it is not necessary

to address this point distinctly. We are not convinced that on its own this would justify allowing the appeal, given that it is not based on a contemporaneous document and Mr Ward was not called as a witness to be cross-examined on it.

Key documents and evidence - conclusion

121. Part of the claimants' argument in effect contends that these points cannot be said to be significant omissions from a judgment which, on the face of it, was prepared with considerable care and attention to detail. As we have tried to explain, in other circumstances that submission might have had real force. But its force is blunted by the 19 month delay to the judgment, after a trial of about five weeks. The key documents were among a number of factors relied on by the defendants as being inconsistent with the Traders dishonestly turning a blind eye to a VAT fraud, and in a case like this where there was no direct record of what was said at the dinner, they cannot be treated by us as minor or peripheral. They could have made a difference to the outcome, and the Judge's omission to address them cannot be treated as immaterial.

122. Having subjected this judgment to the appropriate degree of scrutiny in the light of the delay, we are not satisfied that the Judge's findings and conclusion on this key issue were right. We have reluctantly concluded that in fairness the judgment cannot be allowed to stand. We are compelled to allow the appeal on Ground A and, in the circumstances, we believe the only right course is to remit this matter to the High Court to be re-tried by a different judge. It is a highly unpalatable prospect, but we believe it is the right thing to do. As we have already explained, we cannot say what the right result is in the action itself. It may be that when the matters are examined in the round these extra documents change nothing at all. Conversely, they may lead a judge to come to a very different conclusion. That is why the matter must be re-tried, recognising that such a trial will take place at an even longer distance of time from the relevant events.

123. We have considered whether it can or should be re-tried on a limited basis. For example, one might say that the Judge's dismissal of the claimed dishonesty in the week of 17th June could stand, or even the Judge's findings that the Traders knew the spot trade of EUAs were liable for VAT. Neither of these points are directly connected with the CarbonDesk dinner. However, we cannot see how that would be the right approach. The findings which we are not satisfied are right go to the heart of the Judge's approach overall and to his findings about the Traders' evidence. We cannot second-guess what would happen on a re-trial when these matters were considered.

Other points on Ground A

124. The defendants submitted that the Judge also erred in failing to look at the evidence as a whole, failing to address arguments which were made and failing to decide the case as presented. These arguments add nothing to the appeal based on key documents which has already been considered. To the extent they are intended to make a further or different point, we are not persuaded. Nor are we persuaded that there is anything of substance in the submission that the Judge selectively quoted from documents. Mr Wardell's further submission that the legal test for blind-eye knowledge was not satisfied even on the Judge's findings of fact need not be addressed in the light of our conclusion that there must be a re-trial.

125. The final criticism under Ground A is that the judgment ignored the evidence of RBS's market expert Mr Radov. So it does. However, the Judge plainly decided to give weight to the opinions of the Claimants' expert Mr Redshaw and, in part, RBS SEEL's expert Mr Kanji. He was entitled to do so and did not need to spell out that in doing that, he was preferring that evidence to the evidence of Mr Radov.

Conclusion on Ground A

126. For the reasons set out above, we allow the appeal on Ground A and order a re-trial.

GROUND B

127. In the light of our conclusions on Ground A, and the fact that we are ordering a re-trial, it is unnecessary for us to address Ground B.

THE CLAIMANTS' CROSS-APPEAL

128. The re-trial also means that all issues of fact, including the critical question of whether, and if so when, the Traders satisfied the test for blind-eye knowledge in *Manifest Shipping* will be a matter for the new trial judge to determine. Therefore we need not address the cross-appeal insofar as it is based on the submission that the test for dishonest assistance was satisfied earlier than the Judge found it was.

129. However we should add that, even if it were open to him on his pleadings (a matter of some debate before us, which it is unnecessary to resolve), we were not persuaded by Mr Parker's alternative argument that all the claimants needed to do in order to prove dishonesty for the purposes of establishing that the Traders dishonestly assisted in the perpetration of a VAT fraud by CarbonDesk's clients was to establish that Mr Gygax had "questions and concerns" about the trading with CarbonDesk which he knew or believed he ought to have brought to the attention of Compliance (Mr Savage). Mr Parker submitted that if a trader has the degree of doubt about the legitimacy of the trading that he (the trader) says would lead him to go to Compliance, and he fails to do so, he is necessarily dishonest. The Judge was therefore wrong to approach the matter on the basis that it was necessary for the claimants to establish that the Traders suspected VAT fraud and deliberately turned a blind eye to it. We reject those submissions. The argument is not supported by the cases that Mr Parker cited, and involves an unwarranted dilution of the correct legal test.

130. The decision in *Ivey v Genting Casinos* (above) establishes that where dishonesty is in question the fact-finding tribunal must ascertain (i) the defendant's actual state of knowledge or belief *as to the facts* and (ii) whether, in the light of that state of mind, their conduct was honest or dishonest applying the objective standards of ordinary decent people. In *Group Seven Ltd and another* v *Nasir and others* [2020] EWCA Civ 614, [2020] Ch 129, when applying the *Ivey* test in the context of a claim for dishonest assistance in a breach of trust, (in that case, the payment of a large sum of money to someone who was not entitled to it) this Court held that at stage 1 of the *Ivey* test "knowledge" includes blind-eye knowledge, but in principle "belief" may include suspicion which in and of itself falls short of blind-eye knowledge.

131. At [59] the court expressly endorsed the test for blind-eye knowledge in *Manifest Shipping*, reiterating that "it is not enough that the defendant merely suspects something

to be the case, or that he negligently refrains from making further inquiries." At [60] the court quoted from the passage in Lord Scott's judgment at [116] of *Manifest Shipping*, where he said that:

> "to allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."

132. The Court of Appeal in *Group Seven* then went on to make the entirely orthodox observation at [61] that knowledge and belief are different things, and expressed the view that in principle a person's beliefs may include suspicions which he harbours. They said that a person's suspicions which in and of themselves fall short of constituting blind-eye knowledge are not necessarily irrelevant when evaluating if their behaviour was dishonest because:

> "the state of a person's mind is in principle a pure question of fact, and suspicions of all types and degrees of probability may form part of it, and thus form part of the overall picture to which the objective standard of dishonesty is to be applied".

