CL-2019-000068

Neutral Citation Number: [2021] EWHC 2875 (Comm)

Case No: CL-2019-000068

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL

Date: 01/11/2021

Before :

MRS JUSTICE MOULDER

- -

Between :

THE ECU GROUP PLC	**Claimant**
- and -	
(1) HSBC BANK PLC **(2) HSBC UK BANK PLC** **(3) HSBC BANK USA, N.A.**	**Defendants**

- -
- -

RICHARD LISSACK QC, JAMES CUTRESS QC and NICO LESLIE (instructed by **Mishcon de Reya LLP**) for the **Claimant**
KENNETH MacLEAN QC, SANDY PHIPPS and JOSHUA CROW (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Defendants**

Hearing dates: 14-17 June 2021, 21-24 June 2021, 28 June-1 July 2021, 5-8 July 2021, 12-15 July 2021, 27-29 July 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE MOULDER

CONTENTS

MRS JUSTICE MOULDER:

Introduction

1. This is a claim brought by The ECU Group PLC ("ECU") against a number of entities within the HSBC Group in relation to matters which occurred between 2004 and 2006.

2. ECU describes itself as a specialist currency debt management firm which managed multi-currency loan facilities on behalf of clients through its multi-currency debt management programme (the "MCDMP"). The facilities comprised individual loans that ECU's clients (the "Loan Customers") had taken out with a number of banks, by far the largest of which was HSBC Private Bank (UK) Limited ("HBPB"). HBPB was substituted as a defendant in these proceedings by HSBC UK Bank Plc by an order of Fancourt J dated 9 December 2019.

3. The loan agreement entered into by the Loan Customer with the bank (the "Facility Agreement") provided that the loan could be switched to another currency and that switches would be transacted for value 2 business days thereafter (Special Condition 2). An administration fee of £125 was payable on each switch. The Facility Agreement also specified that multi-currency management would be provided by ECU (Special Condition 10) and a power of attorney was granted by each Loan Customer to ECU for this purpose.

4. The MCDMP pooled the loan facilities of the clients and this meant that the switch instructions were placed in identical terms in respect of the individual loan balances. Under an agreement between the Loan Customer and ECU the role of ECU was to monitor the currencies and to instruct the Lender on the Loan Customer's behalf to change the currency exposure as and when ECU considered it appropriate or desirable, in order to denominate the Loan in the currency which, "*in the opinion of ECU ...provide the greatest perceived benefit to the [Loan Customer] by way of interest rate saving and /or debt reduction potential"*.

5. Thus from time to time, ECU gave instructions to the banks (including HBPB) to switch the currency exposure of the client loans. This claim concerns two types of instruction or order, referred to as "market" and "stop-loss" orders respectively. In each case, the order required the bank to switch the currency denomination of the loan: a "Market Order" required an immediate switch, whereas a "Stop Loss Order" was a conditional switch that would be 'triggered' where the prevailing foreign exchange ("FX") spot rate reached or exceeded a specified trigger level.

6. The nature of the "instruction" or "order" given by ECU is disputed. ECU says that they placed FX "*orders*" with HBPB in respect of their clients and as the business increased HBPB relayed the orders to the First Defendant, HSBC Bank PLC ("HBEU") and/or HSBC Bank USA, N.A. ("HBUS") for "*handling and execution*" (paragraph 8 of the Particulars of Claim).

7. The Facility Agreement did not specify the rate at which the switches were to be effected. The power of attorney authorised ECU to convert the loan "*at the Lender's prevailing foreign exchange rate from time to time"*.

8. ECU brings the claims in its own right and in the capacity of assignee of certain causes of action vested in the Loan Customers (the "Assignors") which have been assigned to it.

9. The factual basis of the claims against HSBC can be summarised as follows:

   9.1. "Trading Ahead Claims": it is alleged by ECU that it instructed HBPB not to trade ahead of the order and that this instruction also bound HBEU and HBUS. It is further alleged that HBEU and HBUS breached that instruction and traded ahead in a number of trades.

   9.2. "Front Running Claims": ECU also alleges that traders at HBEU and HBUS were engaged in "*front running*" certain trades that is that they traded in the market with knowledge of ECU's order in order to trigger the Stop Loss order and that the traders by their actions did trigger the orders and made a profit for HSBC.

   9.3. "Margin Claims": ECU alleges that HBEU and HBUS wrongfully added a margin to the rate at which they traded in the market and that the rate provided to ECU included that margin causing loss to ECU. (HBPB has admitted prior to the commencement of this trial that it added a margin to the rate provided by HBEU and HBUS and that it was not entitled to do so.)

   9.4. Collateral proprietary trading ("Confidence Claims"): ECU alleges that certain traders wrongfully traded on their own account with knowledge of the ECU orders as described below.

10. This is the judgment of the court on the liability issues, a split trial on liability and quantum having been ordered.

Issues for determination

11. ECU advanced a number of legal bases for its various claims. However it was submitted for ECU that its claims could be addressed on the basis of its claim for breach of confidence.

12. HSBC rejected the claims but in addition to its substantive responses to the various claims it also relied on the defence of limitation and the issue of causation.

13. In the light of the submissions and my findings, I have addressed the following principal issues (as explained below in the relevant section) in this judgment:

    13.1. Limitation;

    13.2. Misuse of Confidential Information:

        13.2.1. Front running;

        13.2.2. Causation;

        13.2.3. Account of profits;

        13.2.4. Trades which would not have triggered on the same day

    13.3. Confidence Claims and the Margin Claims.

Approach to evidence

14. There are a number of preliminary matters to consider in relation to the evidence:

14.1. In relation to the witnesses who were called, they were being asked to recollect matters that occurred some 15 years ago. I bear in mind the fact that witnesses are unlikely to be able to recollect matters which occurred such a long time ago and that even where a witness appears to recollect a conversation or meeting that recollection may be faulty. If authority is needed for this approach, I have regard to *Gestmin SGPS v Credit Suisse* [2013] EWHC 3560 at [22]. I also note that in some instances there are audio recordings of conversations which, by contrast with witness evidence many years after the event, are in my view reliable and to the extent that they contain material evidence are to be preferred to witness testimony.

14.2. A number of people who ECU says should have been called to give evidence were not called as witnesses. In particular the court did not have evidence from the individual traders who are accused of having perpetrated the alleged wrongdoing at HSBC. The question of whether the court should draw an adverse inference from the absence of these potential witnesses is considered below.

14.3. Partly due to the time elapsed the documentary evidence in relation to individual trades in particular is incomplete. Whilst the experts have largely been prepared to express conclusions on the data provided, the reliability of the conclusions expressed by the experts has to be assessed in the light of the shortcomings in the data which was available to them. This is discussed further below.

14.4. ECU seeks to rely on circumstantial evidence and in particular evidence of the wrongdoing on the part of HSBC referred to in the Deferred Prosecution Agreement dated 17 January 2018 (the "Deferred Prosecution Agreement") in the US proceedings and the FCA Final Notice dated 11 November 2014 (the "FCA Final Notice"). The weight to be given to such circumstantial evidence is considered below.

Submissions

15. The court has had the benefit of detailed and extensive written opening and closing submissions as well as oral closing submissions. The court has considered the submissions in the light of its assessment of the evidence and where necessary by reference to the daily transcripts. The court does not need to address every submission in its judgment and it would not be practicable to do so. However the failure to address a submission in the judgment in relation to a particular issue does not mean that a submission has not been considered.

16. However it is important for the court to make one observation as to its approach to the issues in this case. The Claimant has repeatedly submitted that there has been "*widespread misconduct*" on the part of HSBC and its FX traders (paragraphs 9 and 14 of Closing Submissions). The task of this court is to determine on the balance of probabilities whether the pleaded claims are made out. The court rejects the somewhat remarkable submission for ECU (paragraph 14 of Closing Submissions) that the court should have in mind "*as a starting point*" that "*nearly all of the traders are (or are likely to be) guilty of some form of serious misconduct*". This judgment is concerned with the pleaded claims and to the extent misconduct is pleaded and the court has determined that it is necessary or desirable to resolve the issue, the court has determined whether the claims are made out. It does not, and should not, start from the premise that the traders "*are likely to be guilty*". Further the court is only concerned with the pleaded claims and the application of the relevant legal principles to the facts found by the court. Accordingly

this judgment does not address the more colourful submissions which were made on behalf of ECU and which in the view of the court were neither pleaded nor did they have any real evidential basis. I refer for example to assertions of "*lax moral standards*" (paragraphs 17 -19 of the Closing Submissions) based on mere "*notoriety*" in relation to (unspecified) parts of the banking industry (paragraph 17) and a single conversation in 2010 (well after the period in issue in this claim) which is said to describe "*the established practice of the entire HSBC London trading desk*" and thus a "*culture of impunity*". Whilst I note that ECU submitted that the facts in the Deferred Prosecution Agreement and the FCA Notice are a product of consensual settlement, the relevance of those facts to the claims in this case are considered below.

Credibility of witnesses of fact

Claimant's witnesses

Mr Petley

17. Mr Petley is currently the Chief Executive and Chief Investment Officer of ECU (paragraph 1 of his witness statement). In 1988 he co-founded ECU and served as its Chief Executive and Chief Investment Officer. In 2001 ECU was sold and became a wholly owned subsidiary of ED and F Mann Holdings but Mr Petley together with Mr MacKinnon and Mr Alexander Jones made a buyout offer to ED and F Mann in November 2003. Thereafter Mr Petley acted as Chief Investment Officer of ECU until November 2008. After a sabbatical Mr Petley rejoined ECU in 2011 as Chief Investment Officer and in July 2014 also became Chief Executive Officer (paragraphs 9 – 12 of his witness statement).

18. In cross examination Mr Petley appeared to answer frankly about the claims brought by ECU against other banks and ECU's current financial situation. He acknowledged that ECU's business had been a "*casualty*" of the financial crisis in 2008 after which time banks were no longer prepared to make multi-currency loans of the type being made to ECU's clients; that currently ECU has only around £5m under management and is not trading profitably. His evidence was that the current litigation has arisen as result of the regulatory findings, that he believed ECU had a "*duty*" to investigate the misconduct and that ECU was bringing claims alleging misconduct in the FX market under a different mechanism but against a number of banks.

19. In my view Mr Petley was less frank when commenting on emails and transcripts of what he suspected had occurred: he appeared to downplay what he believed at the relevant time and his oral evidence contrasted with the much more forceful language of contemporaneous emails and calls. For example he was asked in cross examination about an email he sent to Mr MacKinnon and Mr Hughes on 12 April 2005:

    Q. *"... You see that you say that you have had a series of very bad fills from the private bank, and you refer to the one that came in at 09, which you were talking about a bit before, and you say:*

    "Before we go into battle we need to be clear on the facts."

    So you were envisaging having a row or dispute about this, were you?

20. Mr Petley replied:

"*My approach has always been, and I said it time and again, you know, people are innocent until proven guilty. I wouldn't want to go into a battle, it may not be the nicest term, but I don't want to ruffle feathers unless there was a case to answer*." [emphasis added]

21. Of more concern were certain inconsistencies in Mr Petley's evidence. For example when in cross examination he was asked directly about his ability to monitor dealings in the foreign exchange markets, he said that he only used systems for charting which enabled him to make his analysis in forecasting. However later in his oral evidence when he was being asked about a particular transaction, he said that he had been watching the trade and described in detail the movements in the rates which he said he could see. The first exchange was as follows:

"Q. *During the period with which we are concerned, 2004 to 2006, you had access to platforms which enabled you to monitor dealings in the foreign exchange markets in real time, didn't you?*

A. No, I wouldn't -- the systems I had were charting programmes. During the relevant time I had one system which I used extensively called CQG, which is purely a charting, very sophisticated charting programme, and that is how I made my analysis in forecasting which currencies I ranked more highly over one another. In the same vein at some point during that time I had a Bloomberg machine which also allowed me some fairly sophisticated charting programmes. But I didn't use -- well, CQG didn't have that capacity, or it may do now, I don't even know if it exists. But Bloomberg I did not use for really any other purpose than my proficiency, which is chart analysis. News, yes, but dealing…" [emphasis added]

22. However later in his evidence he said:

"As I had been watching that trade myself, the level had been breached, had gone through 1.20. Got as high, I think from the document we reviewed a little earlier, up to 1.2003 or so, and then actually went down by recollection well below 1.20, before then oscillating between varying levels. So I was not satisfied that that rate given at 1.2009 was in accordance with our instructions, and hence I wanted to establish with David Rumsey whether it was or wasn't…

Q. You mentioned you had been watching. What was it that you were watching and on what?

A… either through CQG, which was my preferred charting system, possibly Bloomberg, I can't see definitively, I can't recall when I would have taken either system. However, either on CQG or Bloomberg these are the bar charts that my systems would show, would be the midpoint between the bid and offer spreads given by multi major banks in the foreign exchange industry. So would be technically indicative but very, very precisely indicative of the majority of the major players transacting foreign exchange" [emphasis added]

23. Again later in his evidence Mr Petley apparently contradicted his original evidence that he only used Bloomberg for chart analysis. It was put to him that in January 2006 he was closely monitoring market movements which he accepted. Mr Petley was asked what platforms he was using to which he responded:

"*A. I would have been watching on my Bloomberg screen.*

Q. On your Bloomberg screen?

A. Yes, or CQG. I think Bloomberg. By 2006 I was exclusively on Bloomberg."

24. Mr Petley also appeared to seek to downplay in cross examination his knowledge of who he believed was responsible for the "trading ahead" although he eventually admitted that he thought it was HSBC. The relevant exchange started as follows:

"Q. So you were very much alive to the possibility, weren't you, back in 2006, that someone had profited as a result, as you saw it, of abuse of stop loss orders placed by ECU. That is right, isn't it?

A. Yes"

25. Mr Petley was referred to a telephone conversation with Mr Jones on 7 February 2006 in which Mr Petley referred to sending to Mr Brown "evidence" of price movements. Mr Petley's evidence in cross examination was that this was "*suggestive that somebody had traded ahead of the stop loss orders*" and that this was "*possibly HSBC*"

26. However the transcript of the contemporaneous evidence of the telephone conversation suggests that Mr Petley was in no doubt that HSBC was responsible. The relevant exchange in that conversation was as follows:

"*MP: I was just going to say that I'm sending Andrew Brown at HSBC the evidence of the sort of price movement on these last 3 stops, what I've suggested is that we're making good progress for the future but I expect that he will agree —*

AJ: These they have been front run as he calls them.

MP: That his or their actions, I think he will agree had they not, I've put front run or order book managed the stop position that in all probability those stops wouldn't have been triggered, and as such...

AJ: May not have been. I don't think you can...

MP: They wouldn't at that time, in each of them, I've gone back and looked and the first thing they did from the price action was to go straight down once we'd been filled, and in case of two of them for some time, before coming back eventually. It's not my point, my point is that in the knowledge that we would never have countenanced such sort of behaviour at all, it was actually expressly 100% diametrically opposed to where, how we wanted things done and our and that sort of philosophy has been embedded in our banking relationships since we started. The price action leads me to believe that HSBC must have profited out of that activity, because if they're buying something low and pushing the price up and then they've dumped the position on us and had an exit strategy they have benefitted by definition, they must have done…" [emphasis added]

27. Further in his email to Mr Brown of 7 February 2006 asking HSBC to investigate the January trades, Mr Petley wrote:

"...In managing your order book - by buying ahead of the above given stop orders-it seems clear to us that the practice of us placing a stop-loss order with you has, in reality, only served as to create a magnet effect to and through our specified stop-loss level...

The rather galling conclusion drawn from all this is that by seeking to protect our clients' position by placing stop-loss orders behind strategic levels of overhead resistance, your subsequent actions have achieved the opposite...

With respect to these last three stop-loss orders (above), my colleagues and I are keen to establish the extent to which HSBC benefitted financially from buying ahead of the above stop-loss orders which we believe was in clear contravention (albeit unintentionally) of our stated policy regarding the execution of such orders..." [emphasis added]

28. He concluded the email by referring to three charts attached to the email which covered the time periods from giving the stop loss orders to their execution and wrote:

"*I think the price action illustrated is pretty conclusive of our position."*

29. The relevant exchange in cross examination concluded as follows:

"Q. Well, who else was in your mind at the time if not HSBC?

A. Well, it is possible that there are any number of theories as to who could have been directly responsible for it, but my position at the time was to establish definitively whether or not that was HSBC.

Q. We are not able to discern in the papers, as far as I can see, from disclosure that you were thinking of anyone else other than HSBC?

A. No, I was very much thinking of HSBC at that time.

Q. Yes, and not somebody else?

A. This -- as at 7 February all my focus was on HSBC, correct." [emphasis added]

30. Mr Petley also appeared in his evidence in cross examination to downplay ECU's concerns and in particular the involvement of Mr Belchambers. The contemporaneous documentary evidence is that Mr Romilly in a conversation with a Ms Zarbafi on 16 March 2006 at ECU referred to the involvement of Anthony Belchambers:

"...what we all agreed would be a good way forward is Anthony's gone away with the evidence and he's going to go and see Alan [Ramsey] and just say look I know these guys well, they are very angry and very upset at the way they've been treated and I don' think you want this going public. I think it's going to look very very bad indeed because front running is kind of a hot potato at the moment....It's all over the MIFID stuff, Antony's just going to say you need to revisit this because you know they're good guys, they're not asking for any money, it's their clients who have been disadvantaged but you wouldn't want these images being banded around because it doesn't look you know...

...And the letter, did you see the letter, the letter doesn't actually really deny anything and was quite carefully crafted and we said look the one thing we don't want to do is beat up the guys at the private bank, you know, we don't want them getting upset, we

don't want them put in the middle but we do want Alan Ramsey to come and look at the evidence and have a conversation you know, and the way we would like it presented back to the private bank is that they've further reviewed it and on reflection they do think that an ex gratia payment is due to the clients." [emphasis added]

31. In cross examination Mr Petley was asked about what Mr Romilly said:

Q. "*…And you knew that the plan was to take the evidence, show it to Mr Ramsey and say you wouldn't want this going public in the current climate. That is right, isn't it?*

A. It is what Charles said. What the understanding I had from it was that Mr Romilly was going to ask Anthony Belchambers to get Alan Ramsey, if he hadn't done already, to have a look at it and to report back that, you know, there was nothing to see here or otherwise."