133. It is important not to take these observations, which were *obiter*, out of context. The case goes no further than confirming that the honesty of a person's conduct falls to be considered objectively in the light of all relevant material including their state of mind. The court went on to find that, on the basis of the trial judge's findings as to the state of the defendant's actual knowledge of the relevant facts, the inescapable conclusion was that he had blind-eye knowledge that the recipient was not beneficially entitled to the money [96]–[101]. The defendant's whole course of conduct was objectively dishonest, because no reasonable and honest person who knew those facts would have done what he did to facilitate the payment. The case was therefore one of actual knowledge of facts which, objectively assessed, constituted a breach of trust.

134. The Judge correctly directed himself on the law on dishonest assistance. The conduct complained of in the present case was continuing to trade with CarbonDesk despite the unprecedently high volumes of transactions coming to the Desk from that source on and after 17 June 2009, which are said by the claimants to have been sufficient to alert the Traders to the risk that CarbonDesk was being used as a vehicle for VAT fraud. When the matter is retried it will be a matter for the judge to determine whether, in the light of all relevant circumstances, including their states of mind, specifically their knowledge (actual or imputed), beliefs, and conduct (including, but not limited to their dealings with Compliance), it was or was not dishonest for the Traders to continue that trading.

VICARIOUS LIABILITY

135. The one outstanding matter which requires consideration on this appeal is the question of vicarious liability. RBS has not appealed the Judge's finding that it was vicariously liable for the wrongdoing of the Traders. RBS SEEL, on the other hand, does contend that the Judge was wrong to find it vicariously liable and therefore that he was wrong, in any event, to allow the claims against RBS SEEL. If this ground of appeal succeeds, RBS SEEL will be relieved of liability in any event and need not take part in any retrial.

It is important, therefore, to determine this issue in order to avoid what might be unnecessary delay and expense and unnecessary use of court time.

136. As Lord Phillips noted at [19] in the Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2013] AC 1 (the "*Christian Brothers*" case), "[T]he law of vicarious liability is on the move." It remains so, particularly in the circumstances in which an employer loans his employee to another organisation. In this case, it is said that there was such a "loan" and that it was so effective and complete that only RBS, the organisation to which the Traders were "loaned", should be held responsible for their tortious acts.

The Judge's approach

137. We have already summarised the Judge's findings on the issue of vicarious liability in paragraph 31 above. The Judge considered the relevant authorities in some detail at [199]-[203] of the judgment. Having done so, he turned to the "practical and structural considerations" of the arrangements, echoing the phrase used by Rix LJ in *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* [2006] QB 510 at [79]. He noted that the terms on which RBS SEEL made the Traders available to RBS were set out in the CTAMA ([204]). Having considered the terms of the CTAMA in some detail, the Judge held that this was a case of dual liability and found both RBS and RBS SEEL liable for the conduct of the Traders on the basis that: "… RBS SEEL remained, in law and in fact, the employer of the Traders, and retained an obligation to exercise some supervision and control over the way in which the Traders were to perform their trading activities" ([210]).

138. His conclusion in this regard was based on the reasoning set out at [207]-[209] as follows:

> "[207] It should first be noted that Section 2.5 of the CTAMA makes clear that all "Section 2.5 Representatives", including the Traders, remained employees of RBS SEEL at all material times. RBS SEEL also remained primarily liable to pay the Traders' salaries, bonuses, business expenses, and other benefits.
>
> [208] Section 2.2 also made it clear that although the Traders would have authority to bind RBS to trades, this was subject to a proviso, "that at all times such officers remain subject to the supervision and control" of RBS SEEL.
>
> [209] Section 2.5 further imposed an obligation upon RBS SEEL to cause the Traders "to devote as much of their time and attention to the provision of their services as is required for the purposes of this agreement". The natural reading of the final sentence of Section 2.5 is that RBS SEEL also had an obligation to ensure that its nominated directors and senior managers "supervise, manage and control the activities undertaken [by the Traders] in accordance with this Section".

139. The Judge went on to reject Mr MacLean's argument about the construction of Section 2.5 in relation to "Section 2.5 Representatives", to the effect that RBS SEEL managers

supervised staff in their capacity as Section 2.5 Representatives, on behalf of RBS, in the following terms:

> "[211] In that regard, I do not accept Mr. MacLean QC's argument that the final words of Section 2.5 meant that the persons at RBS SEEL who would be exercising such supervision and control of the Traders would themselves be acting as Section 2.5 Representatives, and would be doing so on behalf of RBS. Such an interpretation would negate the plain intent of the remainder of the wording of the Section which was to set out the status and obligations of the "SET UK Entities" (including RBS SEEL). It also ignores the essential point that the definition of Section 2.5 Representatives is expressly limited to persons engaging in Trading Activities or ancillary Additional Activities in their capacity as such ("such persons in such capacity being the "Section 2.5 Representatives""). In my judgment, Section 2.5 does not mean that any relevant persons at RBS SEEL, who would have the responsibility within RBS SEEL of ensuring that it complied with its direct obligations to RBS under Section 2.5, would also be deemed to be acting in that regard for RBS as Section 2.5 Representatives."

140. He relied, further, upon Section 2.2 and other terms of the CTAMA, as follows:

> "[212] So far as RBS is concerned, Section 2.2 of the CTAMA made it clear that the Traders were to have the authority to perform their trading activities as agents for RBS. In addition, however, RBS SEEL agreed that it would procure that the Traders would comply with any instructions reasonably given by RBS in connection with, and consistent with, the terms of the CTAMA. In particular, it was expressly envisaged in Section 2.2 that RBS might give the Traders directions not to enter into specific trades or transactions or types or groups of similar trades or transactions.
>
> [213] Similarly, under Section 3.2, RBS SEEL agreed that the Traders would perform their trading activities in accordance with RBS policies relating to market risk and credit risk, and in compliance with investment and trading guidelines and restrictions imposed by RBS. RBS also agreed in Section 4.1(b) to make payments to reimburse RBS SEEL for the salaries, commissions and bonuses and benefit costs of the Traders."

141. His conclusions were as follows:

> "[214] In these circumstances, I consider this to be a paradigm case for the imposition of dual vicarious liability. To use the words of Rix LJ in paragraph [80] of ***Viasystems***, the Traders plainly were still recognisable as the employees of RBS SEEL by whom they were legally employed, paid and supervised. But they were not simply operating within the RBS SEEL sphere of operations. On the contrary, the Traders had the power and authority to commit RBS to trading contracts as agents for RBS, the trading activity that they were conducting was that of RBS, and in that regard they were operating in the RBS sphere of operations too. Moreover, in so doing, the Traders had at all times to operate within the

> guidelines and restrictions imposed by RBS and were subject to directions that might be given by RBS. The cost of their employment to RBS SEEL was also reimbursed by RBS.
>
> [215] Taking these factors together, I therefore consider that it would be entirely appropriate, for the purposes of determining liability for their actions, to regard the Traders as employees of RBS as well as RBS SEEL. To use Rix LJ's words from paragraph [79] of *Viasystems*, I consider that the Traders were so much a part of the work, business or organisation of both RBS SEEL and RBS that it would be just to make both companies liable for any wrongs that the Traders committed to third parties
>
> [216] Accordingly, if and to the extent that either of the Traders, in causing RBS to enter into the trading contracts with CarbonDesk, dishonestly assisted the breaches of duty by the directors of the Claimant companies or knowingly participated in the fraudulent trading by the Claimant companies, then both RBS SEEL and RBS will be vicariously liable to the Claimant companies for the Traders' misconduct."

Basis for the appeal

142. There is no complaint about the Judge's approach to the law, nor is it suggested that he applied the wrong test. It is his application of the law to the facts and, in particular, his interpretation of the CTAMA governing the provision of staff by RBS SEEL, which are said to be in error. In summary, Mr MacLean submitted that the Judge's conclusion that this was a paradigm case for imposing dual liability was wrong. Rather, this is a case in which it is clear that despite nominally remaining the employers of RBS SEEL, all responsibility for the Traders, including the responsibility for supervision, had been transferred to RBS, which should be solely responsible for their tortious acts, if any. As we have already mentioned, he contended that the Judge's view in relation to supervision stemmed from (i) his mistake in relation to Section 2.2 of the CTAMA, and (ii) his erroneous construction of the penultimate sentence of Section 2.5 which led him to reject Mr MacLean's argument in relation to the role of the Section 2.5 Representatives who were also directors or managers.

The Law

143. There is no dispute before us about the principles which underpin the imposition of vicarious liability for tort. They were considered by the Supreme Court in the *Christian Brothers* case and have been considered most recently in *Barclays Bank plc v Various Claimants* [2020] AC 973. In the *Christian Brothers* case, Lord Phillips PSC (with whom Baroness Hale, Lord Kerr, Lord Wilson and Lord Carnwath JJSC agreed) noted the developments in the law of vicarious liability and described them as representing "sound and logical incremental developments of the law." See [20] and [21]. The developments to which he referred included the possibility that two different defendants might each be vicariously liable for the tortious act of another, as in the *Viasystems* case.

144. Lord Phillips also approved and refined the two stage test which had been proposed by Hughes LJ (as he then was) in the Court of Appeal in the *Christian Brothers* case itself. Lord Phillips stated that:

> "21. . . Hughes LJ rightly observed that the test requires a synthesis of two stages: (i) The first stage is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability. (ii) Hughes LJ identified the second stage as requiring examination of the connection between D2 and the act or omission of D1. This is not entirely correct. What is critical at the second stage is the connection that links *the relationship between D1 and D2* and the act or omission of D1, hence the synthesis of the two stages."

145. In relation to the first stage, Lord Phillips noted that in the vast majority of cases, the relationship which gives rise to vicarious liability is that of employer and employee under a contract of employment and stated that "[T]he employer will be vicariously liable when the employee commits a tort in the course of his employment." He went on set out the policy reasons which make it fair, just and reasonable to impose liability on an employer, as follows:

> "35. . . There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer."

146. Lord Phillips also observed that the control which an employer may have over an employee had changed since the days of master and servant and that the "significance of control today is that the employer can direct what the employee does, not how he does it." See [36].

147. The Supreme Court gave further guidance as to the five factors which had been identified by Lord Phillips PSC in *Cox v Ministry of Justice* [2016] AC 660. That was a case in which the Ministry of Justice was held vicariously liable for the negligence of a prisoner who dropped a heavy bag of rice on a catering manager's back whilst working in the prison kitchen. Lord Reed JSC, with whom Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson and Lord Toulson JJSC agreed, noted Lord Phillips' comment about the development of the law in relation to vicarious liability in the *Christian Brothers* case and commented that it had "not yet come to a stop" ([1]). As to Lord Phillips' five factors, Lord Reed stated as follows:

> "20. The five factors which Lord Phillips mentioned in para 35 are not all equally significant. The first — that the defendant is more likely than the tortfeasor to have the means to compensate the victim, and can be expected to have insured against vicarious liability — did not feature in the remainder of the judgment, and is unlikely to be of independent significance in most cases. It is, of course, true that where an individual is employed under a contract of employment, his employer is likely to have a deeper pocket, and can in any event be expected to have insured

against vicarious liability. Neither of these, however, is a principled justification for imposing vicarious liability. The mere possession of wealth is not in itself any ground for imposing liability. As for insurance, employers insure themselves because they are liable: they are not liable because they have insured themselves. On the other hand, given the infinite variety of circumstances in which the question of vicarious liability might arise, it cannot be ruled out that there might be circumstances in which the absence or unavailability of insurance, or other means of meeting a potential liability, might be a relevant consideration.

21. The fifth of the factors — that the tortfeasor will, to a greater or lesser degree, have been under the control of the defendant — no longer has the significance that it was sometimes considered to have in the past, as Lord Phillips immediately made clear. As he explained at para 36, the ability to direct how an individual did his work was sometimes regarded as an important test of the existence of a relationship of master and servant, and came to be treated at times as the test for the imposition of vicarious liability. But it is not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee; nor indeed was it in times gone by, if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea. Accordingly, as Lord Phillips stated, the significance of control is that the defendant can direct what the tortfeasor does, not how he does it. So understood, it is a factor which is unlikely to be of independent significance in most cases. On the other hand, the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability.