32. The cross examination on this issue concluded:

Q…Now, what the plan was, wasn't it, was to get Mr Romilly to engage Mr Belchambers to go through a route to Mr Ramsey to persuade Mr Ramsey to look again at the evidence and to have words with the private bank and, as a result, to make some form of ex gratia payment to ECU. That is right too, isn't it?

A. Yes, if our suspicions were in any way close to the mark then, yes.

Q. Yes. It is not a question of your suspicions being in any way close to the mark, it is a question of "Please look at the evidence, Mr Ramsey, and do the right thing". That is the approach that is going to be made, isn't it?

A. No, it was -- sorry to disagree with you, it was "Mr Ramsey, please look at the evidence and go and make sure that you, Mr Ramsey, have investigated this matter". [emphasis added]

33. The evidence that Mr Petley gave in cross examination about the involvement of Mr Belchambers and the purpose of contacting Mr Ramsey ran contrary to what was clearly said by Mr Romilly as evidenced by the transcript of the contemporaneous conversation. As set out above the stated purpose was to get an ex-gratia payment:

"…and the way we would like it presented back to the private bank is that they've further reviewed it and on reflection they do think that an ex gratia payment is due to the clients."

34. In my view this was an attempt by Mr Petley in cross examination to advance the Claimant's case and downplay the knowledge of the Claimant at the relevant time.

35. In giving evidence Mr Petley was also evasive in trying to avoid answering questions which one could infer supported HSBC's case. For example Mr Petley was asked in cross examination about the position in April 2006 and an email from Mr Romilly in which Mr Romilly said:

"*AR said that the bank was being hard-nosed about the matter and that he would revert to Anthony tomorrow. reimpressed on Anthony the strength of our relationship with the*

private bank and the impossible position they had been put in by the investment bank and that given the value of our business relationship with the private bank and the weight of evidence against the investment bank, being hard-nosed wasn't going to achieve anything but an ex-gratia goodwill price improvement would."

36. The relevant exchange was as follows:

"Q. So by this stage, 20 April 2006, it is correct that you had not accepted the explanation given in the letter of 9 March, had you?

A. Not formally, no.

Q. Well, you hadn't accepted it at all, had you?

A. Erm, we were running with Mr Ramsey, or rather Anthony Belchambers and Mr Ramsey with Charles, but, erm, no, I hadn't concluded the matter at this stage.

Q. Well, you hadn't concluded the matter. You were still trying to get a payment out of the bank. That is correct, isn't it?

A. If they had benefited, yes.

Q. Well, you believed very strongly that they had benefited, didn't you?

A. We did." [emphasis added]

37. Even when faced with clear contemporaneous evidence Mr Petley was reluctant to admit the obvious inference. When asked about the commercial implications of pursuing a case against HSBC Mr Petley was taken to an internal ECU document, a bank pipeline review, a document managed by Ms Chapman which stated against "*Notes from last bank review*":

"As agreed not to entangle new business and dispute. Flow of business is from HSBC to ECU and very little the other way."

38. The relevant exchange in cross examination was as follows:

"*Q. When it says: "Flow of business is from HSBC to ECU and very little the other way". That was right, wasn't it?*

A. Well, it had already -- always been actually pretty even. Sometimes we were ahead, but I think on balance we had introduced more or less half of our book to them and they had introduced more or less half of their book -- sorry, half of our book was introduced by them. It was a very even partnership, I believe.

Q. Whoever prepared this was under some misapprehension about this, were they?

A. It may have been just at the time, and dependent on ECU's marketing endeavours, that would sometimes generate waves of new business. So it is possible that at that point in time the flow of business was much larger the other way." [emphasis added]

39. It appeared as though Mr Petley also sought to downplay his own views and to suggest that they were "personal" views rather than those of ECU. Mr Petley in a call with Mr Whiting on 2 May 2006 told him that:

"…The board's view is that, shall I just say, we concluded that it's time to draw a line under this. There are all sorts of pros and cons –"

40. However Mr Petley also then referred to:

"…dismay when one feels that somebody has not behaved perhaps in accordance with the way things should be done… The important thing for us on this issue is for our relationship with you as a private bank. We know and have always known and have never had any doubt on the subject that any misdemeanour or lack of any duty of care or any -- whichever way you might not look at it or any questionable issue that needed investigating was not on your watch… And as such we are not, if you like, prepared on, you know, on this instance to go and hurt, you know, a very formidable ally and friend in order to bring certain people to account." [emphasis added]

41. Again in cross examination Mr Petley appeared evasive:

"Q… When you referred to dismay where you felt that somebody had not been behaving properly, that reflected your continuing belief that the bank in Canary Wharf or New York had behaved improperly, didn't it?

A. It was my -- yes, my consideration that if they hadn't behaved properly, that, you know, that I was accepting if that was the case, that it certainly had nothing to do with the private bank. It wasn't on their watch.

Q. Whether you are accepting it had nothing to do with the private bank or not, this, what you said on 2 May, reflected your continuing view that the bank in Canary Wharf or in New York had been front running the stop loss orders, didn't it?

A. Well, I had personal reservations about what had happened and I still hadn't any definitive answers one way or the other.

Q. So you still adhere to the view that the bank in Canary Wharf or in New York had been front running the orders, didn't you?

A. A personal view and concern that that was a possibility, yes." [emphasis added]

42. Mr Petley sought to present a picture that Mr Petley and Mr Romilly were on a "frolic" of their own. His evidence in cross examination was:

"I believe that maybe both Mr MacKinnon and Mrs Chapman found it, along with, from my recollection, Cormac Naughten, Alexander Jones and Stephen Cooper, our compliance director, and if I recall correctly even one of our non-executive directors, took the view that it was fanciful and unrealistic for me to believe that the independent checking and verification that was put in black and white that had been conducted by legal and compliance would have -- would have knowingly lied."

43. Mr Petley's evidence was that he was "*blinkered*" whilst his colleagues were more objective.

44. This however has to be contrasted with the fact of his involvement with ECU since founding the company. Further (irrespective of his then role at ECU) his evidence has to be tested against the other evidence. In the transcript of a contemporaneous call between Ms Chapman and Ms Negre, Ms Chapman said:

"what happens with Mickey – although I didn't say this in my email – is that he'll overrule everything everyone else has said –"

45. Although in cross examination Ms Chapman said this did not reflect the "*general rule*" she did accept that it was the case "*in areas where he took full responsibility*" and that if there was something he was particularly concerned about his views would count for a great deal.

46. Further Mr Petley's evidence has to be contrasted with the statements in the telephone conversation where Ms Chapman made reference to the dispute with HSBC and stated that ECU were agreeing not to pursue the matter because of the amount of business and not, as Mr Petley said, because the other directors regarded the claim as "fanciful":

"MC: There's a dispute on – going on about the – they've actually proved that they're – they're sort of – that – front-running, if you like, the stop orders and stuff so that, basically, whenever we seem to put a stop order in, miraculously, it hits that level and then bounces bloody back again. The thing is: Mark said that about a year and a half ago.

Patricia Negre: Yeah.

Maria Chapman: And he said, 'Yes but it's difficult. We need proof and we've got proof now.' And of course, HSBC at first were sort of – apparently – I haven't really been involved, I don't even read the emails, but I – they admitted liability and now they've completely done a backtrack.

Patricia Negre: Ah, okay. So I don't know about that one, anyway.

Maria Chapman: No, I wouldn't worry about it. I think –

Patricia Negre: Yeah.

Maria Chapman: – we're agreeing because of the amount of business that we do but Mickey has this sort of one-man-band crusades on, you know, what's right and wrong, basically…" [emphasis added]

Conclusion on credibility of Mr Petley

47. Given his role at ECU it is perhaps unsurprising that Mr Petley sought to advance the Claimant's case through his evidence. However I infer from his evasiveness and his attempts to interpret the documentary evidence in a way which supported the Claimant's case that his evidence was not objective and is unlikely to be reliable. Further the evident inconsistencies in his evidence such as his ability to monitor rates through the screens that he had, raises further doubts as to his general credibility. The court therefore approaches his evidence with considerable caution and looks to the documentary record in preference to his evidence and the extent to which his evidence is supported either by contemporaneous documents or other evidence.

Mr Hughes

48. Mr Hughes described his role at ECU as "Head of Trading". He stated in his witness statement (paragraph 10) that at ECU he assisted with the trading in the MCDMP. He described (paragraph 10 of his witness statement) how he would call up the banks and place orders either "at market" "take profit" or "stop loss". He stated that ECU would then confirm the order on paper usually by fax and sometimes by email. When the order was filled, they would then receive a phone call from the private bank and would also receive written confirmation that the order had been filled. He said that the placement of the orders between 2004 and 2006 was primarily carried out by Mr Petley and Mr De Klerk with him providing assistance where required. However, his evidence was that he became increasingly involved in the MCDMP and the placements of orders from 2005. He said (paragraph 12 of his witness statement) that he was involved in "*trading strategy discussions*" with Mr Petty and Mr MacKinnon. He describes his role as to provide short-term "*colour*" to Mr Petley and Mr MacKinnon on the currency markets based on his background as an FX trader and through his daily contact with bank traders and marketers.

49. Mr Hughes was straightforward in giving evidence to the court. He ceased to be employed by ECU in April 2011 and is no longer working in the financial sector; he retired in June 2018 having taken employment in education. He has no apparent motive to give anything other than honest evidence to the court. He discloses in his witness statement (paragraph 1) that he is a minority shareholder of ECU but it has not been suggested that this is material. To the extent that he was able to give relevant evidence I accept his evidence.

50. However Mr Hughes is not a lawyer and I infer from his evidence to the court that he had no clear idea of the contractual relationship between the various parties. His expertise lay in his background in the currency markets. His background in this regard is set out in his witness statement (paragraphs 8 and 9): he started his career in trading in 1985 as a currency options trader in the foreign exchange department of Robert Fleming & Co. Robert Fleming & Co merged with Chase Manhattan and subsequently with JP Morgan in 2000. He continued to work for JP Morgan as an FX rates and derivatives marketer until 2003. He took a year out of working in the finance sector before joining ECU in 2004.

51. Insofar as he was able to give evidence about the trading aspects of the MCDMP and ECU's knowledge and understanding in respect of the execution of the orders that it had placed with banks, I accept that evidence as credible. I note the submissions of ECU in relation to his evidence which are considered in detail below. However for the reasons discussed below, in my view Mr Hughes had worked in the currency markets for twenty years at the relevant time and I find that he is likely to have had a strong knowledge and understanding of the operation of the FX markets in 2005 and 2006.

Ms Chapman

52. Ms Chapman worked at ECU from November 1998 to around September 2010 as a director of private banking services. After 2010 she returned to work at ECU from 2012 to 2014. She is also a shareholder. When she first joined ECU in 1998, she says that it was "*for the most part, just me and Mr Michael Petley*". Her evidence (paragraph 4 of her witness statement) is that she was responsible for the administrative setup of the business and Mr Petley was responsible for trading and strategy. As the company grew and in particular during the period 2004- 2006 her role became more focused on relationships

with the banks and the contractual framework and banking procedures in respect of the MCDMP.

53. Her evidence (paragraph 13 of her witness statement) is that she was responsible for organising, negotiating and implementing the contractual framework and banking procedures between the ECU clients, the participating private banks and ECU. She was not involved in the placement of the orders or for the administration of the switches.

54. Overall Ms Chapman appeared to give honest evidence to the court. She was frank about the role of Mr Petley within ECU: as referred to above, she frankly accepted in cross examination that in areas where Mr Petley took full responsibility his views counted for a lot and that if there was something he was particularly concerned about his views would count for a great deal.

55. On occasions however she appeared to struggle with giving her answers and to try and support the Claimant's case. For example asked about the conversation that she had with Mr Naughten on 30 March 2006, Ms Chapman appeared to try and draw a distinction between her views and those of Mr Petley based on their roles within the business:

"Q. What it seems to be in the course of this conversation is that it was recognised within ECU that pursuing a complaint was likely to be damaging to business, wasn't it?

A. ... I would say that there are two different points of view here. Obviously myself and Cormac were more on generating the business, looking at the business, growing it, getting new mortgages in, that was our focus. Mr Petley's focus was different, it was on the trading side. So I think you can't sort of say when it is two different viewpoints because of the work that we did was different fundamentally."

56. As Counsel for HSBC put to Ms Chapman, the trading was only a means to an end and related to the borrowings which had been given by, for example, HBPB. It was there as a service which was offered by ECU to its clients. It was then put to Ms Chapman:

"*Of course the performance was important but ultimately you and Mr Naughten here are expressing the view, you would agree, that it would be commercially very damaging to pursue this, isn't that right?"*

57. Ms Chapman replied:

"*From our perspective*."

58. In the light of her approach to her oral evidence, I am mindful of her long relationship with ECU and approach her evidence with a degree of caution looking for support from other witnesses and contemporaneous documentary evidence in assessing the weight to be given to her evidence.

Mr De Klerk

59. Mr De Klerk originally joined ECU in or around September 2001 as an authorised Foreign Exchange Trader and Analyst, although his evidence is that he did not in fact make any of the decisions to trade currency. As part of this role, once the decision to trade had been taken, he would routinely place the FX orders that ECU had decided to place with banks, including HBPB. His evidence was that he was also responsible for

the FX and interest rate inputs into the MCDMP Performance Track Record Model and designed some key operational and reporting systems.

60. He is currently the Chief Financial Officer and Company Secretary of ECU having rejoined in 2014. He is also a shareholder.

61. Mr De Klerk in my view gave convoluted answers to questions in the course of his cross-examination. At the outset of his oral evidence I was concerned that he did not understand the questions that were being put as he failed to answer directly. However as his evidence progressed, I formed the view that he was seeking to give answers that supported ECU's case.

62. The most striking example of this was when questions were being put to him about what ECU thought had happened in relation to its FX trades. He insisted that there were a range of suspicions including the possibility that someone from within their own organisation had leaked confidential information. He acknowledged in response to a question from the court that no steps had been taken to investigate this possibility and there is no support for this in the contemporaneous documentation. His evidence included the following:

"...Apart from front running, which was my personal view, there were other views that say perhaps our market information was leaked or shared, in which case some other party than HSBC, some other market participant could have used that information. So we had a wide array of beliefs and suspicions that we were discussing and debating amongst each other. I personally didn't really work at a trading desk from a bank so I might have had different views than say someone like Mike Hughes, who had a different expertise and experience level…

…We certainly -- or I certainly considered quite a few things. I considered whether the bank were viewing our orders as so large they are starting to buy as soon as we gave the order, but then I would have expected them to give that benefit to the clients maybe. I thought maybe it is possible that someone like a bank or perhaps even in our office could have leaked some information. I thought it could be entirely possible that we need to consider all these things and that is probably -- well, that is definitely why we at ECU, and specifically Mr Michael Petley, requested the banks to enable us to verify not just the price action but what was underneath the price action, who traded with whom and in which sizes. That would have probably helped us in quashing some of these hypotheses and actually coming to a more believable answer." [emphasis added]

63. In my view this part of his evidence in cross examination, illustrated by the extract above, was a striking attempt by Mr De Klerk to give evidence which supported the Claimant's case.

64. Other examples of Mr De Klerk not answering direct questions but attempting to give evidence which accorded with ECU's case included the following lengthy response to a straightforward question of which this is merely an extract of the protracted exchange:

"Q. But you didn't see, as far as you are aware, any agreement between ECU and HBPB, is that correct?

A. In my role as switching the client from one currency to another, I would not do so unless I were informed by our back office and compliance people, Sharon Onciu and Patricia, that I had the right to go ahead with this, and I know for a fact that those departments would have looked at the client documentation and they would have had some sort of agreement from HSBC that gives us the authority and the power of attorney to switch that currency, that client's debt from one currency to another. So I did not go and inspect each and every one because we had a back office and a compliance function who did that. They would not have given me the right to include or exclude that particular client from the programme, and in doing so trade and switch his debt from one currency to another, unless they were not satisfied.

Q. Right –

A. So, yes, there would have been some authorisation or signed piece of paper from HSBC saying that they have received the client's power of attorney and accepted that, and therefore now I am free to switch."

65. A further example of Mr De Klerk seeking to advance ECU's case was when Mr De Klerk gave evidence that the term "*front running*" was used to mean "*trading ahead*"; evidence which was not supported by the contemporaneous documentation. The relevant exchange was as follows:

"*Q. When you say "I believe the term 'front running' was also used more loosely or to simply describe trading ahead", is it your evidence that that is something you thought, you actually thought at the time, that is a belief you had back in 2006?*

A. Yes. Back in 2006 we discussed this in the office and we discussed various hypotheses and what could potentially happen and there were -- I was one of the ones that believed that perhaps the bank is using our information and then trading upon that. There were also other hypotheses thrown around, but that was one of them.

Q. Yes. It is your evidence, is it, that in 2006 the question as to whether front running meant something other than market manipulation was present to your mind, is that right?

A. Yes. Erm, it could have been -- it could have been the case. Yes.

Q. But as far as we can tell, there is no written material which would guide us to believe that that is a view you held at the time? As far as you are aware there isn't, is there?

A. No."

66. For the reasons discussed I therefore approach the evidence of Mr De Klerk with considerable caution. There were occasions however when despite his attempts to present his evidence as supporting ECU's case, he nevertheless provided relevant credible evidence.

Mr MacKinnon

67. Mr MacKinnon provided a witness statement but was unable to give oral evidence and be cross examined as he had undergone an operation and according to the evidence of his GP was not fit to give evidence at the trial. The court determined (in a separate ruling) that in the circumstances his evidence should be admitted as hearsay.