22. The remaining factors listed by Lord Phillips were that (1) the tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant, (2) the tortfeasor's activity is likely to be part of the business activity of the defendant, and (3) the defendant, by employing the tortfeasor to carry on the activity, will have created the risk of the tort committed by the tortfeasor.

23. These three factors are inter-related. The first has been reflected historically in explanations of the vicarious liability of employers based on deemed authorisation or delegation, … The second, that the tortfeasor's activity is likely to be an integral part of the business activity of the defendant, has long been regarded as a justification for the imposition of vicarious liability on employers, on the basis that, since the employee's activities are undertaken as part of the activities of the employer and for its benefit, it is appropriate that the employer should bear the cost of harm wrongfully done by the employee within the field of activities assigned to him: … The third factor, that the defendant, by employing the tortfeasor to carry on the activities, will have created the risk of the tort committed by the tortfeasor, is very closely related to the second: since the risk of an individual behaving negligently, or indeed

> committing an intentional wrong, is a fact of life, anyone who employs others to carry out activities is likely to create the risk of their behaving tortiously within the field of activities assigned to them. The essential idea is that the defendant should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not. This idea has been emphasised in recent times in United States and Canadian authorities, sometimes in the context of an economic analysis, but has much older roots, as I have explained. It was reaffirmed in the cases of *Lister* and *Dubai Aluminium*. In the latter case, Lord Nicholls of Birkenhead said at para 21:
>
> > "The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged."
>
> 24. Lord Phillips's analysis in the "*Christian Brothers*" case wove together these related ideas so as to develop a modern theory of vicarious liability. . . "

148. The nature of the enquiry was addressed once more by Lord Toulson in *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 at [44] and [45] in the following terms:

> "44. In the simplest terms, the court has to consider two matters. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly; …
>
> 45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party… ."

149. The Supreme Court in the *Christian Brothers* case also considered the circumstances which are directly relevant here, namely when vicarious liability for the tortious acts of a person "can be transferred from his employer to a third person who is using the employee's services under a contract, or other arrangement, with his employer" (see [37]). Lord Phillips noted that the circumstances in which such a transfer could take place had been considered in *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 and stated that in that case:

> "37. . . Their Lordships imposed a test that was so stringent as to render a transfer of vicarious liability almost impossible in practice. It may well be that that was their intention. The negligence in question was that of the driver of a crane, which had been hired, together with the services of the driver, by the driver's employer to a firm of stevedores.
>
> 38. Viscount Simon at pp.10 and 11 said that a heavy burden of proof lay on the general or permanent employer to shift responsibility for the negligence of servants engaged and paid by such employer to the hirer for the time being who had the benefit of the services rendered. This could only be achieved where the hirer enjoyed the right to "control the way in which the act involving negligence was done". The inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it. Lord Macmillan at p.14, Lord Porter at p.17 and Lord Uthwatt at pp. 22-23 applied the same test."

150. In the *Mersey Docks* case, the facts of which were described by Lord Phillips in the passage quoted above, the House of Lords held that the harbour authority, as the crane man's permanent employer, was liable for his negligent operation of the crane which caused injury to a third party. The crane man, in the manner in which he was driving the crane, was exercising the discretion which the authority had vested in him. His employer had failed to discharge the "heavy burden of proof" so as to shift its prima facie liability for the negligence to the stevedores. That conclusion was reached despite the fact that the general hiring conditions had provided that the crane driver should be the servant of the hirer, who must take "all risks in connection with the matter".

151. Importantly for the present case, Viscount Simon, Lord Porter, Lord Simonds and Lord Uthwatt made it clear that the question of vicarious liability was not to be determined by the terms of any agreement between the two employers under which they may have declared whose "servant" the employee was to be at any particular time. Although contractual provisions might govern their liability as between them, the question of vicarious liability turns on all the circumstances of the case. See Viscount Simon at p.10, Lord Porter at p.15, Lord Simonds at p.20 and Lord Uthwatt at p.21.

152. In the *Christian Brothers* case, Lord Phillips went on to explain that the *Mersey Docks* case remained the leading case in this area of law at the time at which *Viasystems* was heard by a two-man Court of Appeal (May and Rix LJJ). That case established, for the first time, that it was possible to have dual vicarious liability where an employee was loaned to or hired by another organisation. Lord Phillips held at [45] that when considering whether there is dual vicarious liability, there is no justification for applying the stringent test of control which had been imposed by the House of Lords in *Mersey Docks* case and which had also been applied by May LJ in *Viasystems*. He said: "where two defendants are potentially vicariously liable for the act of a tortfeasor it is necessary to give independent consideration to the relationship of the tortfeasor with each defendant in order to decide whether that defendant is vicariously liable" and that when considering that question, the approach of Rix LJ in the *Viasystems* case was to be preferred.

153. *Viasystems* was a case in which the claimants engaged the first defendants to install air conditioning in their factory. The first defendants sub-contracted the ducting work to

the second defendants. The ducting was being carried out by a fitter and his mate, supplied to the second defendants by the third defendants on a labour-only basis, under the supervision of a fitter working for the second defendants, when the fitter's mate negligently fractured the factory's sprinkler system resulting in severe flood damage to the factory.