68. Mr MacKinnon was the former chief economist and chief currency strategist of ECU. He started his career as a civil servant at the Treasury from 1982 until 1987 and thereafter worked as a stockbroker at various city institutions, moving to Citibank as their chief currency strategist in 1992 and then working as the chief economist for a global hedge fund in 2000. He first became involved with ECU in around 1998 when he joined ECU's advisory Investment Management Committee. In 2002 he joined ECU full-time and jointly managed the MCDMP with Mr Petley. He did not place orders ECU for the MCDMP but he was on the board of directors of ECU from 1999 until 2009. Mr MacKinnon was at the time of the trial a shareholder in ECU.

69. In his witness statement (paragraph 18) Mr MacKinnon stated that he was responsible for formulating the economic and market aspect of ECU's strategy which strategy would then inform the trading decisions concerning the switch of currencies and the orders that would be placed with the banks. He stated that his role was to provide economic and market input but did not extend to communicating with banks directly about the execution of orders either in general terms or for the placement of individual orders.

70. The weight to be given to Mr MacKinnon's evidence is reduced by reason of the fact that his evidence was not tested in cross-examination. The court therefore approaches his evidence with caution and weighs it in the light of the other evidence particularly the contemporaneous documentary evidence (including the transcripts of the contemporaneous telephone calls).

Defendants' witnesses

Mr Whiting

71. Mr Stephen Whiting gave evidence by video link from Portugal where he is currently staying. He gave evidence from the offices of a Portuguese law firm.

72. Mr Whiting joined HBPB in 1995 and his role at the material time was managing ultra-high net worth clients for the UK (paragraph 4 his witness statement). He stated (paragraphs 6 and 7 of his witness statement) that he was responsible for HBPB's overall relationship with ECU. David McKenzie was his deputy and according to Mr Whiting, Mr McKenzie played an important role in managing the bank's day-to-day relationship with ECU.

73. With respect to foreign exchange trading, Mr Whiting's evidence was that ECU dealt directly with the Treasury team of the Private Bank which included Mr Terry Simonian as the Treasury team head, Mr David Rumsey and Mr Hugh Jones. Mr Whiting stressed in cross examination that he was not involved in the FX trading and (paragraph 12 his witness statement) had "*no real expertise*" in the matter.

74. He left HBPB in 2012 and moved to Deutsche Bank. He is now largely retired, having left Deutsche in 2018.

75. In cross examination Mr Whiting was pressed repeatedly for explanations of emails which he stated that he did not recollect. On occasions this led him to speculate in what I infer was an attempt to assist the court. For example in the following exchange having stated that he did not recall discussions, Mr Whiting gave evidence in response to hypothetical and general questions as to what he would "*expect*":

"Q. So you would have taken the issues raised sufficiently seriously to hope that colleagues better informed than you in say treasury or some other department would investigate it and then discuss it with you presumably?

A. Yes, but I can't remember any discussions.

Q. No, no, I am just talking generally. Of course you can't remember from what you say about all this and, as my Lady pointed out, you mustn't speculate and I am not asking you to, I stress that. As a matter of generality, if you received an email from one of your customers making a complaint, with a capital C or small C, it doesn't matter.

A. Very much a small C.

Q. Yes, I would agree with you on that. Small C. You would read it, you would note it, you would expect your colleagues in treasury, for example in this instance Mr Rumsey, to investigate it, and you would then keep an eye on it. Correct?

A. Correct."

76. Mr Whiting repeatedly stressed that he was not involved in FX trading and could not comment on matters which related to FX trading. Given his role at HBPB as a relationship manager I accept his evidence that he was not involved in the FX trading and did not need to have an understanding of how the switches were effected in the market. It was also understandable given the time elapsed that he could not remember the detail of meetings or the circumstances of emails.

77. In my view it is clear on his evidence that he was not involved in documentation and was not qualified to comment on the legal relationship between ECU/the Loan Customers and HBPB or ECU/the Loan Customers and any other HSBC entity.

78. One feature of Mr Whiting's involvement in the proceedings is relevant to note. Mr Whiting was asked to attend a meeting at the home of Lady Rona Delves Broughton, Mr Petley's ex mother-in-law, on 28 March 2017. Mr Petley was present although Mr Whiting had not been told that he would be at the meeting (and had expected that it was to discuss Lady Broughton's own affairs).

79. Mr Whiting did not keep a note of that meeting and he disputes the contents of a file note made by Mr Petley including that Mr Whiting understood that ECU decided not to pursue its complaint because Mr Petley accepted what HBPB told him.

80. Mr Whiting's evidence (paragraph 43 of his witness statement) is that in his view:

"*whilst Mr Petley and his team had not been satisfied by my response to ECU's complaint, they had decided that the value of ECU's relationship with HBPB was commercially more important than pursuing a claim. The relationship was important to ECU not least because of all the relationships ECU had, HBPB was by far the largest introducer of business to ECU*."

81. Although ECU stated in its closing submissions that Mr Whiting had a perfectly proper "*work-based friendship*" with Mr Petley and Lady Rona Delves Broughton, it made no attempt to justify the note written by Mr Petley purporting to reflect the views expressed by Mr Whiting at the meeting. There was no real challenge in cross examination to Mr

Whiting's rejection of aspects of the meeting note identified in his witness statement. The relevant exchange in cross examination was as follows:

"A. … whilst I agree with most of it, it is not factually correct throughout, as I have detailed in my witness statement.

Q. Yes. If I was to put it this way, it is very largely correct but you take issue with a couple of phrases as you set out in your witness statement?

A. I think in fairness there is more than one phrase, or two phrases. Well, I am sure we will come on to that.

Q. I am not sure that we will, not for my part in any event because we have seen what you say in your witness statement. But the position is that I suggest to you that the record, this document, is entirely accurate of how the conversation went.

A. Well, I would have to disagree. Because it is not --you only need to refer to my witness statement.

Q. Yes, I have.

A. With all due respect, it is not okay to gloss over this and say it is factually correct, we need to go through my witness statement because it clearly states that it is not correct.

Q. We have your evidence on the point. We know that you say it is not correct. We know exactly paragraph by paragraph –

A. Okay, so the note then -- the note sitting alongside my own views is factually correct, my own statement.

Q. I suggest to you that the record is accurate. It is one or the other.

A. My comments are accurate."

82. In my view the incident does not reflect well on Mr Petley: in particular it was at best foolish to try and obtain evidence from Mr Whiting and concerning in the light of Mr Whiting's evidence that Mr Petley's note was not accurate in material respects.

83. Mr Whiting left HSBC in 2012. He no longer has any connection with HSBC. There is no apparent reason why he would give anything other than his honest recollection of events to the court. Although Mr Petley insisted in cross examination that Mr Whiting had said that he understood that ECU had accepted the findings of the investigation and moved on, I do not accept this evidence. I have considered above the credibility of Mr Petley and for the reasons discussed approach his evidence with considerable caution. Faced with conflicting evidence I prefer the evidence of Mr Whiting who in my view is more likely to be giving an objective account as to the value to ECU of the relationship with HBPB and the fact that in his view the relationship was viewed by ECU as commercially more important than pursuing a claim.

Mr Brown

84. In the 2004 to 2006 period, Mr Brown was the head of foreign exchange for Europe, the Middle East, and Africa ("EMEA"), and in around May 2006 became the Global Head of Foreign Exchange. He left HBEU in March 2009.

85. Mr Brown no longer has any association with HSBC or indeed the City so there is no reason to infer that he would not give honest evidence to the court.

86. I accept Mr Brown's evidence that he was only involved with ECU in 2006 around the time of the January 2006 Trades (as defined below) and the subsequent complaint: in particular the meeting with ECU on 2 February 2006, a telephone call with Mr Petley on 7 February 2006 and as the addressee of the complaint from ECU sent on 7 February 2006.

87. As to the meeting in February 2006, contrary to the evidence of Mr Petley, Mr Brown's recollection was that the meeting was amicable (paragraph 23 of his witness statement). Mr Brown's evidence was that the report of the meeting prepared by Mr Rumsey was accurate.

88. On 9 February Mr Brown had a call with Mr Bowden, a business manager at HBEU. His evidence (paragraph 29) was that the call reflected his view

> *"of how a stop-loss order of this size would have been handled at the time. I do not think it would have been realistic to fill a US$250 million stop-loss order at or around the stop-loss level without at least some buying ahead of the trigger level*."

89. Mr Bowden also said to Mr Brown:

> *"...there's so many of them that it might be easier just to get rid of it if we could."*

90. Whilst the contemporaneous evidence therefore indicates that Mr Bowden referred to other incidents on the call, I accept Mr Brown's explanation in cross examination that he was focussed on the three January Trades. There is nothing in the conversation to suggest that Mr Brown was aware of other incidents; his absence of reaction to Mr Bowden's statement in that regard would tend to confirm his oral evidence.

91. Mr Brown also gave evidence as to the trading practices in the market. He was honest about transparency requirements in 2021 as compared with 2006 and what was acceptable practice.

92. In my view Mr Brown was a careful and honest witness who given the passage of time had no particular recollection of events. His evidence was that he did recall a conversation with Mr Scott, the trader who handled the euro/dollar order executed on 6 January 2006 about the execution of that order, although it is likely in my view that his recollection of the date (as being on 6 January 2006) is inaccurate as Mr Brown's recollection appears inconsistent with the documentary record as to the date when ECU first complained to HSBC (after the 31 January 2006 trade). I give weight to his evidence accordingly.

Mr McEvoy

93. Mr McEvoy worked in FX sales at the material time. He left HBEU in 2010 and has now retired. His role "*involved receiving client orders, passing the orders on to the traders on the trading desk, and reporting back to the client on the order*" (paragraph 5 of his witness statement). He did not do any trading and whilst he would speak to the traders about how they would execute orders he did not have any direct knowledge of how they would execute orders (paragraph 6).

94. Mr McEvoy has no current involvement with HSBC. One might ask therefore what motive he has to give anything other than honest evidence to the court. Having agreed to give evidence, he was faced with lengthy cross examination. He was challenged to explain some 15 years after the event certain practices such as adding pips and pre-positioning. His evidence as to why they were pre-positioning was that ECU wanted tighter fills but it was impossible to hit the range without pre-positioning.

95. In my view Mr McEvoy had genuinely held beliefs as to how HSBC handled the ECU trades. In my view his evidence was that of someone who was trying to explain the practices which he regarded as justified at the time and which are now under the spotlight in the light of the current claim. In his evidence he expressed his frustration with ECU and what he saw as the contradiction in what ECU was seeking in on the one hand complaining about fill levels and on the other saying that ECU did not want pre-positioning or trading ahead of ECU's orders.

96. Mr McEvoy was challenged on certain statements that he made in conversations with Mr Rumsey on 1 February 2006 in particular when he said he "*didn't want to see the evidence*" and apparently suggesting HSBC should "*lie*" to ECU. In my view these remarks have to be considered in context: it was a conversation between two men who were long standing colleagues and not a letter or email to a third party and it was against a background that they were trying to keep a client happy but a client who they felt had irreconcilable aims. Viewed in context of the entire conversation I do not accept these remarks lead to an inference that Mr McEvoy would not give honest evidence to the court.

97. I accept that Mr McEvoy did not wish to make it clear to ECU at the time that HSBC traded ahead but this reflected the commercial situation in which he found himself in that as he put it:

> *"[Mr Petley] had two incompatible objectives. He didn't want any dollars bought before his stop loss level but he wanted them all at where only $3 million were offered. So he couldn't have, dare I say it, his cake and eat it."*

98. In my view Mr McEvoy sought to give honest evidence to the court.

Mr Dench

99. Mr Dench worked at HBPB from 2005 to 2013 as the Head of Compliance. Prior to that he had had extensive experience in compliance having worked for around eight years with the Securities and Futures Authority followed by periods at JP Morgan Private Bank, Schroder & Co and Credit Suisse, all as Head of Compliance. After he left ECU, he continued to work in a compliance/governance role.

100. As might be expected from someone who has been in a senior compliance role over many years Mr Dench gave careful and guarded answers in cross examination. In particular he was keen to stress that he was a generalist and not an expert in FX and thus relied on others to investigate the complaint. In his witness statement he said:

"*While I am familiar with foreign exchange ("FX") trading and stop loss orders, I am not, and was not at the time, a specialist in such products. Similarly, I was aware of matters such as front running but I was not an expert in such matters and so I would have relied on the compliance team at HBEU for their specialised knowledge*."

101. He described his role (paragraph 8 of his witness statement) as "*to liaise with the Global Markets compliance teams and the team at HBPB responsible for the relationship with ECU, and to ensure that the complaint was properly investigated*."

102. Mr Dench has no ongoing connection with the Defendants and given his ongoing role in compliance in the City, I approach his evidence on the basis that he gave truthful answers to the court.

103. In cross examination questions appeared to be directed at the notion that Mr Dench would have tried to get rid of ECU's complaint. That in my view is not credible for the head of compliance of a major bank with a long-standing background in compliance. Rather the tenor of the response to ECU, as Mr Dench candidly acknowledged, had in mind that letters would end up potentially with the ombudsman or a litigator.

Mrs Lane

104. Mrs Lane is currently an employee of HSBC UK Bank PLC. She joined HBPB in 2003. At the material time she worked in a support role to Mr McKenzie, one of the relationship managers at HBPB. It was clear from her evidence in cross examination that Mrs Lane worked in a purely administrative role. Although therefore her signature appeared on documents relating to ECU, she was not responsible for the drafting of the documents and merely followed the procedure established by others. Similarly it was clear from her evidence that she was not involved in the rate fixing on a switch of currencies; she was responsible merely for sending communications to ECU informing ECU of the rate and the loan balances after an order had been transacted by the dealers. Whilst in my view Mrs Lane sought to give truthful evidence her evidence was of limited assistance to the issues in the case.

Credibility of expert witnesses

105. As noted in the Defendants' opening submissions one of the central issues addressed by each expert is whether FX traders at HBEU or HBUS began executing the Stop Loss Orders prior to the trigger point being reached and, if so, whether they did so with an intention to manipulate the market.

106. The potential significance of the expert evidence to the substantive claims is particularly high in this case by reason of the nature of the evidence before the court. ECU's case on whether front running, trading ahead and proprietary trading occurred in respect of each of the trades (still in issue) is dependent to a large extent on inferences which it submits can be drawn from the data and the extent to which those inferences are supported by the expert witnesses. In many of the trades the court has little or no documentary evidence to assist in the interpretation of the data. This is therefore a case where in relation to the substantive claims, the expert evidence plays a key role and the

court has to be satisfied that the expert witnesses can properly give the opinions that they express and that those opinions have a sufficient evidential foundation to be relied upon.

Mr Gladwin

His experience

107. The Defendants sought to criticise Mr Gladwin on the basis of his experience of FX trading. It was submitted for the Defendants that unlike Mr Moore, Mr Gladwin had never been a spot FX trader or held any other "*desk level role*" in spot FX (Paragraph 58 Defendants' Opening Submissions).

108. In cross examination Mr Gladwin said that he had traded spot FX although it is clear that on such occasions he was not trading with the frequency of a spot FX dealer. Nevertheless he was Global FX Head at Lehman Brothers Europe (2006-2008) and Global Head of Foreign Exchange at Nomura International Plc (2008-2011). In my view anyone holding these roles would have had to understand the FX market in order to carry out their responsibilities as head of the desk. I do not accept therefore that Mr Gladwin was not competent to give an expert view of the spot FX market and the nature of the trading by the Defendants at the relevant time.

109. However despite his experience of the FX market I have the following concerns about his evidence:

109.1. His failure to correct his reports;

109.2. His assumptions;

109.3. The level of certainty in his conclusions;

109.4. His presentation of data.

His failure to correct his reports

110. Mr Gladwin had not previously given expert evidence to a court. Whilst of course this is not a prerequisite, when adopting his expert reports as his evidence, Mr Gladwin failed to mention two instances where he had subsequently changed his conclusions as expressed in his reports. He acknowledged his change of view when the points were put to him in cross examination and explained that he had assumed that the points would be covered during his evidence.

111. I accept that in relation to Trade 18 (12 April 2005) new EBS data had become available to Mr Gladwin only a few days before he gave evidence such that he had not had time to produce a further report. However his evidence was that he had examined the new data in relation to this particular trade and it is perhaps surprising that it was not made clear to him by those who instructed him, that he should have raised any changes to the conclusions of his reports arising out of the new data at the outset of his evidence. In this particular case the new data showed the direction of trading and led him to withdraw his previous assertion that Mr O'Sullivan had engaged in illegitimate proprietary trading.

112. The second instance related to Trade 32 (30 May 2006) where Mr Gladwin did not identify at the outset of his oral evidence that he was in fact aware that his conclusion of trading ahead by Mr Davies could not be maintained in light of the fact that the SWIFT data which showed that the trade was executed by UBS and not as Mr Gladwin stated in

his report, HBEU. Although Mr Gladwin acknowledged in cross examination that he had made a mistake, it was clear from his evidence that he was aware of the mistake and yet he failed to mention this at the outset of giving evidence.

113. Whilst I accept his personal lack of familiarity with the court process, these were material allegations and should not have been left to counsel to highlight in cross examination. Even if one assumes this was an error borne of ignorance on the part of Mr Gladwin, the errors emphasize the caution which the court needs to adopt in considering the conclusions of Mr Gladwin especially where, as in the case of Trade 18, the conclusion is based on incomplete data, and even where the conclusions of Mr Gladwin on a particular trade are apparently firmly held and expressed as such in the reports.