154. Rix LJ held:

> "77. In my judgment, if consideration is given to the function and purposes of the doctrine of vicarious liability, then the possibility of dual responsibility provides a coherent solution to the problem of the borrowed employee. Both employers are using the employee for the purposes of their business. Both have a general responsibility to select their personnel with care and to encourage and control the careful execution of their employees' duties, and both fall within the practical policy of the law which looks in general to the employer to organise his affairs in such a way as to make it fair, just and convenient for him to bear the risk of his employees' negligence. I am here using the expression "employee" in the extended sense used in the authorities relating to the borrowed employee. The functional basis of the doctrine of vicarious liability has become increasingly clear over the years. The Civil Liability (Contribution Act) 1978 now provides a clear and fair statutory basis for the assessment of contribution between the two employers. In my judgment, the existence of the possibility of dual responsibility will be fairer and will also enable cases to be settled more easily.
>
> 78. The remaining question is to attempt to define the circumstances in which the liability should be dual. It is possible that where the right to control the method of performance of the employee's duties lies solely on the one side or the other, then the responsibility similarly lies on the same side. That reflects the significance of Lord Esher's doctrine of entire and absolute control. If so, then it will only be where the right of control is shared that vicarious liability can be dual. I would agree that the balance of authority is in favour of this solution. On this basis, I agree with Lord Justice May's analysis of the facts in this case as demonstrating a situation of shared control. I would go further and say that it is a situation of shared control where it is just for both employers to share a dual vicarious liability. The relevant employee, Darren, was both part of the temporary employer's team, under the supervision of Mr Horsley, and part of the general employer's small hired squad, under the supervision of its Mr Megson.
>
> 79. However, I am a little sceptical that the doctrine of dual vicarious liability is to be wholly equated with the question of control. I can see that, where the assumption is that liability has to fall wholly and solely on the one side or the other, then a test of sole right of control has force to it. Even *Mersey Docks*, however, does not make the control test wholly determinative. Once, however, a doctrine of dual responsibility becomes possible, I am less clear that either the existence of sole right of control or the existence of something less than entire and absolute control

> necessarily either excludes or respectively invokes the doctrine. Even in the establishment of a formal employer/employee relationship, the right of control has not retained the critical significance it once did. I would prefer to say that I anticipate that subsequent cases may, in various factual circumstances, refine the circumstances in which dual vicarious liability may be imposed. I would hazard, however, the view that what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence. What has to be recalled is that the vicarious liability in question is one which involves no fault on the part of the employer. It is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit.
>
> 80. One is looking therefore for practical and structural considerations. Is the employee, in context, still recognisable as the employee of his general employer and, in addition, to be treated as though he was the employee of the temporary employer as well?"

155. Lord Phillips' approach in the *Christian Brothers* case was noted with approval by Lord Reed JSC in *Cox v Ministry of Justice*. Lord Reed stated as follows:

> "25. Lord Phillips PSC illustrated the approach which I have described by considering two earlier cases in the Court of Appeal. He discussed first its decision in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* ... That case concerned a situation of a kind which commonly arises in modern workplaces. Employees of the third defendants were supplied to the second defendants on a labour-only basis, under a contract between the two companies, and worked under the supervision of a self-employed person also working under a contract with the second defendant. The question was whether the second defendant, as well as the third, was vicariously liable for the negligence of the employees in the course of their employment. The Court of Appeal agreed that it was, but for different reasons: May LJ considered that the imposition of vicarious liability depended on who had the right to control the employees' activities, whereas Rix LJ formulated a test which was based not on control, but on the integration of the employees into the employer's business enterprise. He stated that vicarious liability was imposed because the employer was treated as picking up the burden of an organisational or business relationship which he had undertaken for his own benefit. Accordingly, what one was looking for was "a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence": p. 537. Lord Phillips endorsed the approach of Rix LJ."

156. As this Court pointed out in *Group Seven* (above) at [154], the imposition of vicarious liability is a highly fact sensitive exercise. It is all the more so in the circumstances in which an employee has been loaned or is hired out or seconded to another organisation.

Factual background and the CTAMA

157. Mr MacLean submitted that the Traders were so integrated into RBS' business enterprise that it alone should be responsible for their tortious acts committed in the course of that enterprise. He pointed out that it is common ground that the trading took place on RBS's behalf and on its balance sheet and that the Traders were acting as its representatives and in its name. The business was portrayed to the world as being that of RBS, and RBS paid the invoices in relation to the trading and claimed back the VAT.

158. On the other hand, it is not in dispute that: the Traders remained RBS SEEL employees; RBS SEEL paid their salaries, bonuses and other fees, albeit that it was reimbursed by RBS; they were located in RBS SEEL's offices; they were managed by RBS SEEL employees who were Section 2.5 Representatives as defined in the CTAMA; the compliance officer to whom they reported was employed by an associated company of RBS SEEL; the trading was carried out on RBS SEEL's systems; RBS had no day to day involvement with the trading; and, but for a review of RBS SEEL's policies, carried out by Miss Aspinall of RBS in December 2008 (which led to minor changes), RBS, although entitled to do so, did not impose policies upon the Traders.

159. Contrary to Mr Wardell's submissions, Mr MacLean contended that the Judge was right to concentrate on the CTAMA which was the focus of the submissions below. There was no evidence to suggest that the CTAMA did not reflect how business was dealt with and, to the contrary, the witness evidence on behalf of RBS itself was that the terms of the CTAMA reflected what happened on the ground. Mr MacLean submitted, therefore, that once the Judge's errors in relation to the interpretation of the CTAMA are corrected (including his interpretation of the position of Section 2.5 Representatives who were also managers, which, he averred, fundamentally contaminated the Judge's reasoning), it is obvious that RBS alone should be vicariously liable for the Traders' conduct.

160. We acknowledge that the terms of an agreement between the employer of the wrongdoer and the party to which he has been loaned, hired or seconded cannot be determinative of the issues which are relevant to the imposition of vicarious liability. The imposition of liability is based on the principles to which we have referred and which have been developed and approved by the Supreme Court. It is not possible, for example, to avoid the imposition of vicarious liability purely as a result of having reached a contractual arrangement with the body to which an employee is loaned that it will bear all loss in relation to his or her conduct or that the employee shall be treated solely as the employee of that organisation at a particular time. One cannot contractually opt out. Vicarious liability is imposed as a matter of public policy and is not concerned with fault or with contractual liability.

161. Despite this, the Judge cannot be criticised for having given the CTAMA some prominence in his judgment. The practicalities in relation to the trading and the position of the Traders, RBS and RBS SEEL appear to have been explained to the Judge through the medium of that contract because it reflected the realities of the arrangement which were common ground. The actual circumstances which were not, and are not in dispute, were consistent with the terms of the CTAMA. Accordingly, it is not surprising that it forms a central part of the Judge's reasoning.

The CTAMA in more detail

162. The CTAMA arose in the context of a joint venture between RBS and Sempra Energy, an energy and metals trading group based in the USA which had operations worldwide. Together, they established the LLP, RBS Sempra, pursuant to a Partnership Agreement. It bought Sempra Energy's worldwide trading business, including in the United Kingdom, RBS SEEL and another company. RBS held 51% of the members' interest in the LLP and therefore, the Judge was right to describe RBS SEEL at [2] as an indirect subsidiary of RBS.

163. The CTAMA dealt with the arrangements between RBS, RBS Sempra and the subsidiary companies worldwide (referred to as the "SET Companies", and which included RBS SEEL), in relation to the continued trading.

164. The terms upon which the Traders were made available to RBS were governed by the terms of the CTAMA. In order to understand Mr MacLean's criticism of the Judge's approach, it is helpful to set out the central provisions again here. They are as follows:

> "WHEREAS, RBS and Sempra Energy have formed LLP in order to own and manage the commodities trading business of the SET Companies …
>
> WHEREAS, RBS carries on a variety of banking and trading businesses;
>
> WHEREAS, RBS and the SET Companies wish to engage in certain commodities trading activities, with respect to which the SET Companies will, except as provided below, act as agent for RBS, as set forth in more detail below;
>
> WHEREAS, the Parties have agreed that both Sempra Metals Limited … and [RBS SEEL] (together … the "SET UK Entities"), each of which is an SET Company, will not act as agent for RBS, but rather will provide to RBS all its employees and other personnel (whether appointed under a contract for services or otherwise), including its senior managers and officers (the "SET UK Personnel") to RBS to undertake certain commodities trading and other activities as representatives of, and in the name of, RBS, as set forth in more detail below; and
>
> WHEREAS, RBS wishes to limit potential losses associated with such trading activities, and LLP is willing to assume the risk of loss.
>
> …
>
> SECTION 2.1. Appointment. Subject to the terms and conditions of this Agreement, and except as set forth in Section 2.5, RBS hereby authorizes the SET Companies as an agent of RBS, and each of the SET Companies hereby accepts such authorization from RBS, to engage in the Trading Activities.
>
> SECTION 2.2. Authority. In performing the Trading Activities (a) as agent of RBS or (b) as Section 2.5 Representatives of RBS, subject to the terms and conditions of this Agreement, each of the SET Companies (or where applicable the Section 2.5 Representatives nominated by the SET

UK Entities in writing) shall have authority, on behalf of RBS, to enter into commitments or undertakings and do any other act or thing necessary for the proper performance of the Trading Activities, all of which shall thereby be binding on RBS. Each of the SET Companies which acts as agent shall have the authority, in accordance with this Agreement, to delegate, in writing, officers of such SET Company to perform the Trading Activities and to execute transactions and related legal documents; provided that at all times such officers remain subject to the supervision and control of such SET Company. The SET Companies shall, and shall cause the SET Representatives to, in all cases comply with any instructions reasonably given by RBS in connection with, and consistent with the terms of, this Agreement. RBS shall have no obligation to, and may in its sole discretion direct the SET Companies not to (which direction shall also be binding upon the SET Representatives), enter into a specific trade or transaction or types or groups of similar trades or transactions under this Agreement.

. . .

SECTION 2.5. SET UK Entities. Notwithstanding any other provisions of this Agreement with respect to any Trading Activities and any Additional Activities the SET UK Entities will not act as agent for RBS, but rather the SET UK Entities will make the SET UK Personnel available to RBS to act as representatives of, and in the name of, RBS and to act in such capacity to engage in such Trading Activities and Additional Activities in the name of RBS (such persons in such capacity being the "Section 2.5 Representatives"). The SET UK Entities will continue to pay all salary, bonus, fees and other amounts or benefits (including reimbursement of business expenses) due to the SET UK Personnel, and such SET UK Personnel who are employees of either of the SET UK Entities shall remain the employees of such SET UK Entity at all times. The SET UK Entities shall cause the SET UK Personnel to devote as much of their time and attention to the provision of their services as is required for the purposes of this Agreement. The SET UK Entities shall cause their nominated directors and senior managers, acting as Section 2.5 Representatives, to supervise, manage and control the activities undertaken in accordance with this Section….

…

SECTION 3.1 Performance of Trading Activities; Additional Activities.

(a) Each of the SET Companies shall, and shall cause their respective SET Representatives to use their reasonable best efforts to perform and the Trading Activities in accordance with this Agreement (including by performing the Additional Activities).

(b) Each of the SET Companies shall, and shall cause their respective SET Representatives to, perform the Additional Activities in accordance with the terms and conditions of this Agreement.

(c) Without limiting the foregoing, each of the SET Companies shall, and shall cause their respective SET Representatives to, perform the SET Companies' obligations under this Agreement (or, where Section 2.5 applies, cause the Section 2.5 Representatives to provide their services) in a manner consistent with all contracts and other documents entered into in connection with any Trading Activities or Additional Activities with third parties and the past practices of the SET Companies (subject to changes in such practices as are commercially reasonable and subject to the RBS Policies and any other requirements under this Agreement).

SECTION 3.2. Compliance with RBS Policies and Direction. Each of the SET Companies shall, and shall cause their respective SET Representatives to perform the Trading Activities and Additional Activities (i) in accordance with RBS Policies, including, without limitation, those relating to market risk, credit risk and other such policies and rules applicable thereto and (ii) in compliance with all guidelines and restrictions imposed from time to time by RBS, including any investment limitations, trading guidelines, VaR limits and position limits. Each of the SET Companies shall establish committees of its directors and officers (including where applicable committees of Section 2.5 Representatives) as requested by RBS for the purpose of authorizing or approving transactions, commitments, undertakings and other acts and things effected by the SET Companies and the SET Representatives hereunder.