His assumptions

114. A further troubling aspect of Mr Gladwin's evidence was that it appeared on a number of occasions that Mr Gladwin, having formed a view that the Defendants had engaged in misconduct, gave his oral evidence in a way which appeared to be advancing the Claimant's case rather than providing his objective opinion. For example, Mr Gladwin approached his evidence and formed his opinions on the basis that the Claimant had instructed the Defendants not to trade ahead and thus any trading ahead was prohibited. Although counsel for the Defendants in the course of cross examination told Mr Gladwin that the issue of whether such instructions had been given was a matter in dispute between the parties and for the court to determine, Mr Gladwin continued throughout his four days of giving evidence to refer to the issue of instructions as a fact which had been established and thus supported the Claimant's case in relation to trading ahead. One such example (of a number) was in relation to Trade 19 where the relevant exchange was as follows:

Q. Yes, and wouldn't a fair view of this, Mr Gladwin, to use my train metaphor, you may say the metaphor is inapposite, be that Mr Nettleingham was getting on the train at this stage rather than jumping into the cab trying to drive it?

A. Again, it depends upon the type of order that he had. He was told not to get on the train until it had passed his stop"

115. Not only did Mr Gladwin continue to refer to the instructions having been given to the Defendants but he also postulated that similar instructions had been given to the other banks which were given part of the stop loss orders. There was no apparent basis for this assumption and in my view, it was another example of Mr Gladwin appearing to wish to support the Claimant's case by his evidence.

116. It was submitted for the Claimant (M/22 p135) that it was clear on the evidence of Mr McEvoy that instructions that there should be no trading ahead were relayed so the attack on Mr Gladwin by counsel for the Defendants was misplaced. However in this context the issue is not how the disputed issue is ultimately resolved by the court on the evidence but how Mr Gladwin approached his task of giving expert evidence and whether he did so objectively.

117. A further example of his approach to giving evidence which raised a concern as to whether or not Mr Gladwin was able to give objective evidence to the court or whether having formed an opinion on the behaviour of the Defendants, he sought to bolster that

opinion in a partisan manner was the following examples of his evidence in relation to Trade 19 and Trade 26 respectively.

118. In relation to Trade 19 (18 April 2005) the relevant passage is as follows:

Q…In fact by 14.31.30 in this table, about two thirds of the way down, you see that the prices have started to rise up?

A. That's right.

Q. Yes, and this despite the fact that Mr Nettleingham continues to sell aggressively?

A. Absolutely.

Q. And this tends to show, doesn't it, that selling of this scale doesn't control the direction of the market, does it?

A. It doesn't necessarily, certainly not when spread out over a period of time.

Q. Well, I mean, we've got him selling in a time slice, 15.31.17, 23 million and the price goes up?

A. 20 million of that was sold to HSBC New York.

Q. What's that got to do with it?

A. Well, clearly they were a large buyer at that point…"

119. Mr MacLean went back to this point a few minutes later in cross examination and sought clarification on Mr Gladwin's evidence concerning selling to HSBC New York:

Q…Mr Gladwin, looking at your D.1/1/357, the table, and I was asking you about the trading taking place in the single second time slice and pointing out that it doesn't cause the market price to fall and you said, oh well, part of that trading was with HSBC New York. Now, just so that we're clear, we can see here in this data that part of the trading was with HSBC New York, correct?

A. That's correct.

Q. But at the time prior to doing the trading, before they clicked on the button, traders would not have known with whom they're dealing. That's right, isn't it?

A. That's right at that time.

Q. So they wouldn't have known?

A. That's correct.

Q. Just another counterparty in the market as far as they were concerned?

A. That's correct."

120. In my view this is an example of where Mr Gladwin gave oral evidence to bolster the conclusion that he had already reached but where the evidence when tested did not in fact provide support for the conclusion expressed.

121. In relation to Trade 26 Mr Gladwin said in his report at 2.2.5:

"*I don't know why Mr Sarramenga was buying when Mr Courtney was selling but leaving a bid at the trigger level in a small amount during a volatile market could be a strategy for triggering an order*." [emphasis added]

122. It was put to Mr Gladwin in cross examination that this was pure speculation. Mr Gladwin's evidence was that:

"*It's one possible thing that he could have been doing*."

Mr Gladwin was asked if he had ever seen this strategy in operation to which he replied:

"*I have no personal experience not having worked in an organisation that would tolerate that kind of behaviour.*" [emphasis added]

123. The clear inference from this response (although he denied it) was that Mr Gladwin had concluded that the Defendants had engaged in unacceptable behaviour. It was in my view a gratuitous comment from someone who was being asked to give an independent view on the inferences that could properly be drawn from the data. I also note that Mr Moore by contrast was of the opinion that:

"*In my opinion and experience, expressing an interest to purchase a currency pair could not form part of a strategy to trigger a stop loss sell order for a currency pair*."

The degree of certainty in his conclusions

124. Mr Gladwin expressed his opinions in his report often in a categoric fashion leaving little or no apparent room for doubt as to the inferences which could or should be drawn. However although reading his reports one might assume that the data was clear that the traders had engaged in front running and/or trading ahead and/or proprietary trading, it was established in cross examination that in some instances the opinions were not as firm as might appear on their face or were not supported by the evidence.

125. For example, as referred to above, having apparently been firm in his conclusion on proprietary trading by Mr O'Sullivan on Trade 18, Mr Gladwin subsequently changed his opinion on that trade having received and considered additional data.

126. In his first report Mr Gladwin said in relation to the trade on 12 April 2005 (Trade 18):

"*It should be noted that at 14.46.24, 7 seconds after being told how close ECU's stop loss order was, Mr O'Sullivan makes three trades totalling 5 million dollars US Swiss. I do not know whether these trades are buys or sells, but the timing seems very suspicious. There is then more activity by a number of traders in the short run up to the trigger, including another USD10 million from Mr O'Sullivan. There is USD 15 million of activity during the 12.48.45 time slice. We do not know the true direction of this trading but if it was all buying then this would have added to the upward price pressure prior to the trigger…"* [emphasis added]

127. In his second supplemental report Mr Gladwin said in relation to this trade:

"Whilst we do not know exactly how Mr O'Sullivan was trading, the sudden and unusual increase in his dollar Swiss activity immediately after the conversation with Mr Scott and its concentration in the period immediately before and after the trigger leads me to conclude that it is likely to be proprietary trading based on knowledge of ECU's stop loss order level." [emphasis added]

128. Mr Gladwin was asked in cross examination to explain how he was able to go from a position of "*suspicion*" in his first report to a conclusion that it was "*likely to be proprietary trading"*. Mr Gladwin said that after considering Mr Moore's supplemental report he had considered the analysis of trading over the whole day and he concluded that someone who had traded almost nothing in dollar Swiss all day and then carried out most of his trading around the time of the trigger, made his view firmer that the trader was in fact carrying out proprietary trading.

129. However as referred to above, shortly before Mr Gladwin was to give his expert evidence and during the course of the trial, it would appear that EBS produced data which showed the direction of trading. Mr Gladwin acknowledged that if the trading was in fact selling it would not be "*suspicious*" because it would be in the wrong direction for the trade. Mr Gladwin stated that having considered the new data, he was wrong to assert that Mr O'Sullivan was engaged in illegitimate proprietary trading.

130. A further example of his apparently firm view expressed in his report being withdrawn is in relation to Mr Barnett and Trade 7. At paragraph 2.2.215 of his report Mr Gladwin said:

"It should be noted that Robert Barnet again buys before the likely ECU order execution begins and sells at the end of the likely execution... I am of the opinion that he is taking proprietary positions using the confidential information of ECU order-buying at the start of the execution of their order and selling after the execution has moved the price higher."

131. However in cross examination Mr Gladwin accepted that in fact Mr Barnett sold 10 points away from the trigger and this did not accord with Mr Gladwin's assertion. The relevant exchange was as follows:

Q: So if he was thinking when he did these trades at the trigger level as you say he was, he sold out way too early, didn't he?

A: Yes.

Q: Don't you think from your experience if he was thinking of that order, isn't it very odd that he didn't hang on till the trigger level had been reached?

A: Yes, in this case it does look a bit odd.

Q: Do you want to withdraw the assertion Mr Barrett was engaging in an improper breach of confidential information or do you wish to maintain that?

A: Well, in the case of the dollar/Swiss on this one it does look a bit peculiar.

Q: Yes, it does. Would you like to answer my question?

A: In the case of dollar/Swiss, yes."

132. An example of Mr Gladwin expressing an opinion which was not properly supported by the evidence was in relation to Trade 21. In the joint memorandum it was agreed between the experts that there was insufficient data to reach an opinion as to whether the defendants' trading ahead materially influenced the currency pair. However in his original report Mr Gladwin said:

"*3.1 No trading deal records have been disclosed which show any trading by the defendants so we cannot know by how much, if at all, they may have influenced the currency pair. However the contemporaneous price data is consistent with someone trading ahead of the order, with an intention to influence the EUR/GBP price so as to trigger that order. As stated above, I consider that this order was executed by the FX desk of HBHK.*

3.2 At this time of day it would have been very easy to influence the currency pair given the prevailing liquidity and the size of ECU's order." [emphasis added]

133. In cross examination Mr Gladwin was asked:

"*Why can't you simply say in answer to the question, "did the trading ahead materially influence the currency pair?" that "I do not have sufficient information to answer that question"?*

Mr Gladwin's response was:

"*I've simply added some more colour about the market trading at that time*."

134. In my view this was not additional "*colour*": there is a clear inference that Mr Gladwin was linking the trading ahead with the Defendants/HBHK on the basis it was possible for a bank to influence the relevant market but without any trading data from HBHK on which to support that conclusion.

His presentation of data

135. Whilst Mr Gladwin apparently had experience in analysing FX data, the use of certain statistics to support his opinions were clearly flawed.

136. For example, in his second supplementary report in relation to Trade 22, Mr Gladwin stated that Mr Davies was trading using his knowledge of ECU's order. He stated (paragraph 2.8.3):

"Mr Davies makes his first purchase in the period prior to the trigger of 14.44.57. This is exactly the same time when James Courtney begins buying. Mr Davies switches from buying to selling at 15.46.21, 11 seconds after the trigger of the order and 38 seconds after his last purchase. During the whole day the average time between switching the direction of his trading by Mr Davies is 4.48 and the median time is 3. It therefore seems unusual to me that he would have switched from buying to selling so quickly, especially at the time frame straddles the trigger time quite tightly. After Mr Davies sale of 1 million at 15.46.45, he does not trade again until 15.53.29, 6 minutes and 44 seconds later."

137. Although when it was put to Mr Gladwin in cross examination that this was a misuse of statistics in an effort to establish his proposition that Mr Davies was doing something illegitimate Mr Gladwin replied:

"It suggests that he switches here far more quickly than he usually does during the day."

This was not a satisfactory explanation and in my view was not an appropriate statistic to have used in support of his opinion.

138. I am also of the view that the presentation of data in graphs was unhelpful to the court where the X axis was not presented in a linear fashion. It was submitted for the Claimant that the presentation reflected the relevant time slices but I do not believe that these graphs were helpful to the court as a result of the presentation of the data.

Conclusion on credibility of Mr Gladwin

139. It was submitted for the Claimant that when considering the individual trade reports the court will find "*again and again Mr Gladwin considering a range of different hypotheses acknowledging doubts and giving traders the benefit of the doubt where appropriate".*

140. However when the court looks at the overall approach of Mr Gladwin as set out in his "*Executive Summary*" I note that he sets out his views in firm and far-reaching terms. At paragraph 1.1.2 of his report he said:

"*The analysis of each individual Trade is set out in detail in the individual reports at Section C of this Report. As summarised below, I identify repeated systematic misconduct by a range of foreign exchange traders and other FX personnel at HBEU and HBUS*…" [emphasis added]

At 2.1.1 under "*Overview of Findings*":

"*My analysis [of the individual trades] at Section C demonstrates widespread misconduct by HSBC's FX traders. The picture that emerges from the trading data is of the routine and systematic abuse of ECU's stop loss orders. This includes a significant number of traders albeit with certain individuals particularly prominent and points to a wider cultural problem at the trading desks."* [emphasis added]

Under "*Key Findings*" and "*Front running*" Mr Gladwin stated (paragraph 3.1.1):

"*A pattern of consistent front running emerges from HSBC's trading activity. Across ECU's 32 trades, 16 were front run and three more bear the hallmarks of front running although the data is too incomplete to reach a firm conclusion (at least on the basis of the data alone)..."* [emphasis added]

141. Mr Gladwin accepted in cross examination that ECU has dropped its allegations of front running in relation to ten out of 32 Stop Loss Orders and he was unable to support the remaining allegations as far as six of them are concerned (Trades 3, 20, 21, 23, 24 and 32). Thus the trades which Mr Gladwin is of the view there was front running are Trades 7- 11, 14, 15-19, 25 and 26- 29.

142. At paragraph 3.1.2 under the subheading of "*A clear pattern*", Mr Gladwin said that:

"The breakdown of the HSBC's front running is notable. Across the six trades executed between 6 February 2004 and 19 October 2004, only one bears the hallmarks of front running, although the data is incomplete. However, of the 14 subsequent orders between 26 October 2004 [Trade 7] and 12 May 2005 [Trade 20], every single order appears to have been front run to some extent." [emphasis added]

143. When this was challenged in cross examination on the basis that Trades 12 and 13 have been abandoned and Mr Gladwin had found no evidence of deliberate manipulation in relation to those orders, Mr Gladwin replied:

"*That front run really should have said traded ahead*."

144. This is in my view not a satisfactory explanation for his sweeping statement in paragraph 3.1.2, in light of the fact that, at paragraph 2.1.4 of his report, Mr Gladwin referred to the "*significant*" distinction which he drew in his report between trading ahead and "*front running*". He said:

"*Across the 32 stop-loss orders placed with HSBC, I have concluded that the bank's traders traded ahead of 27 trades, and that in respect of 15 trades this was done in a manner deliberately intended to trigger the order. The distinction is a significant one in the context of this Report. In my analysis of Issue 2 for each Trade I analyse whether HSBC's traders traded ahead of the stop-loss order, and in my analysis of Issue 3 I assess whether this was deliberate."* [emphasis added]

145. The significance of the distinction drawn by Mr Gladwin in his report between trading ahead and front running is further stressed at paragraph 2.1.6 of the report where Mr Gladwin said:

"In 12 cases, from the data made available (which in many cases I accept does not represent the full picture), I consider that HSBC's traders did not seek to move the market despite trading ahead of the stop-loss order. Subject to my comments above, I do not comment further as to whether such trading ahead was permissible under the terms of the orders placed by ECU with the bank. However, in 15 cases I have determined that HSBC's traders traded ahead with the intention of targeting ECU's stop-loss orders, and there is also circumstantial evidence pointing to similar activity in respect of two further orders. Trading ahead of this type means that the bank's traders deliberately set out to manipulate the prevailing spot FX rate to trigger the relevant stop-loss orders. In this Report, I use the term 'front-running' to describe trading ahead of this sort, which requires deliberate, intentional conduct…" [emphasis added]

146. In the light of these passages in his report I do not accept that Mr Gladwin made a mistake and intended to refer to trading ahead in paragraph 3.1.2.

147. Mr Gladwin was also challenged in cross examination on paragraph 3.1.3 of his report where he stated:

"It follows that of the orders executed between 26 October 2004 (Trade 7) and 31 January 2006 (Trade 29), I have concluded that 21 of 23 stop loss orders were either front run or bear the hallmarks of front running…" [emphasis added]

148. Mr Gladwin accepted that this statement was not correct on the basis that Trades 12 and 13 have been abandoned, Trade 22 has been abandoned, he did not support a claim of front running of Trade 20 and had no evidence to support the claim of front running on Trade 24. In fact the correct number according to Mr Gladwin's conclusions on the individual trades would appear to be 16 out of 23 trades (Trades 7- 11, 14, 15-19, 25 and 26- 29).

149. These incorrect statements of his own findings call into question his conclusion at paragraph 3.1.4:

"In short, apart from the period up to 26 October 2004 (prior to which ECU's stop-loss orders were generally somewhat smaller in size) and the period after ECU's complaint in February 2006, I have identified a consistent pattern of front-running of ECU's stop-loss orders. This amounted to the systematic exploitation of ECU and its clients for HSBC's benefit." [emphasis added]

150. These statements and assertions of a "*consistent pattern of front-running*" in paragraph 3.1 illustrate Mr Gladwin's views and overall approach to the issues. Whilst I believe Mr Gladwin sought to give his honest opinion, I believe that he allowed himself to lose objectivity in his analysis and in some instances, on the individual trades expressed his conclusions with a greater degree of certainty than the raw data available to him would justify.

151. In the light of the matters discussed above, I have considerable misgivings about the reliability of the opinions that he expresses in his reports and a concern that he has approached his analysis in a way which tended to confirm his views rather than put before the court a balanced view of the possible (and likely) conclusions which can properly be drawn from the available data. Although I have had regard to his views in making my findings, I cannot give any independent weight to his conclusions and look to see whether his conclusions are supported by other evidence and where his views conflict with those of Mr Moore, I am inclined to prefer the evidence of Mr Moore, as discussed below.

Mr Moore

General

152. Mr Moore had not given expert evidence before and has only prepared one other expert report. Mr Moore is not a lawyer and in his report was not expressing himself in legal terms or with the precision that might perhaps be expected from a lawyer. He wrote an extremely long report and insofar as Counsel for the Claimant appeared to criticise Mr Moore for his terminology on occasions, for example as to a heading in his report, that was in my view unfair and without substance.

153. Mr Moore was frank as to the extent that he had used others to help prepare his report and there can be no doubt having heard him give evidence over 4 days that he had a detailed and comprehensive grasp of the matters in his report and that the opinions he expressed were clearly his own and were the product of careful analysis and consideration by him and not by others.

154. Mr Moore had not seen the witness statements of the Defendants and had not seen all the contemporaneous documents that were before the court e.g. transcripts of certain telephone conversations. Mr Moore accepted in cross examination that had he seen the

evidence of Mr Brown and Mr McEvoy, that "*may have added to [his] knowledge [as to the motivation behind any trading ahead]*".

155. Whilst noting Mr Moore's response in cross examination, it is unclear what real "*disadvantage*" ECU implies (Paragraph 82 of Closing Submissions) has resulted from the fact that Mr Moore had not seen these witness statements. I do not regard the fact that Mr Moore had not considered the witness statements of Mr Brown and Mr McEvoy as likely to have a material effect on his conclusions on front running, given that neither of these individuals were directly involved in the trading by HSBC traders which is alleged to have deliberately triggered the stop loss orders.

156. It was further submitted for ECU (paragraph 82.2 of Closing submissions) that Mr Moore's evidence was "*robbed of its essential context*" because he ignored the terms of ECU's orders.

157. I see no force in that submission. Mr Moore agreed that "*if it was the case that HBEU knew that it was not allowed to trade ahead of [the] stop loss orders*", that would have been "*a relevant fact".* The question of whether valid instructions were given to HSBC not to trade ahead is an issue in these proceedings and therefore Mr Moore could only have proceeded on the "hypothesis or assumption" and even if such an assumption were made, the conclusion as to whether any trading ahead of a trigger was in breach of instructions is only valid if the facts of a particular trade show that the trading is not otherwise permitted (as would be the case if it were unrelated to the ECU order). I note that in his report (paragraph 28) Mr Moore made the conservative assumption (which he acknowledged was "*unhelpful*" to HSBC) that all trading in the period immediately preceding the trigger of a stop loss order in the direction of the stop loss order was related to that stop loss order, although he stated that this was an "*unrealistic*" assumption as there would be trading that related to other customer business or the trader's management of their own risk.

158. ECU also criticised Mr Moore (paragraph 82.4 of Closing Submissions) for taking as a "*starting point*" that:

"…the trading associated with a pre-hedge to reduce order slippage can seem virtually identical to the trading that would be observed if the trader was acting nefariously to cause the Stop Loss order to be triggered." (Paragraph 134 of his report)

159. It does not seem to me to have been the "*starting point*" for Mr Moore appearing as it does part way through a section in his report entitled "*Pre-hedging*". More significantly I do not accept that there is anything amiss with this statement and it appeared to be accepted by Mr Gladwin in cross examination that the data alone does not provide any indication as to the motive for the trading ahead of the trigger:

"*Q. …when we look at the trading data which we have, if there was trading ahead for a "nefarious purpose", if there was trading ahead for a benign purpose, if there was trading ahead to fill a customer order, and if there was trading for the purposes of altering the position, these are likely to look identical in terms of the raw data which is available to you?*

A. That's correct. Other than, of course, we have some extra data, which is we know that they executed ECU's order and we know the size of that, and we can therefore fairly match that part of their activity, probably, against ECU…

"Q. …when you look at the data itself that you have been presented with, the actual cause or reason for the trading is not apparent on the face of the data, is it?

A. That's correct.

Q. You simply see a stream of figures which is uninformative as to precisely why the trader was doing what he was doing –

A. Yes.

Q. -- from the figures itself, correct?

A. No, it is clearly not uninformative, because it is what he was actually doing. So it tells you what he was doing, it is very informative from that perspective.

Q. Okay, fair enough. But not why he was doing it?

A. No." [emphasis added]

160. I also note that in his evidence in cross examination Mr Gladwin accepted that:

"As Mr Moore refers to in his own report, a trader needs to be extremely careful, when adjusting his own position, not to interfere with the client order. It is almost impossible to determine from the data that we have whether it is carried out for legitimate purposes or a nefarious one, "nefarious" being his choice of words. But it is entirely permissible, of course, for them to carry out other client business, according to strict rules which should have been communicated to all people who left order with them…" [emphasis added]

161. The issue of trading ahead in breach of instructions was covered in cross examination of Mr Moore but Mr Moore's apparent acceptance that any breach of an instruction given not to trade ahead was "*serious*" and his evidence that at Citibank would have attracted disciplinary sanction, is of no relevance to the issue for this court as to whether such an instruction was in fact validly given to HSBC or the motive behind any trading which took place ahead of the trigger. Similarly Mr Moore's views on the meaning of the market codes of conduct in this regard were of limited, if any, significance.

162. Mr Moore was criticised by ECU for failing to differentiate between orders which required the rate to trade "*through*" a level as opposed to orders which triggered when the rate was "*above*" or "*below*" the trigger. It was submitted for ECU (paragraph 82.4 of Closing Submissions) that this had a significant impact on his assessment of the timing and scale of the trading activity that took place before the trigger.

163. I accept that the determination of the trigger time affects the assessment of the timing and scale of the trading activity that took place before the trigger but it seems to me that the difference between the experts did not lie in any failure on the part of Mr Moore to distinguish between an order to trade "through" or "above/below". It seems to me that the key difference between the experts was that Mr Gladwin took the trigger time from EBS

whereas Mr Moore's evidence was that there was no one prevailing market rate on which people could make a determination and accordingly the trigger involved a judgment on the part of the trader having regard to the market including but not limited to EBS or Reuters data. Mr Moore explained that:

"…[Mr Gladwin's approach] presupposes there is one prevailing market rate on which people can make a determination on an order trigger. …, we see in Trade 18, in a one second time slice we see the market trade at 1.1987 and 1.2005 in EBS. Now in that trade, Mr Gladwin takes the earlier time but my judgment in that trade is that the dealers in HBEU had not mentally decided to trigger the order and as a trader it would be routine to see things trade on an EBS screen or a Reuters screen and not mentally trigger the order because you would be trying to keep the customer in."

164. Mr Moore explained the different approach as follows:

"…I think Mr Gladwin uses in his methodology EBS trading at a rate at or above the stop loss order level and my evidence is that the decision to exercise a stop loss is a judgment that would certainly include that but isn't confined to that…"

165. Trade 18 is an example where the trigger time was different by 22 seconds but Mr Moore explained the reason for his trigger as follows:

"…I think this illustrates the methodology difference quite nicely because in the same -- in Mr Gladwin's trigger time selected, the market trades at 1.19.87 and 1.20.05, 1.20.05 being above the stop loss order level. That Mr Gladwin's methodology is the trigger time. I think that HBEU traders didn't select – believe that they were executing the order until my trigger time, partly because that is when we see activity in the market but also in the intervening 20 seconds you see some sales in the opposite direction to the order at a time when if they were executing the order I wouldn't expect to see those sales."

Objectivity

166. Although ECU does not go so far as to directly assert that Mr Moore was biased in favour of the Defendants, ECU submitted (paragraph 81 of Closing Submissions) that:

"The evidence …betrayed Mr Moore's inclination to treat traders with the greatest possible indulgence"

167. In support of its submission ECU pointed to a failure to consider the cumulative wrongdoing of traders, the extent of wrongdoing for which the same traders had been "*deemed guilty*" by other regulatory or prosecuting authorities and a failure to take into account the instructions not to trade ahead.

168. I have already addressed the fact that Mr Moore did not take into account the issue of any instructions to HSBC not to trade ahead and this provides no support for ECU's submission that Mr Moore was "*inclined to defend the traders*". As to the second point, in my view it would have been entirely inappropriate for Mr Moore to have been influenced in his analysis of the data by inferences drawn from the subsequent US or UK proceedings. His role was to give expert evidence on the FX market and the data. Any wider inferences to be drawn from the evidence in reaching conclusions on the allegations is a matter for the court.

169. Similarly as to the third point, I note Mr Moore's evidence that he did consider Mr Gladwin's view on the behaviour of a number of traders together but cautioned that it was necessary to consider the context in which the trading occurred. In the context of Trade 18 (12 April 2005) the relevant exchange in cross examination was as follows:

Q. Does it affect your assessment, with all of your experience, if there is more than one person behaving in the way that you have read, or do you silo them and analyse individually their respective trading?

A. So in -- I am just reflecting on how I did the work on Mr Gladwin's report. I did look at the individual trading in light of the points that Mr Gladwin had made. But what I would suggest that Mr Gladwin did was to rule out the notion that anything other than the ECU Group order was paramount in a trader's mind. On a busy spot desk, with figures just out, operating in one of the top five, I think we said last week, market-makers, every spot desk would have been if you had looked at their trading, because they are the intermediaries through which the end users establish what risk they are taking, if we picked any spot desk, my guess would be, and it is a guess but based on experience, they would all look like buyers because the intermediaries were buying dollar/Swiss there.

...

A. You know I have seen multiple examples in time when if you simply look at the trading you could reach a somewhat condemning view of the trading without understanding the context and I try to take that context into account. That said, on eight occasions, even with that context, I agreed with Mr Gladwin and I think on five occasions I think Mr Gladwin's hypothesis was ranked as an equally likely hypothesis. But where I have individually looked at the trades I have done that based on the data that I have looked at."

170. As to any inferences to be drawn from the conduct of traders in relation to the overall trading in my view that is a matter for the court and not the expert witness.

171. In my view Mr Moore sought in his oral evidence to explain to the court the reality of the FX dealing desk and present the facts that the traders were often responding to market movements, in some cases sharp movements, and that the court is looking with the benefit of hindsight at the trading that the traders decided in the very short time periods to do. His evidence sought to inform the court as to the context of the data:

"*A… We are attributing, in less time than it took you to ask me the question, we are attributing these motives to traders who aren't here to defend themselves and I think it is unreasonable and unfair. I mean, in that environment the market would have been moving up incredibly sharply. He would have had a stop loss, he would have been somewhat panicked by that, and if that line continued up another 50 points instead of stopping, which we know it did, he would have been looking at a very bad fill for the client. So those are -- the facts you present to me, Mr Lissack, are accurate. The negative connotation on the trader might be unfair.*"

172. This explanation of the context in which the trader was operating entirely accords in my view with his role as an expert on the FX market and does not establish a lack of objectivity on the part of Mr Moore.

173. Further in my view Mr Moore gave reasons for arriving at his conclusions which were clearly considered and he was prepared to acknowledge when Mr Gladwin's view was one with which he agreed. It is notable that ECU in its Closing Submissions (paragraph 79) in support of its contention that Mr Moore "*was inclined to a generous interpretation*" did not include the whole of the following exchange in which Mr Moore in my view not only clearly sets out his reasoning for his opinion based on what was happening in the market (and not on any unsupported tendency to defend traders) but also acknowledged the extent to which he could agree with Mr Gladwin:

"A. And I tended to manage spot dealers and defended them in my career because it is easy to condemn a dealer. I think the other factors that I refer to at the time, the Canada was strengthening, the impact was in dollar/Canada rather than dollar/yen, the size of dollar/yen movement at the time was -- the volume of dollar/yen was significant around that time, so it wasn't just the ECU order. So I can't rule out what Mr Gladwin says but I think it is not certain.

Q. No, it may not be certain. All I am asking you is he is probably correct, isn't he?

A. He is correct that that trading moved the market in the direction of the order and contributed to the order being triggered. In that he is correct. It could be that the motivation he ascribes to that trading is also correct. I would accept that." [emphasis added]

174. It would appear that ECU also makes a thinly veiled accusation of bias against Mr Moore because he had "*come across or worked with*" certain individuals (Closing submissions paragraph 80).

175. Mr Moore noted in his report that he had known Mr Barnett when the latter worked at Citigroup around 1995 but he said that he had not seen him for more than 20 years. He said that:

"...he is not a friend of mine. I didn't particularly get on with him when we worked together..."

176. Given the time elapsed and the circumstances of his past contact, I accept Mr Moore's evidence that the fact that Mr Barnett had worked under him at Citigroup did not impact Mr Moore's analysis of whether his conduct whilst at HSBC was acceptable. The fact that Mr Moore acknowledged he "*came across*" Mr O'Sullivan is an even flimsier basis to mount an attack on Mr Moore's objectivity.

177. In my view Mr Moore was very fair and measured in giving evidence – he accepted when he was able to agree and did not try to argue a case for one side or the other.

178. For the reasons discussed above I reject any suggestion that Mr Moore's evidence is not to be accepted on the basis of any lack of objectivity.

Experience

179. There was some attempt for ECU to suggest that Mr Moore lacked relevant experience to assist the court because he had no experience of the design, implementation or analysis of trading systems. It was submitted for ECU (paragraph 73 of Closing Submissions) that Mr Gladwin's approach was the "*more analytical*" and "*more precise*" because he had

engaged in forensic data analysis during his time as a trader in a way that Mr Moore had not.

180. I note Mr Moore's experience as set out in his report was as follows: Mr Moore joined Citigroup in 1986 as a spot FX trader trading G10 currencies, became Spot Desk Head in 1992, followed by UK FX Head in 1996 and Global Head of Foreign Exchange in 2001. He left Citigroup in 2008. In 2012 he joined Lloyds Banking Group where he was Head of Financial Markets from 2012 to 2017.

181. I also note that Mr Moore was a Non-Executive Director of Electronic Broking Services ("EBS") the leading electronic FX broker, from 2001 to 2006 and a Member of the FX Expert Working Group in 2014 and 2015 that contributed to the Fair and Effective Markets Review ("FEMR") published in 2015.

182. In my view Mr Moore's experience of working in the FX markets made him an appropriate expert witness to assist the court on the questions posed to the experts and in particular to assist the court as to the inferences that could properly be drawn from the available data as to the trading carried out by HSBC in relation to the trades in issue.

Conclusion on expert evidence

183. In cross examination it was put to Mr Moore that he was operating in a field of expertise where there is often room for a range of reasonable opinion between experts which he accepted was fair.

184. Whilst I accept the proposition that there may be a range of reasonable opinion between experts, the court is looking to determine issues on the balance of probability and not on the basis of a possible outcome. For the reasons set out above, I am not satisfied that Mr Gladwin was wholly objective in his approach and where the views of Mr Moore and Mr Gladwin differ on a particular trade or a particular issue in relation to such trade, I am inclined to prefer the evidence of Mr Moore. This does not mean that I accept the evidence of Mr Moore without qualification: as both experts accepted (and referred to below) there were shortcomings in the data and in some instances, Mr Moore had not considered the totality of the evidence in relation to the trade where there were relevant transcripts of phone calls and evidence in the Defendants' witness statements. In reaching my conclusions I have considered the entirety of the evidence including the evidence of the factual witnesses and any contemporaneous documentary evidence as well as the evidence of the expert witnesses and the shortcomings in the evidence as discussed elsewhere.

Limitation

Introduction

185. It was common ground that the primary limitation periods for the claims have expired.

186. ECU relies on section 32 of the Limitation Act 1980 ("section 32") to postpone the commencement of the limitation periods. As regards its claims in negligence, ECU relies on s.14A of the Limitation Act 1980. However as noted by the Defendants in closing submissions (paragraph 301), the analysis under section 14A is not materially different from the analysis in relation to section 32 and the Claimant made no separate or additional submissions in closing based on section 14A. It is therefore sufficient for the purposes of limitation to address the factual findings by reference to the test under section 32.

187. Section 32 of the Limitation Act 1980 ("LA 1980") provides that:

"*(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either –*

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

188. There is a preliminary submission on the part of ECU which should be addressed. This was the submission (paragraph 33 of Closing Submissions) that in the context of a "*major fraud*" which was "*concealed*", HSBC's defence is "*an inherently unattractive one*".

189. In *OT Computers v Infineon Technologies* [2021] EWCA Civ 501 the Court of Appeal considered the rationale for section 32:

[29] …The LA 1980, like the many Limitation Acts before it, strikes a balance between the competing aims of protecting defendants from stale claims but allowing claimants to overcome the expiry of the ordinary time limit where the statute so provides. This was explained recently by the Supreme Court in describing the rationale behind section 32(1)(c) in Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2020] UKSC 47, [2020] 3 WLR 1369 ('FII'):

> *'228. ... First, section 32(1)(c), like the equitable rule which preceded it, necessarily qualifies the certainty otherwise provided by limitation periods. It means that the 1980 Act does not pursue an unqualified goal of barring stale claims: its pursuit of that objective is tempered by an acceptance that it would be unfair for time to run against a claimant before he could reasonably be aware of the circumstances giving rise to his right of action.'* [emphasis added]

190. There is therefore a balance which underlies the statutory limitation defence. In this case the events at issue occurred between 2004 and 2006. The passage of time (in this case some 15 years) not only reduces the likelihood that witnesses will be able to recollect events accurately but also has the consequence that contemporaneous documents may not have been preserved. The defendant may be thus placed in the position of seeking to defend a claim in circumstances which may be unfair given the time elapsed and the resulting deficiencies in the evidence. One of the main reasons for the statute of limitation is "*to require claims to be put before the court at a time when*

the evidence necessary for their fair adjudication is likely to remain available…" (*AB v Ministry of Defence* [2013] 1 AC 78 at [6]). On the other hand the statute provides an extension of time where it would be unfair on the claimant for time to run based on the knowledge of the claimant at the time. The limitation defence is not therefore an "*unattractive*" defence; it is a mechanism to strike a fair balance between the right of the claimant to bring a claim and the right of the defendant to be able to properly defend itself.

191. In *OT Computers v Infineon Technologies* [2021] EWCA Civ 501 the Court of Appeal set out the test for "discovery" of the fraud or concealment or the mistake:

> *[26] The state of knowledge which a claimant must have in order for it to have "discovered" the concealment (or as the case may be, the fraud or the mistake) has been considered in the cases. For the most part the "statement of claim" test has been applied: that is to say, a claimant must have sufficient knowledge to enable it to plead a claim (e.g. Law Society v Sephton & Co [2004] EWCA C iv 1627, [2005] Q B 1013; The Kriti Palm[2006] EWCA C iv 1601, [2007] 1 All ER (Comm) 667; Arcadia v Visa; and DSG Retail Ltd v Mastercard Inc [2020] EWC A C iv 671, [2020] Bus LR1360). This was the test which the judge applied in the present case and his approach is not challenged on appeal. More recently, in the FII case, where the issue was from what point it can be said that the claimant has discovered a mistake of law, the Supreme Court suggested that time should begin to run from the point when the claimant knows, or could with reasonable diligence know, about the mistake with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings, such as submitting a claim to the proposed defendant, taking advice and collecting evidence. This may mean that time begins to run somewhat earlier than under the statement of claim test, but this is a point which need not be explored in the present case."* [emphasis added]

192. ECU's case is that the Defendants (or their agents) deliberately committed the breaches of duty (or some of them) in circumstances where those breaches were unlikely to be discovered for some time. Further or alternatively, facts relevant to ECU's right of action have been deliberately concealed from it by HSBC under s.32(1)(b). Further, some of ECU's claims are based on the fraud of the Defendant under s.32(1)(a) (including in particular ECU's claims for fraudulent misrepresentation and/or conspiracy). For the purpose of considering limitation I propose to assume that these elements are satisfied and consider the issue of whether ECU had "discovered" the fraud or concealment within the meaning of s.32.