SECTION 4.1. SET Fee. In consideration of the SET Companies acting as agents for, or providing the SET UK Personnel and other services to, RBS (as applicable) under this Agreement, RBS hereby agrees to pay to LLP for the benefit of the SET Companies quarterly in arrears as soon as practicable after calculation thereof pursuant to Section 5.2(a) fees in an amount (exclusive of VAT) equal to the aggregate amount of all reasonable costs, expenses and required fees (determined using principles in accordance with the Applicable Laws of the jurisdictions in which each of the SET Companies is organized, domiciled and operating at the time of calculation of such fees) of the SET Companies in performing the Trading Activities and Additional Activities hereunder for such period (the "SET Fees") including …

(b) employee compensation, including salaries, commissions, bonuses and benefit costs; provided that no payments shall be required in respect of estimated bonus payments; …

…

SECTION 5.1 Reports from the SET Companies. Each of the SET Companies shall prepare, as reasonably requested by RBS from time to time reports regarding the Trading Activities, including information relating to the transaction entered into by the SET Companies and the SET Representatives under this Agreement …

…

> SECTION 5.3 Access to Books. Each of the SET Companies and LLP, on the one hand, and RBS, on the other, shall provide the other, in a manner so as not to interfere with normal operations, with reasonable access to, and shall allow the other Party to inspect, examine, audit and check … all books and records concerning the Trading Activities, including all records of trades and other transaction entered into by such SET Companies as agents for RBS (or where applicable by the Section 2.5 Representatives) under this Agreement… ."

165. Pursuant to section 6.1, RBS Sempra assumed the risk of loss with respect to the "Trading Activities", and pursuant to section 6.2, as soon as RBS had completed the annual audit of its books and records in relation to all Trading Activities for any financial year, it was required to pay the "LLP Fee" to RBS Sempra. In simple terms, the LLP Fee meant the realised gains from the trading.

166. Section 8.1 contains indemnification provisions under which RBS Sempra was to indemnify and hold harmless RBS against: "all losses, liabilities, obligations, penalties, judgments, damages, and all reasonably incurred disbursements, costs, expenses … or Taxes … (collectively, "Damages"), to the extent that such Damages arise out of or result from any Trading Activities and Additional Activities by the SET Companies or the SET Representatives on behalf of or in the name of RBS …". Further, Section 8.3 states that the exclusive remedy for RBS in respect of damages arises under Section 8.1 except in the case of fraud.

167. The governing law of the CTAMA was expressly stated to be the internal laws of the State of New York: see Section 10.8. No evidence of that law was before the Judge or before us and it has been assumed that, so far as is relevant to the interpretation of the CTAMA, that law does not differ from the laws of England and Wales.

168. As the Judge explained at [206] of the judgment, "Trading Activities" were defined in a schedule to the CTAMA in a way which included the emissions trading conducted by the Traders and "Additional Activities" was defined to mean all other activities and services incidental to the Trading Activities including, amongst other things, documenting transactions, preparing invoices, maintaining business relationships in furtherance of the Trading Activities and maintaining adequate staff levels.

Sections 2.2 and 2.5 and supervision by RBS SEEL

169. Mr MacLean contended that the Judge erred in finding at [210] of the judgment that RBS SEEL retained an obligation to exercise some supervision and control over the way in which the Traders performed their activities and that this error led to his ultimate conclusion in relation to the role of RBS SEEL and its liability. In particular, it is said that he made a mistake about how Section 2.2 applied in the circumstances and was wrong to reject Mr MacLean's argument that the final words of Section 2.5 of the CTAMA meant that the persons at RBS SEEL who would be exercising such supervision and control of the Traders would themselves be acting as Section 2.5 Representatives, and therefore, would be doing so on behalf of RBS.

170. Mr MacLean's interpretation is said to be consistent with the fact that the trading business was held out to be that of RBS and that as a result, RBS SEEL should not be held responsible for the Traders' misconduct while they were working solely for and as

representatives of RBS and were subject to its supervision. It is said that all that RBS SEEL was required to do was to employ the relevant personnel and to make them available to RBS, ensuring that they complied with RBS's reasonable instructions and devoted as much time and attention to the provision of the services as was necessary. It carried out all its functions, including these residual ones, on behalf of RBS.

171. We agree that it is clear from [208] and the first sentence of [212] of the judgment that the Judge misread Section 2.2 of the CTAMA or, at least, that he misapplied it in the circumstances. He stated that Section 2.2 made clear that the Traders were to have the authority to perform their trading activities as agents for RBS and quoted the proviso which applied to SET Companies acting in that capacity. That was not the case here. The personnel in this case were "Section 2.5 Representatives" and gained their authority in that capacity under Section 2.2.

172. However, the remainder of [212] is accurate and the general point which the Judge was seeking to make was a good one. Under Section 2.2, RBS SEEL was under a direct obligation to ensure that SET Representatives, (which included Section 2.5 Representatives such as the Traders) complied with any instructions reasonably given to them by RBS. The CTAMA also contained other direct obligations which fell upon RBS SEEL to which we refer below. When these are coupled with Section 2.5 and it is read in the light of the CTAMA as a whole, it seems to us that the Judge's error in relation to Section 2.2 was not fatal to his reasoning or the conclusion he reached.

173. What of the second alleged error at [211] in relation to Section 2.5 Representatives? Mr MacLean submitted before us, as he had before the Judge, that the effect of the last part of Section 2.5 is that Section 2.5 Representatives who are directors and senior managers carry out their managerial duties as Section 2.5 Representatives and accordingly, do so on behalf of RBS rather than RBS SEEL.

174. It seems to us that the Judge was right to reject Mr MacLean's interpretation. If Section 2.5 is read in the context of the CTAMA as a whole, it is clear that Section 2.5 Representatives who are also directors and senior managers are responsible for supervising the activities of other Section 2.5 Representatives, and because the managers are Section 2.5 Representatives themselves, they do so in the name of RBS. Nevertheless, in doing so, they are fulfilling RBS SEEL's obligations under the CTAMA.

175. The ordinary and natural meaning of Section 2.5 and, in particular, the use of the term "Section 2.5 Representative" in the penultimate sentence of that section, when read in the context of the CTAMA as a whole, is not to erase the direct obligations imposed upon RBS SEEL elsewhere in the CTAMA or to transfer them to RBS as result of the fact that the managers are carrying out their functions in the name of RBS. As the Judge explained at [211]: "Section 2.5 does not mean that any relevant persons at RBS SEEL, who would have the responsibility within RBS SEEL of ensuring that it complied with its direct obligations <u>to</u> RBS under Section 2.5, would also be deemed to be acting in that regard <u>for</u> RBS as Section 2.5 Representatives."