193. It was common ground that the test for "discovery" under section 32 was the pleading or "*statement of claim*" test referred to above and the burden of proof is on ECU. However it was submitted for ECU that in cases of fraud, such a claim could not be pleaded unless counsel was prepared to advance the allegation bearing in mind the duties on counsel as set out in *Medcalf v. Mardell* [2002] UKHL 27 by Lord Bingham at [22]:

> *"…Counsel is bound to exercise an objective professional judgment whether it is in all the circumstances proper to lend his name to the allegation. As the rule recognises, counsel could not properly judge it proper to make such an allegation unless he had material before him which he judged to be reasonably credible and which appeared to justify the allegation.... at the preparatory stage the requirement*

is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it." [emphasis added]

194. In *Granville Technology Group Limited v Infineon Technologies AG* [2020] EWHC 415 (Comm) Foxton J addressed this issue as follows (at [28] and [29]:

"28. Reflecting the generally pragmatic and purposive approach to the interpretation of s.32(1)(b), therefore, the authorities establish that a claimant can be said to have discovered a fact when the claimant is aware of sufficient material to be able properly to plead that fact. This conclusion avoids the improbable interpretation of s.32(1)(b) by which a claimant who has in fact pleaded a particular fact might be said not yet to have discovered that fact for s.32(1)(b) purposes.

29. In order to be able to properly plead a claim:

i) any professional obligations which attach to making allegations of a particular kind must be satisfied;

ii) the pleaded case must be one which would not be struck out on the basis that it has no sufficient evidential basis or was not sufficiently arguable; and

iii) the pleading must be one capable of being supported by a Statement of Truth…"

195. However at [33] Foxton J also cited the judgment of Sales J in *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731 (Ch) referring to the latitude afforded to claimants:

"…the availability of such procedural protections [including the professional obligations on counsel that a claim in fraud can only be pleaded where there is sufficient material available to the pleader to justify the plea] for a defendant to ensure that a claim is fully and properly explained in good time before trial (as against the possible loss to a claimant of an entire, potentially meritorious claim), indicates that in resolving the tension referred to above and determining whether a cause of action has been sufficiently pleaded in a statement of case (particularly in the claim form and/or the particulars of claim when an action is commenced), the balance is to be struck by allowing a measure of generosity in favour of a claimant. Such an approach is appropriate and in the overall interests of justice and the overriding objective set out in CPR Part 1.1…"

196. Foxton J also referred at [34] to the observations of Flaux J in *Bord Na Mona Horticulture Limited v British Polythene Industries plc* [2012] EWHC 3346 (Comm) at [30]-[31] as to the "*more generous ambit for pleadings, where what is being alleged is necessarily a matter which is largely within the exclusive knowledge of the defendants*".

197. As to the extent of the evidence which is required in relation to fraud, Bryan J in Libyan *Investment Authority v JP Morgan* [2019] EWHC 1452 said at [33]:

[33] For the fraud to be known or discoverable by a claimant under s.32 (such that time will start running against them), it is not necessary that the claimant knows or could have discovered each and every piece of evidence which it later decides to

plead. See Sir Terence Etherton in Arcadia Group Brands v Visa [2015] EWC A C iv 883 at [49]:

"Johnson, the Mirror Group Newspaper case and The Kriti Palm are clear authority, binding on this court, for the following principles applicable to section 32(1)(b)of the 1980 Act: (1) a "fact relevant to the plaintiff's right of action" within section 32(1)(b)is a fact without which the cause of action is incomplete; (2) facts which merely improve prospects of success are not facts relevant to the claimant's right of action; (3) facts bearing on a matter which is not a necessary ingredient of the cause of action but which may provide a defence are not facts relevant to the claimant's right of action."

[46] ... The law, as set out above, requires that for the purposes of limitation the claimant should not wait to have discovered each and every fact which it wishes to rely." [emphasis added]

198. As to what is required to be pleaded, I note the judgment in *Libyan Investment Authority* at [34]:

> *"Therefore, the court must "look for the gist of the cause of action that is asserted, to see if that was available to the claimant without knowledge of the concealed material" (AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm)[2007] 1 All ER (Comm) 667 per Buxton LJ at [453], quoted in Arcadia at [48]). At the point at which the claimant can plead the complete cause of action, however weak or strong, time starts to run. Not every detail needs to be known and a realistic view must be taken by the court."*

199. In its opening submissions (paragraph 334.1) ECU said:

> "*As regards the front running of the January 2006 Orders, there are a number of documents that HSBC may allege show that persons within ECU suspected or even believed that HSBC had engaged in such conduct. However, the relevant question is not whether ECU suspected or believed that such misconduct had occurred, but rather is whether ECU could have properly pleaded the fraud in 2006.*"

200. There was a dispute between the parties advanced in closing submissions as to whether "reasonable belief" on the part of the claimant was sufficient to start time running. It was submitted for the Defendants that relying on *AB v Ministry of Defence* [2013] 1 AC 78 at [11]:

"*that the belief has to be reasonable, so it has to be underpinned by some facts. But the fact that they lack evidence in order to substantiate their belief and the fact that they lack evidence to substantiate the case at trial doesn't stop the limitation period from running*."

201. However it was also submitted for the Defendants that:

"...in this case we are miles away from this because we have the admission that they had sufficient evidence. Substantial evidence as they put it."

202. In my view it is not necessary in this case to approach the issue from the perspective of "reasonable belief" and rather than resolve that debate, I propose to focus on the

question of whether ECU could have properly pleaded the fraud in 2006, as discussed below.

203. However in the light of the Claimant's submissions on the evidence (discussed below) it is relevant to have in mind the passages in the judgments of Lord Reed and Lord Hodge in *FII Group Test Claimants v HMRC* [2020] 3 WLR 1369. At [186] their Lordships set out the relevant test:

"186. What is more important for present purposes, however, is that the approach adopted in these cases of fraud, like that proposed by Lord Brown for cases of mistake, treats the relevant date, for the purposes of the commencement of the limitation period, not as the date when the claimant knows or can establish the truth, but as the date when he can recognise that a worthwhile claim arises, in Lord Brown's formulation, or can plead a statement of claim, in the formulation preferred in the fraud cases." [emphasis added]

204. As the following passages in the judgment in *FII* make clear, the issue of limitation is distinct from the merits of the claim and the question whether there was in reality any fraud will not be established unless and until the court issues a judgment on the merits. The question when considering section 32 is therefore not whether ECU could have established its claim in 2006 but whether it could have commenced proceedings and the existence of the constituents of the cause of action as "*verified facts*" is not the issue. Their Lordships stated:

[199] The approach adopted in the fraud cases discussed in paras 180—186 above, and in the cases concerned with analogous provisions of the 1980 Act, discussed in paras 187—196 above, is consistent with the nature of a plea of limitation: it is legally distinct from the merits of the claim in question, and is often conveniently dealt with as a preliminary issue. The1980 Act proceeds on the basis that a cause of action has accrued, without concerning itself with the question whether or not the action is well-founded. Section 32(1)(a) applies where "the action is based upon the fraud of the defendant", and section 32(1)(c) applies where "the action is for relief from the consequences of a mistake". If the action runs its full course, it may transpire that there was no fraud or mistake, indeed no cause of action at all. But where, at the stage of an inquiry into the defendant's plea that the action is time-barred, the claimant relies on section 32(1)(a) or (c), the question is not whether there was in reality any fraud or mistake: that will not be established unless and until the court issues a judgment on the merits of the case. The question under section 32(1)(a) and (c) of the 1980 Act is whether, upon the assumption that there was fraud or mistake, as identified by the claimant in the way in which he pleads his case, it was discovered or could with reasonable diligence have been discovered at such a time as would render the claim time-barred…

[201] Hence the situation which may seem paradoxical, but sometimes arises in practice (as, for example, in Law Society v Sephton & Co [2004] PNLR27), where in a trial on limitation the defendant disputes the claimant's assertion that he could not have known or discovered a fact which, in relation to the merits of the claim, the defendant denies is a fact at all. There is in reality no paradox, because at the stage of an inquiry into limitation the existence of the cause of action, and therefore the truth of the facts relied on by the claimant to establish it, is not the relevant issue. Put in general terms, the question is not whether the claimant could have established his cause of action more than six years (or whatever other limitation period might be relevant) before he issued his

claim, but whether he could have commenced proceedings more than six years before he issued his claim. The existence of the constituents of the cause of action-such as fraud or mistake-as verified facts is not the issue." [emphasis added]

"Sufficient knowledge to plead a claim"

Claimant's submissions

205. ECU's case is that in each instance, the relevant facts were not discovered by ECU prior to 4 February 2013 (Closing Submissions paragraph 386). It was submitted that:

205.1. in order for the relevant facts to be "discovered", it is not enough that a claimant might suspect or even believe that it has been defrauded. Rather, the facts must be ones which are capable of being properly pleaded and which would survive a strike out application on the basis that they have no sufficient evidential basis. (Closing submissions paragraph 388);

205.2. such a case cannot be pleaded on the basis of mere suspicion or belief held by one or more persons within ECU. Rather, credible evidence establishing an arguable case is required. In this respect, ECU stressed that the allegation of front running necessarily requires an allegation of dishonest intention, namely that there was trading ahead with the intention of deliberately triggering the order (Closing Submissions paragraph 390);

205.3. by May 2006, HSBC's position set out in its response was accepted and whilst business considerations were an important issue, there was also "*no hard evidence*" of HSBC wrongdoing (Closing Submissions paragraph 391);

205.4. the current claim in these proceedings was pleaded by reference to HSBC trading data obtained by way of pre-action disclosure. Without that data, ECU could only have sought to plead a claim by inference (Closing Submissions paragraph 392);

205.5. the circumstantial market data would not amount to evidence of dishonest front running by HSBC sufficient to enable such a case against HSBC to be pleaded because particulars of facts which are consistent with honesty are not sufficient: in this case it is also consistent with market movements caused by other market participants or external market factors (Closing Submissions paragraphs 393 and 398.5).

Defendants' submissions

206. It was submitted for the Defendants that by 4 May 2006 at the latest, when ECU formally notified HBPB that it would not pursue the 2006 Complaint, ECU was in a position to plead all of its claims. In particular:

206.1. ECU was told at the 2 February 2006 lunch meeting that HBEU had been trading ahead of stop loss orders for "order book management" in order to give tighter fills (that is pre-hedging).

206.2. ECU did not believe that the trading ahead was merely pre-hedging and not front running. ECU's senior management all believed that the January 2006 Trades (as defined below) had been deliberately triggered by HBEU and HBUS and that this amounted to 'market abuse' and 'front running'.

206.3. ECU had a considerable body of evidence in support of its claims: testimony from Mr Petley, Mr MacKinnon and Mr Hughes based on their experience of the FX market; the data obtained from various electronic platforms; the "trap" set in relation to the 31 January 2006 order.

206.4. ECU was in a position to, and did, analyse the data to which it had access and formulate a case that the January 2006 Trades had been front run. Mr Petley, Mr MacKinnon and Mr Hughes (if not others) all had Bloomberg terminals and would have been familiar with data of this nature; as Mr Petley said at the time of the 2006 Complaint, they were "*forensically now going over the last three stops*".

206.5. ECU had access to a well-known industry figure - Mr Belchambers - from whom they could have, and did, seek assistance.

206.6. ECU was told by Mr Manduca that there had been breaches of duties of confidence which could lead to 'huge awards' of damages. ECU also had prior experience of litigation, given its 2003 dispute with Kleinwort Benson.

206.7. ECU clearly did contemplate litigation. At the time Mr Petley said in terms that ECU had done so, albeit that it had encountered the problem that it had suffered no loss.

January 2006 Trades

207. I propose to consider first the issue of limitation with respect to the allegation of front running in relation to the three Stop Loss Orders placed on 5, 6 and 31 January 2006 (identified as Trades 27, 28 and 29, respectively, and referred to in this judgment as the "January 2006 Trades" or the "January 2006 Orders").

208. The order placed on 5 January was to buy EUR €167,313,926.23 against Canadian Dollars ("CAD") "*should the spot inter-bank EUR/CAD exchange rate trade through: CAD 1.4071*". According to ECU (paragraph 145 of Closing submissions and paragraph 61 of the Particulars of Claim) it was placed at 17:10 at a time when EUR/CAD prices were at 1.4025 "*and falling*" and was reported to have been executed at 17:41 at a rate of 1.4075.

209. The order placed on 6 January was to buy EUR €167,313,926.23 against US Dollars ("USD") "*should the spot inter-bank EUR/US exchange rate trade through: USD 1.2176*". According to ECU the order was placed at 13:42, at a time when EUR/USD prices were "*hovering at 1.2119"* and was reported to have been executed at 13:52 at a rate of 1.2179.

210. The order placed on 31 January 2006, was to buy CAD $242,350,919.02 against Japanese Yen ("JPY") "*should the spot inter-bank CAD/JPY exchange rate trade through: JPY 103.06*". This order was placed by telephone at 17:04 GMT whilst the market was trading at a rate of around 102.10, but with the condition that it was valid only from 19:45 GMT. The order was reported to have been executed at 19:50 at a rate of 103.09.

211. It should be noted that in each of the three trades ECU pleaded that "*within minutes of ECU's order having been placed"* the relevant exchange rate "*rallied sharply*".

212. It is alleged (paragraphs 72 and 73 of the Particulars of Claim) that after the order on 5 January was placed and prior to the trigger HBUS bought €183 million EUR/USD and US$190 million USD/CAD and that:

"It is to be inferred from the intense trading activity in which HBUS' FX traders engaged before the price of ECU's stipulated 'stop-loss' level in EUR/CAD was reached in the inter-bank market that: (i) such trading was intended to manipulate the EUR/CAD inter-bank spot FX rate, by moving that rate closer to (and eventually through) ECU's order's trigger-level, and (ii) the trading did in fact manipulate the EUR/CAD inter-bank spot FX rate, moving it closer to and through the order's trigger-level." [emphasis added]

213. This is the pleaded allegation of "front running". Similar allegations are made in respect of the 6 January and 31 January trades. In relation to the January 6 trade it is alleged that between 13:51:01 and 13:52:09 (UK time), HBEU bought a net €175 million EUR/USD. In relation to the January 31 trade it is alleged that between 19:25:12 and 19:49:52 (UK time), HBUS bought C$150 million by selling US$131 million of USD/CAD; and between 19:47:34 and 19:49:52 (UK time), HBUS sold ¥27.8 billion by buying US$237 million of USD/JPY.

214. I note by way of background the following:

214.1. the EUR/CAD currency pair did not at the material time trade with what can be described as 'primary liquidity' that is in sufficient volumes for FX dealers and/or other market makers to quote a bid and offer price for the direct exchange of the pair but rather EUR/CAD traded with 'secondary liquidity' that is when, to complete a trade in the pair, FX dealers have to complete trades in related currency pairs which trade with primary liquidity. Accordingly the EUR/CAD rate was derived from a combination of the EUR/USD rate and the USD/CAD rate at the relevant time and for HBUS to execute the EUR/CAD Order, it was required to buy EUR at the EUR/USD spot rate and buy USD at the USD/CAD spot rate.

214.2. that the EUR/USD currency pair traded with primary liquidity and was one of the most commonly traded currency pairs in the FX market. Accordingly, for HBEU to execute the EUR/USD Order, it could (and did) directly buy EUR with USD at the EUR/USD spot rate.

214.3. the CAD/JPY currency pair did not at the material time trade with primary liquidity. Accordingly the CAD/JPY rate was derived from a combination of the USD/CAD rate and the USD/JPY rate at the relevant time and for HBUS to execute the CAD/JPY Order, it was required to buy CAD at the USD/CAD spot rate and buy USD at the USD/JPY spot rate.

Evidence

Belief/Knowledge of Mr Petley

215. The question (as discussed above) is whether ECU had sufficient knowledge in 2006 to enable it to plead a claim of front running the January Trades. In my view the starting point is therefore the knowledge of ECU and given his central role at the time it is appropriate to start with the knowledge of Mr Petley.

216. The contemporaneous evidence is that Mr Petley was concerned about the stop loss orders as early as December 2004 (a conversation with Kleinwort Benson) and throughout 2005 (in conversations with HBPB). Mr Petley expressed a range of concerns both about stop loss orders being hit and the rate at which orders were being filled.

217. Insofar as stop loss orders being triggered are concerned, I note the following:

217.1. In a conversation with Mr Fish of HBPB on 16 February 2005 where Mr Petley was placing an order (Trade 15), Mr Petley said:

"*I think there is so much frigging about on stops at the moment that I would sooner just have a feel for it and see, you know, see it there and...*

It doesn't matter where I put a stop or whenever, I think, the market likes to have a crack at these, these levels and we're getting, really quite a lot of slippage on them as well." [emphasis added]

217.2. Following the execution of that trade on 17 February 2005 there was a call between Mr Petley and Mr MacKinnon:

"*MP:..I can't understand what's going wrong with these things at all... I was wondering whether we're actually going to have to stop placing orders full stop. It's just, somebody is fucking about with these things. Ok, half a billion might not be very much but I can't believe you can trade even half a billion at 54, which was the trigger...*

NM: Yep.

MP: And to see only a two tick move.