176. As we have already mentioned, the penultimate sentence of Section 2.2 contains such a direct obligation. It provides that the SET Companies "shall cause" the SET Representatives to comply with instructions reasonably given by RBS. It would make

no sense if that obligation were, nevertheless, the responsibility of RBS, which would be the effect of Mr MacLean's construction.

177. The same is true in relation to the obligations contained in the third and the final sentences of Section 2.5 itself. Both use the "shall cause" formulation. The third sentence requires RBS SEEL as a SET UK Entity to cause its personnel to devote as much of their time and attention as is necessary to the provision of their services under the CTAMA. The final sentence provides that notwithstanding what has come before in Section 2.5, the obligations in paragraph 5 of the definition of "Additional Activities", which included maintaining adequate staffing levels, remained the direct obligation of RBS SEEL.

178. If Section 2.5 is read as a whole, therefore, it is clear that Mr MacLean's interpretation of the penultimate sentence cannot be correct, or at least, that that sentence does not erase RBS SEEL's direct obligations under the CTAMA and transfer them solely to RBS in the way that he suggested.

179. Further direct obligations are contained in: Section 3.1(a), (b) and (c) and Section 3.2 of the CTAMA. In summary, they provide that the SET Companies "shall cause" their respective SET Representatives to carry out various activities consistently with the terms of the CTAMA itself, all contracts relating to the trading itself and in compliance with RBS policies; and Sections 5.1 and 5.3. They require SET Companies to provide reports for RBS in relation to the trading as reasonably requested and to give reasonable access to its books.

180. All of this is consistent with RBS SEEL retaining an overarching responsibility for the provision of the traders, managers and others, which it employed and for their supervision.

181. Mr McLean's argument in relation to the proper construction of the CTAMA which we have addressed above was concerned with whether RBS SEEL retained responsibility for supervision of its employees whilst they were trading on behalf of RBS, and accordingly was centred upon the issue of control. As Rix LJ made clear in the *Viasystems* case, however, the law has moved on since the *Mersey Docks* case and the question of control is not determinative. Furthermore, as we have already mentioned, the division of responsibility as a matter of contract is not directly relevant to the imposition of vicarious liability. It is necessary to take all of the actual circumstances into account and consider what happened on the ground in order to determine whether the Traders were an integral part of the business enterprise of both RBS and RBS SEEL or only of RBS.

182. One of the further features which was drawn to our attention in that regard, was whether RBS SEEL had benefitted from any profit or borne any loss in relation to the trading. It is said that RBS SEEL did not benefit from any profits of the trading and that this is another reason why it should not bear any liability for the Traders' conduct. This issue did not appear in the pleadings and was not explored in cross-examination at trial. In fact, having been dubbed irrelevant to the question of vicarious liability by Mr MacLean in submissions at trial, it was raised for the first time by Mr Wardell in RBS's closing submissions before the Judge, where it was stated at [917] that RBS SEEL had shared in the profits of the trading. Perhaps unsurprisingly, the point does not feature in the judgment at all.

183. In RBS SEEL's skeleton argument on the appeal, it is stated that RBS SEEL did not benefit from the trading. In response, before us, Mr Wardell made reference to the Partnership Agreement governing the LLP in order to show that RBS SEEL was entitled to carry on business on its own account, and to RBS SEEL's accounts in order to show that it had benefitted from profits of the trading. Neither of those documents had been before the Judge and unsurprisingly, therefore, he made no findings in relation to them. Mr Wardell asked us to look at the documents "*de bene esse"*, but he neither made an application to adduce fresh evidence, nor filed a Respondent's Notice seeking to support the Judge's decision on additional grounds. It seems to us that even if it were permissible, it is unnecessary to seek to rely upon those documents, and we make no further mention of them.

184. It is clear from the terms of the CTAMA itself and Sections 5 and 6 in particular, that the LLP bore the risk of loss in respect of the Trading Activities and the Additional Activities; and that an adjustment was made between RBS and the LLP at the end of each financial year, so that the LLP would end up gaining the net profits or bearing the net losses. Further, although there was no evidence before the Judge to this effect, it is implicit that such profits, if any, would be distributed in accordance with the Partnership Agreement governing the LLP. Although RBS SEEL was not a direct member of the LLP, this was a sophisticated joint enterprise between RBS, RBS Sempra (the LLP) and the SET Companies, of which RBS SEEL was one.

Conclusion on vicarious liability

185. In our judgment, therefore, the Judge's decision on this issue cannot be impugned. The imposition of vicarious liability and of dual liability, in particular, is a highly fact sensitive exercise. On the basis of all of the matters to which we have referred, it seems to us that the Judge was entitled to decide that the Traders were so much a part of the work, business and organisation of both RBS and RBS SEEL that it is just to make both employers answer for their tortious acts and omissions in the course of their employment. The corollary is that he was entitled to decide that the Traders were still recognisable as the employees of RBS SEEL and were part of its organisation and had not transferred exclusively to RBS.

186. As Rix LJ pointed out in *Viasystems*, it is important to remember that vicarious liability involves no fault on the part of the employer. Liability is incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit. That is true of both RBS and RBS SEEL as a result of the sophisticated business model which they adopted and the way in which it was operated.

187. On the facts of this case, including the proper interpretation of the CTAMA (as a guide to what happened on the ground), there is no basis for concluding that the Traders' activities were solely part of RBS' business activities to the exclusion of that of RBS SEEL. The circumstances in which such a complete shift from the actual employer to the organization to which the employee is loaned will arise, must be very rare. They do not exist here. It is of note that there is no recorded case in which such a shift has been so complete that it has been decided that only the organisation to which the employee is loaned should be vicariously liable for their tortious acts. The Judge was entitled to decide that the factors for dual liability are present in this case.

188. For the reasons set out above, we dismiss RBS SEEL's appeal.