NM: Yep, no, absolutely.

MP: That, I don't believe is possible. Which means either somebody's. ... HSBC or somebody is thinking you know, we'll trade it earlier...

...It wasn't a fast moving market it peeped it's head over the entry level and that was it, if it had been off to the races fair enough but there's just no excuse really....

It just doesn't seem to matter, so I'm saying, I can't be. . .and it's almost, it, it just doesn't make any sense really I mean we could, wherever we put anything. I understand, yeah. You know, it's not just unlucky, it just seems slightly more, I mean 'you win some you lose some'... But this, I don't know, I've got a bad feel... It just makes me think you know someone... And if big banks are sharing information, just saying if..." [emphasis added]

217.3. In cross examination it was put to Mr Petley that the conversation revealed that he did have a concern that potentially there was market abuse going on in relation to the stop loss orders being placed by ECU. Mr Petley said that he was:

"Certainly beginning to consider that as a plausible possibility".

217.4. In a note of a telephone conversation between Mr Rumsey and Mr Petley on 21 June 2005 (which according to Mr Petley was made by Ms Chapman) it was recorded that Mr Petley told Mr Rumsey:

"*MJP is concerned that stop loss orders are banded around the market and act as a magnet to trigger a switch. HSBC pass the orders with no mention of who they are dealing with or for. Banks should respect the confidentiality agreement*."

218. In 2006 Mr Petley's belief was clearly that HSBC had front run the January Trades. That belief is evident from the contemporaneous evidence around the meeting on 2 February 2006. (The evidential basis for his belief is considered below).

219. A meeting was arranged between HBPB, HSBC and ECU on 2 February 2006. Prior to the meeting Mr Petley had a conversation with Mr Simonian of HBPB:

> "*TS: You have a problem?*
>
> *MP: I'll tell you what it is, then - don't take this the wrong way in any respect. But it's something that we've monitored and been a little fussed about it. It's one of those little grey areas that I've wanted to leave until Thursday but without embarrassing David or Ian, just want to sort of talk around. We had the same situation in the early 90s with one of the banking groups as well. And what it is, is slight indiscretion, if I can put it that way, when it comes to letting other institutions or traders stroke hedge funds be aware of where they are working stops on behalf of their clients.*
>
> *TS: Confidentiality you are referring to, by the sound of it'?*
>
> *MP: Yeah.*
>
> *TS: Go on.*
>
> *MP: Well, to my way of thinking, standards have, you know, it's not something against HSBC in Canary Wharf, it's certainly not in your domain, but it is something that it seems that standards for quite the number are slightly [s]lipping, if you like…*
>
> *…*
>
> *MP: Because, we find that maybe the size or something is acting as a bit of a lure or magnet. I mean, David will be aware of this because it has seemed uncanny, you know. In the last few times we have placed this stop there's been bugger all going on in the market...*
>
> *TS: And all of a sudden...*
>
> *MP: We work a stop and give it 10 minutes after David's done it or Ian's done it through Canary Wharf, all hell is breaking loose…" [emphasis added]*

220. On 1 February 2006 Mr Petley had a telephone conversation with Mr Rumsey of HBPB. The relevant extracts of the transcript are as follows:

"*MP: ...I think, for everybody here, they're just – they just don't understand what is going wrong with our execution process. And, I mean, you get the – a pattern in something which just seems to happen. And it may have – like, you know, one loves to feel that it had nothing to do with anybody, it was all coincidence elements. But there's something that doesn't smell quite right on this –*

...

– and it does sort of rather imply that someone is dealing in size in the run-up to these stops and front-running.

....

Well, I know you've been worried in the past that – you've felt that there's been front-running on our positions. I remember you telling me. And of course it may have nothing to do – I mean, you may have satisfied yourself that it's not within, obviously, HSBC, but that doesn't mean to say that it's not happening, so we need to work together to find out, you know, what is happening, because some – some sizeable activity happened prior to those stops being hit, and then virtually no activity afterwards. That's – that's the – so we need – you know, we'll obviously need to have your help and assistance in trying to find out what is going on, because – I don't believe any of us, with our collective experience in foreign exchange, could find it odd that these things are happening with such pinpoint sort of accuracy or coincidence." [emphasis added]

221. In a telephone conversation with Mr Rumsey on 2 February 2006 Mr Rumsey told Mr Petley that HSBC would not be able to discuss the January 2006 Trades specifically at the lunch to be held later that day (having been advised to that effect by their Compliance Department) and that ECU would need to make a formal complaint for those trades to be investigated.

222. The lunch went ahead on 2 February 2006. The lunch was attended by Mr Petley, Mr Romilly, Mr Jones, Mr Hughes and Mr MacKinnon for ECU, Mr Brown and Mr McEvoy for HBEU and Mr Rumsey and Mr Fish for HBPB. There is a contemporaneous note of the meeting prepared by Mr Rumsey.

223. The note referred to "*a history of dissatisfaction on the part of ECU with HSBC deal execution, resulting in a number of meetings between MP and ourselves*". The note also recorded:

"It appeared as though other banks were operating on a different basis to us, in order to achieve a close fill, rather than protecting the price level, although there was no way that we could evidence this. MP was not prepared to accept this premise and would repeatedly ask for disclosure of HSBC fx contracts to justify the price given. Needless to say, we were unable to oblige. Given these concerns, orders were subsequently managed to produce a 'tight' fill for the client. Because of the large bid/offer spread on a sizeable trade, this would have required some dealing ahead of the price trigger to protect HSBC from significant loss." [emphasis added]

224. It can be inferred from this passage in the note that HSBC was "*dealing ahead*" of the stop loss trigger (albeit with the purpose of achieving a "*tight*" fill for ECU). This is consistent with the evidence of Mr Petley that at the meeting Mr Brown had admitted

trading ahead. In cross examination Mr Petley confirmed his evidence in his witness statement that at the meeting Mr Brown had admitted trading ahead. His evidence was:

"…what I took from the meeting was that they seemed to consider, or Mr Brown seemed to consider that it was fair game or legitimate to, at his discretion to engage in order book management. He didn't use the words "pre-hedging" but he did say "order book management", was what I recollect. I think they are all interchangeable. It is trading ahead in any event." [emphasis added]

225. The note also confirms that Mr Petley believed that HSBC had front run the order on 31 January 2006. In relation to that order the note read:

"*On being advised of the fill on Tuesday MP expressed concern that HSBC had been active in Cad/Jpy in the lead up to 19.45 and had thereby triggered the price by 'front-running'. This, he felt, amounted to market abuse and improper action. The fact that the price had subsequently retreated to lower levels, reinforced this view. MP said that he was able to show documentary evidence of HSBC NY trading activity through Bloomberg 'Market depth 'analysis or Reuters' data integrity'. After offering to show us this proof he later withdrew the offer on advice from ECU compliance/legal dept. Our enquiries to Reuters and Bloomberg were unable to discover a service that provided volume or trade details on forex deals by banks*.

MP expressed a mistrust and suspicion of HSBC motives in executing the order, and again a request for sight of the HSBC deal blotter was made. He added that the suspicion also applied to the previous two stop-loss orders.

The strength of the dissatisfaction required referral to compliance at PB and Group, although at this stage fell short of a written formal complaint." [emphasis added]

It is clear that according to this contemporaneous document, by referring to *"front running"* Mr Petley was not just concerned with *"trading ahead"* since he states it amounted to *"market abuse"* (and trading ahead whilst alleged by ECU to be contrary to ECU's instructions is not alleged to have amounted to market abuse).

226. The note recorded that: "*AB refuted any charges of malpractice or front running*."

227. Mr Petley said in cross examination that his recollection was that the meeting was "*pretty heated*" for the first five or ten minutes and accepted that he had accused the bank of behaving in a "*market abusive*" fashion.

228. Mr Petley also accepted in cross examination that he continued to believe after the meeting that HSBC had front run the January orders and that HSBC must have profited at the expense of ECU.

229. On 7 February 2006 Mr Petley had a call with Mr Brown. In a fairly lengthy conversation Mr Petley raised his concerns with Mr Brown. In relation to his belief of front running in relation to the January trades he said:

"*… therefore there was just the element on the last three, the last three, I've not really been satisfied that… there's any follow through from the stop level, … and therefore… it seemed to me fairly clear that…there was advanced trading into that and it, it makes me*

think that could therefore at that time that action have, have caused the price action itself to, to fulfil the… prophecy."

230. Although Mr Rumsey recorded in his note of the lunch that "*The prospect of a formal complaint is probably removed*," Mr Petley made a formal complaint to HBPB in an email to Mr Brown on 7 February 2006. Prior to sending the email to Mr Brown, Mr Petley had a conversation with Mr Jones. As referred to above when dealing with the credibility of Mr Petley, the telephone conversation with Mr Jones on 7 February 2006 is further contemporaneous evidence that Mr Petley believed HSBC had been front running his stop loss orders.

"MP: I was just going to say that I'm sending Andrew Brown at HSBC the evidence of the sort of price movement on these last 3 stops, what I've suggested is that we're making good progress for the future but I expect that he will agree —

AJ: These they have been front run as he calls them.

MP: That his or their actions, I think he will agree had they not, I've put front run or order book managed the stop position that in all probability those stops wouldn't have been triggered, and as such...

AJ: May not have been. I don't think you can...

MP: They wouldn't at that time, in each of them, I've gone back and looked and the first thing they did from the price action was to go straight down once we'd been filled, and in case of two of them for some time, before coming back eventually. It's not my point, my point is that in the knowledge that we would never have countenanced such sort of behaviour at all, it was actually expressly 100% diametrically opposed to where, how we wanted things done and our and that sort of philosophy has been embedded in our banking relationships since we started. The price action leads me to believe that HSBC must have profited out of that activity, because if they're buying something low and pushing the price up and then they've dumped the position on us and had an exit strategy they have benefitted by definition, they must have done…" [emphasis added]

231. In cross examination it was put to Mr Petley that he believed that HSBC had engaged in front running. Although reluctant to accept this proposition, Mr Petley eventually accepted that it was a "*consideration*" that he was "*most concerned about*". The relevant exchange was as follows:

"*…So you considered at that time that they were pushing up the price deliberately in order to profit, as you saw it, at the expense of ECU, is that correct?*

A. Whether deliberately or not, if the effect was to push it up and they were disposing of their positions at a higher level, then yes, mathematically they would have to have benefited.

Q. Yes. At the time, back in 2006, you thought they were doing this deliberately in order to profit deliberately from your stops, didn't you?

A. It is certainly a consideration that I was most concerned about, yes." [emphasis added]

232. In his email to Mr Brown of 7 February 2006 asking HSBC to investigate the January trades, Mr Petley wrote:

> *"…In managing your order book - by buying ahead of the above given stop orders-it seems clear to us that the practice of us placing a stop-loss order with you has, in reality, only served as to create a magnet effect to and through our specified stop-loss level…*
>
> *The rather galling conclusion drawn from all this is that by seeking to protect our clients' position by placing stop-loss orders behind strategic levels of overhead resistance, your subsequent actions have achieved the opposite…*
>
> *With respect to these last three stop-loss orders (above), my colleagues and I are keen to establish the extent to which HSBC benefitted financially from buying ahead of the above stop-loss orders which we believe was in clear contravention (albeit unintentionally) of our stated policy regarding the execution of such orders. We accept your position that HSBC did not engage in this front running / order book management in any underhand or improper way so as to act intentionally against our best interests and those of our mutual clients. None-the-less, upon close analysis of the price action surrounding these three orders, it would appear that in doing what you did, HSBC would have benefited financially. …"* [emphasis added]

233. Although the language of the email might suggest that ECU was only concerned with "trading ahead" Mr Petley accepted in cross examination that ECU's position at the time was that HSBC had front run the stops causing them to be triggered. His evidence in this regard was as follows:

"Q. *ECU's position at the time, wasn't it, was that HSBC had front run the stops, causing them to be triggered when they would otherwise not have been triggered. That is what the position was, wasn't it?*

A. I think the position was very much that somebody had front run these and all fingers were pointing at HSBC.

Q. Well, who else was in your mind at the time if not HSBC?

A. Well, it is possible that there are any number of theories as to who could have been directly responsible for it, but my position at the time was to establish definitively whether or not that was HSBC.

Q. We are not able to discern in the papers, as far as I can see, from disclosure that you were thinking of anyone else other than HSBC?

A. No, I was very much thinking of HSBC at that time.

Q. Yes, and not somebody else?

A. This -- as at 7 February all my focus was on HSBC, correct." [emphasis added]

234. Mr Petley's belief in front running was sufficiently strong that he was prepared to tell clients that there had been front running: on 14 February 2006 Mr Petley wrote to Mr Hugh Willis of BlueBay Asset Management Limited:

"*In the end, despite all, we had a good year last year (performance up 8.30%...) but the markets seem all over the place this month — due, in part no doubt, to some shocking behaviour by some of the banks who have been caught front running our stops big time!"* [emphasis added]

235. In a telephone conversation with a Mr Boden, a client of the MCDMP (shortly before Mr Petley sent the letter to Mr Brown on 7 February 2006) Mr Petley told him that:

"*Banks in managing their order books are front running client stop loss orders. Which again is meaning that the stops are getting hit more regularly and they're not having any material follow through so it's seriously irritating…as soon as we seem to put a stop in the market, the market price action just vacuums straight up to the stop. Thank you very much. It's happened three times in a row…what's been happening is that somebody with deep pockets, which we have identified but that's another story 'cause it's being dealt with at the moment, but what has been happening is that the most ... the position is being bought prior to the stop*." [emphasis added]

In what is clearly a reference to the trade on 31 January, Mr Petley said:

"…what matters is that at the time the stop is hit, it was clear to us that there's no way that I mean, the other day at 8:00pm or 10 to 8, you know, CAD/Yen, you know, that got hit for over half a billion Dollars. Now, I'm telling you, there's no way that where we had our stop the market then went another 2, 2 or 3 ticks higher and that was it. Now, I just know that you can't hit the market with half a billion Dollars in CAD/ Yen and only see that, you should have seen a 30, 50, 60 pip move. And the reason why it hadn't happened was that when we gave the order, 70 pips lower than the stop level ...you know, the buying of our stop order up to the stop level was what it was all about and, I suppose, running around telling everybody, oh, we know that there's a big order up at that level, several eggs on and follows one another and then on these sort of squawk boxes and chat rooms and you can easily get traded to sort of all follow through so there's no point getting completely bent out of shape on it." [emphasis added]

236. In cross examination Mr Petley confirmed that the point he was making to Mr Boden in relation to the 31 January trade was that as far as he could tell from the market movements, that was consistent only with HSBC having engaged in market abuse.

237. HSBC responded to the complaint in a letter of 9 March 2006. It read (so far as material):

"*I apologise for the delay in responding to your original enquiry, but I am sure that you will appreciate that the issues raised in your e-mail dated 8 February 2006 have required a full and thorough investigation, both in London and New York. I am now in a position to respond fully to the issues raised in your communication.*

To summarise, your e-mail asked me to address the following areas:

1. You asked me to fully investigate the circumstances leading up to the execution of three stop-loss orders placed with HSBC

2. You have alleged that the FX Execution Desk of the Bank may have been responsible for the price movements observed in the market prior to ECU's stop-loss orders being triggered, by engaging in some form of order book management. In particular you state that you observed a 'swift and violent move towards the stop-loss levels soon after the orders were placed' and that the FX Desk was directly responsible for this market movement

3. You are keen to establish the extent to which the Bank benefited financially in the event that it carried out any actions under point two above.

One of the reasons for the delay in responding to you is that the findings of the two Foreign Exchange Desks have been independently checked and verified by the Compliance Departments of both the London and New York offices. Our detailed enquiries have revealed no evidence of inappropriate execution of the orders in question. We are fully satisfied that the FX Desks were not responsible for price manipulation or front-running of the company's orders. We are also satisfied that there was no evidence that the FX Desk failed to comply with any aspect of the specific client instructions…"

The Bank then dealt with the specific trades and concluded that:

"*Having completed our extensive enquiries, we can find no reason to support any of your claims and therefore refute the allegations you have made. This concludes our internal complaints process and our investigation into this matter…*"

238. When Mr Petley received the letter in response to his complaint, his reaction was forthright and clear: in an email of 14 March 2006 Mr Petley wrote to Mr Jones, Mr MacKinnon and Mr Romilly (amongst others):

"*Well, here's the official response I will send a short "holding" response whilst we decide what we want to do.*

In essence, I believe Andrew Brown (who had already openly admitted front running our orders) has been silenced and now prevented from dealing with us direct in this matter. Someone, somewhere, has decided that bringing down the shutters and denying any wrongdoing (and lying if necessary) on the basis that we would not have the balls to take it further is preferable to doing what is right, fair and appropriate. It's bullshit, we know it & they know it.

What we do now, however, should be considered very carefully. I'll arrange with Lizzie to get us all together by phone as soon as possible." [emphasis added]

239. In cross examination Mr Petley described this email as a "*knee jerk reaction"* and his *"personal take on it"*. He accepted however that he regarded the investigation as a "*whitewash*" and had no faith in what he had been told.

240. There was no further substantive response from HSBC after this letter.

241. The evidence of Mr Whiting was that it was clear to him that ECU had not accepted his letter of 9 March 2006 "*as having put an end to the complaint*".

242. Mr Petley's position is clear from the contemporaneous evidence of a telephone call with Mr Romilly which took place shortly after the email of 14 March 2006. (The

timing of the email is evident from Mr Romilly's question as to whether Mr Petley had seen his response to that email). Mr Petley said on that call:

"MP: ...my reading of it is, officially – officially, they cannot possibly have come out saying anything different than that which they've done, because the – the implications of them admitting ...that they've knowingly done something. So, the – basically, we have to acknowledge that official position and we let them sit and stew in their own juice for a while. I'll get Manduca involved; he's the best litigation lawyer there is in banking, I reckon. And he has had – I mean we couldn't afford anybody else on that basis. It's part of the – part and parcel, with the relationship that he and I have, that he – he does the opening salvo on this sort of thing. And we'll probably end up, like we did with Singer & Friedlander, like we did with Kleinwort Benson, you know, without having to go formally and spend any money on it to get the – that which we – we want…

They made money on those trades, there is no doubt. And in fact, if you really read carefully what they're saying, they're not denying that. They haven't said anything that – they've tried to sort of, in wishy-washy, subtle terms, say that they don't think that they've done anything wrong or improper, or don't consider what they've done – but they have not denied front running, explicitly.

...

And they have not denied making money out of those transactions, so they have ... avoided the question." [emphasis added]

243. Far from accepting the response, it is clear from the contemporaneous evidence that Mr Petley's view was that HSBC had not explicitly denied front running and that he proposed to get Mr Manduca, at that time a partner in a City law firm involved (although his evidence was that he did not in fact do so).

Knowledge of ECU

244. It was submitted for ECU that Mr Petley's belief cannot be treated as synonymous with that of ECU: Mr Petley was one of nine directors and it is apparent that there was a range of different views within ECU (Closing Submissions paragraph 391).

245. Mr Petley in his witness statement (paragraph 113) said that there was a "*range of views within ECU*" and referred to an email from Mr Cooper on 15 March 2016.

246. The email from Mr Cooper, an ECU board member, of 15 March 2006 to Mr Petley copied to Mr Jones, Mr Romilly and Mr MacKinnon amongst others read as follows:

"Now I know more about this situation I have changed my opinion and would like to make the following points although they may be unpopular.

Whilst it is clear to me that the bank was driving/front running the price towards our stop orders and it is clear that a stop order only becomes a market order when the stop is touched, when dealing with illiquid FOREX pairs is it realistic to use stops at all and is it good practice to complain about slippage i.e. the distance that market executions take place away from the stop?

If we attack the bank, will part of their defence be that ECU knows its onions and should know the dangers of stops in illiquid markets? And in the same way cast aspersions about our duties to our customers.

This is an unregulated market and they can do as they please unless they are filling our stop orders before the stop has been hit, if they are only positioning themselves it's difficult to see where that have done wrong (sic) even if they are also making a great deal of money in the knowledge that the stop is in place. In equity markets Lazards were fined £200,000 for conducting this type of exercise ahead of a program trade which they guessed correctly was about to take place. But this is not the equity market and attacking their systems and controls as I suggested earlier seems much more like a longshot.

I think the fact that their compliance has got involved and no doubt considered the positioning/front running/driving the price issues and come up with its verdict means we should consider our actions carefully. I do not believe that a compliance department of a bank this size could take the risk of unfair "home win" verdict. I also believe that they were not more gracious in their letter because they may have felt that any gesture might be interpreted as an admission of guilt and given them a liability." [emphasis added]

247. Mr Petley stated in his witness statement that this email addressed "*themes discussed within ECU*" including (i) a recognition that it was hard to believe that HSBC's compliance department would actually 'cover up' an inappropriate execution, when it should have been relatively easy for the bank to check how the orders had been executed and (ii) the team's focus at the time was ultimately on 'trading ahead' rather than fraud (and Mr Cooper's reference to "*front running*" means "positioning themselves" ahead of the order).

248. It seems to me that a natural reading of Mr Cooper's email suggests that he was referring to front running: his opening words refer to the bank "*driving*" the price which suggests an intention to move the market not merely positioning. His email read:

"*Whilst it is clear to me that the bank were driving/front running the price towards our stop orders…"* [emphasis added]

Whilst his email is not free from doubt-he then seems to draw a distinction between "*filling [the] stop loss orders before the stop has been hit"* and "*only positioning*", his final paragraph refers to Compliance having "*considered the positioning/front running/driving the price issues"*

I accept however that in effect Mr Cooper urges caution in the light of the response from the Compliance Department.

249. In his witness statement Mr Petley's evidence was:

"*In the days and weeks that followed, the sentiment expressed by Mr Cooper, that ECU should not pursue anything further, came to be shared by the rest of ECU's board. I see that this issue does not appear to have been discussed at the board meetings that took place on 8 February, 21 March and 27 April 2006. However, some internal discussions did take place and I remember people inside and outside ECU telling me that the idea that HSBC would perform an investigation and conceal the truth was far-fetched. For example, I seem to recall conversations I had with each of*

Alexander Jones and Albemarle Cator (directors of ECU) telling me that there was no point in pursuing the matter. This was all at a time before the financial crisis when international investment banks were held in particularly high regard, and when the idea that a bank would engage in certain conduct and then lie about it was unthinkable to many people. I also believe that I was told by Mr Whiting in this period (although I am not sure whether this was by telephone or in person) that the bank had investigated the matter, had found no wrongdoing at all, would not re-open the issue or investigate any further, and if ECU continued to pursue the matter then this could lead to serious consequences for our relationship. In that context, the board was conscious that challenging the bank further would destroy a valuable long-term commercial relationship with what was (at that time) the largest bank in the world, all in circumstances where the bank had already performed a full internal investigation and confirmed that everything was in order." [emphasis added]

250. As referred to above, it was Mr Petley's evidence in cross examination that only Mr Romilly shared his view and that Mr MacKinnon, Ms Chapman, Cormac Naughten, Alexander Jones and Stephen Cooper took the view that it was fanciful and unrealistic for Mr Petley to believe that the independent checking and verification that was put in black and white that had been conducted by HSBC legal and compliance would have been knowingly false.

251. For the reasons discussed above I approach the evidence of Mr Petley with considerable caution and look to the contemporaneous documentary evidence to test the reliability of his evidence. There are two issues to consider; firstly whether those at ECU considered that there had been front running and secondly whether they accepted the HSBC investigation.

252. Dealing first with Mr Romilly, the contemporaneous evidence confirms that the view of Mr Romilly was that HSBC had engaged in front running and that he was not persuaded by the response from HSBC. This is evident from the call which Mr Romilly had with Ms Zarbafi on 16 March 2006. Mr Romilly said:

> *"CR:…Well basically what Mickey has done is he's printed out charts and he's pointed out …*
>
> *GZ: Yeah I saw all of that.*
>
> *CR: And it's an absolute disgrace…I think it's going to look very very bad indeed because front running is kind of a hot potato at the moment.*
>
> *…*
>
> *CR: It's all over the MIFID stuff, Antony's just going to say you need to revisit this because you know they're good guys, they're not asking for any money, it's their clients who have been disadvantaged but you wouldn't want these images being banded around because it doesn't look you know.*
>
> *…*
>
> *CR: Yeah. It's a guaranteed profit and the ridiculous thing is that that was a huge order, it was a billion dollar order late in the London day, in fact*

> *arguably after the London day was over and once the stop was hit it went one or two ticks higher and then came all the way back down again. In other words all you conferred is had they not been buying that stop loss order would never have been hit. So all they've done is take money off their clients. And the letter, did you see the letter, the letter doesn't actually really deny anything and was quite carefully crafted and we said look the one thing we don't want to do is beat up the guys at the private bank, you know, we don't want them getting upset, we don't want them put in the middle but we do want Alan Ramsey to come and look at the evidence and have a conversation you know, and the way we would like it presented back to the private bank is that they've further reviewed it and on reflection they do think that an ex gratia payment is due to the clients…"* [emphasis added]

253. In relation to Ms Chapman, Mr Petley's evidence does not appear to be supported by the contemporaneous evidence of the telephone conversation between Ms Chapman and Ms Negre which clearly took place after the response from HSBC. Ms Chapman said on the call that she had not really been involved in the dispute but she referred to "front running" and that the reason the matter was not being pursued was "*because of the amount of business that we do"*. The relevant parts of the transcript of the call are as follows:

> "*MC: ...There's a dispute on – going on about the – they've actually proved that they're – they're sort of – that – front-running, if you like, the stop orders and stuff so that, basically, whenever we seem to put a stop order in, miraculously, it hits that level and then bounces bloody back again…*
>
> *...HSBC at first were sort of – apparently – I haven't really been involved, I don't even read the emails, but I – they admitted liability and now they've completely done a backtrack.*
>
> *…*
>
> *MC:-we're agreeing because of the amount of business that we do but Mickey has this sort of one-man-band crusades on, you know, what's right and wrong, basically. And yes, the principle might be there but you know –*
>
> *PN: Okay.*
>
> *MC: – you just have to move on, occasionally*." [emphasis added]

254. In the case of Mr MacKinnon, he accepted in his witness statement (paragraph 37) that:

> *"On 31 January 2006, I was on a telephone call with Mr Petley discussing a CAD/JPY order that had just been placed, when he learned that almost immediately after the placing of the HBPB order it had been filled by HSBC New York's FX desk. From the information Mr Petley gave me on the phone, I commented that it sounded like a clear abuse of an order and HBPB needed to explain themselves. As the order was filled in the evening when the market was not particularly liquid, to me the most likely explanation seemed to be that HSBC had taken us out in full knowledge of where the stop-loss was, and had acted improperly and at our expense*." [emphasis added]

As the transcript of that call is available, this evidence is consistent with that transcript although the witness statement fails to reflect the tone of the conversation (played to the court during the trial) which took place as the stop loss level was hit and reflects the surprise and annoyance of the two men. The call included the following exchanges:

"*Michael Petley: ...I jest you not, we have been taken out of CAD-yen.*

Neil MacKinnon: Oh you're joking.

Michael Petley: No. Now, you know, that's bloody HSBC again because of the stop thing. I'm not joking you. This was –

Neil MacKinnon: Where was the stop? 103.50?

Michael Petley: 05.

Neil MacKinnon: 05, yeah.

Michael Petley: But – but – and there's a big 'but' here, I – literally, as I was picking up the phone to you, we were at 102.70. I've got the time and sales here, because I've had it up on the screen, tick by tick, by tick and that is absolutely extraordinary. As soon as they've got that order, it has gone –

Neil MacKinnon: [Inaudible].

Michael Petley: – from 72 –

Neil MacKinnon: It's outrageous.

Michael Petley: And it's gone straight and I can see it's HSFX New York.

Neil MacKinnon: That's outrageous. It really is. I mean that's – that's – you know, given what – the conversation you had with them, they've just ignored you completely.

...

Michael Petley: ...how annoying is that?

MacKinnon: That is very annoying. I mean that's – you know, they [inaudible] running this, completely run it.

Michael Petley: It has gone – you'll see it – from 1.0275 up straight through our level.

Neil MacKinnon: Unbelievable...."

In relation to the decision not to pursue the claim, Mr MacKinnon's evidence is of little assistance as he states that he did not have any direct input into the decision how to respond. His evidence (paragraph 39 of his witness statement) is as follows:

> *"I was aware of ECU's subsequent discussions arising out of its concerns with HBPB following the end of January 2006, and I was copied into most emails on the issue by virtue of my senior position at ECU. Due to the passage of time I do not have a clear recollection of those discussions and communications. I was seriously suspicious about HBPB and HSBC's conduct, and about the potential impact on ECU's performance and reputation. However, HBPB had denied any wrongdoing after an internal investigation and I did not know what could be done without evidence in support of ECU's suspicions. These concerns were discussed by the executive management team and generally within ECU. However, I did not have any direct input into the decision as to how to respond to the events of January 2006 and given the scope of my position I do not consider that to be surprising. The decisions about how ECU should deal with HSBC's conduct was a matter for those more directly involved in the trading process and relationship with HBPB, and I would have deferred to their decision about how to proceed*." [emphasis added]

> In his witness statement Mr MacKinnon stated that:

> *"...HBPB had denied any wrongdoing after an internal investigation and I did not know what could be done without evidence in support of ECU's suspicions*."

> For the reason referred to above, Mr MacKinnon's evidence was not tested in cross examination. Notwithstanding the evidence in his witness statement referring to ECU's "*suspicions*" and lack of evidence (which accords with ECU's submissions at trial), there is no contemporaneous evidence to suggest that Mr MacKinnon disagreed with Mr Petley when Mr Petley sent the charts to Mr Brown on 7 February 2006 and described the price action which the charts illustrated as "*pretty conclusive of our position*". Mr Petley wrote in an email to which Mr MacKinnon had been copied:

> "*For your assistance and in support of the above comments, I attach three 1-minute bar charts covering the time periods that encompass our giving HSBC of each of the above stop-loss orders through to (and beyond) their subsequent execution. The teal-coloured vertical lines represent when we gave you the above stop-loss orders, the light blue horizontal lines illustrate the level of each stop-loss order and the yellow coloured vertical lines show when the said stop-loss level was surpassed. I think the price action, as illustrated, is pretty conclusive of our position!"* [emphasis added]

255. Mr Alexander Jones did not give evidence. The court does have a transcript of a call between Mr Petley and Mr Jones on 7 February 2006. This is not free from doubt as to whether Mr Jones was concerned with front running but it is clear that he thought there was trading ahead and that HSBC was profiting from their actions. The relevant part of the transcript reads:

> "*MP: I was just going to say that I'm sending Andrew Brown at HSBC the evidence of the sort of price movement on these last 3 stops, what I've suggested is that we're making good progress for the future but I expect that he will agree —*

> *AJ: These they have been front run as he calls them.*

MP: That his or their actions, I think he will agree had they not, I've put front run or order book managed the stop position that in all probability those stops wouldn't have been triggered, and as such...

AJ: May not have been. I don't think you can...

MP: They wouldn't at that time, in each of them, I've gone back and looked and the first thing they did from the price action was to go straight down once we'd been filled, and in case of two of them for some time, before coming back eventually. It's not my point, my point is that in the knowledge that we would never have countenanced such sort of behaviour at all, it was actually expressly 100% diametrically opposed to where, how we wanted things done and our and that sort of philosophy has been embedded in our banking relationships since we started. The price action leads me to believe that HSBC must have profited out of that activity, because if they're buying something low and pushing the price up and then they've dumped the position on us and had an exit strategy they have benefitted by definition, they must have done.

AJ Yes, I agree." [emphasis added]

256. As to the views of Mr Naughten, he also did not give evidence. However his views can be inferred from the transcript of a call on 30 March 2006 with Ms Chapman in which she asks him for things he wants to put into an internal banking review and Mr Naughten refers to the HSBC dispute as the "*main thing*". The relevant extract is as follows:

"CN: So hopefully the sort of HSBC thing is kind of under control.

MC: It's not stopping them doing business at the moment, is it?

CN: No, it's not. I think it's making sure that it sort of doesn't ever get to that stage.

MC: Yeah.

CN: So I think it's sort of been made – I think Steve was in to see Mickey today. I think it was made clear that kind of pushing it would just fracture everything.

MC: I thought we'd decided not to push it.

CN: Well, that's exactly what I assumed was the state of play as well.

MC: Well, that was certainly – I know Mickey wasn't in that last banking review but certainly my notes from it, from Charles, were we weren't and Alexander

CN: Yeah, well I think it was kind of – it was a sort of – pretty much the consensus it was a no-brainer, really, in many ways because it's – there is nothing that could be done. And they have too big a kind of hold over us to be ever kind of rock the boat now. The biggest introducer and we sort of mess with that at our peril.

MC: I agree.

CN: So I think that's kind of – Mickey's aware of that now.

MC: Good.

CN: I think he sort of discussed it with Steve but I think he's clinging to the hopes that they'll do something.

MC: He's just – it's always the principle with Mickey, isn't it?

CN: Yeah.

MC: He just can't let go.

CN: Yeah. I think – yeah, I think that – I think it's just one of those ones where it's a poker situation and –

MC: Yeah.

CN: – while initially you may have thought your two kings were going to be enough, it's – when the other bloke's turned over the two aces, you've just got to concede that, yeah, we've got a really good hand but it's just not good enough in this particular case.

MC: Well, particularly if we – you know, if we can get – I mean Charles is working through – has been doing a lot to get this new arrangement set up, so I mean, you know.

CN: [Inaudible] –

MC: Put it down to a bit of bad experience but –

CN: Yeah, I think that's the only thing we can do and to – sort of to say to ourselves, 'Well, what we've had from them more than outweighs the fact we got clipped on a few trades,' and just leave it at that…" [emphasis added]

257. From this evidence it can be inferred that Mr Naughten thought that "*pushing it would just fracture everything*" and that the commercial relationship was too important to ECU to put at risk. He appears to think that they have a good case ("*we've got a really good hand*") but that it was not good enough. That does not suggest that ECU did not have evidence but that he was not confident they would succeed and balanced against the commercial risks to ECU's business it was not worth pursuing.

258. Mr De Klerk did give evidence and he accepted that his "*personal view*" in January 2006 was that there had been "*front running*" by which he said he meant trading ahead of the trigger levels in order to push the market through that level and sell the position back to ECU.

259. Mr De Klerk's evidence was that others used the term more loosely to describe trading ahead and he identified within the trading team, Mr Petley, Mr MacKinnon and Mr Hughes. However he conceded that front running was a "*possibility*" both for him and his colleagues.

Q. "The explanation you offered at the time was that the banks had been front running the orders?

A. That seemed entirely possible to me.

Q. Yes, and it seemed entirely possible to all your other colleagues, didn't it?

A. Yes."

260. I have set out above my assessment of his evidence generally and it seems to me that this evidence seeks to underplay the significance of what ECU (and in particular, on the evidence, what Mr Petley and Mr Hughes) thought at the time.

261. Mr Hughes also gave evidence to the court. Mr Hughes' evidence (Paragraph 23 of his witness statement) was that:

"*In January 2006 I and my colleagues at ECU developed concerns regarding unusual price movements in the market in respect of three orders placed with HBPB on 5, 6 and 31 January 2006*."

262. Mr Hughes' evidence in cross examination on this evidence was as follows:

"Q…Now, what was the nature of the concerns that you recollect having yourself?

A. …, so the concerns that I had were some of the market movements leading up to the order being executed. It seemed to me a coincidence at least that very soon after placing said orders, markets started to move quickly in that direction. We were subsequently taken out. That was my first concern. My concerns were raised even more when I saw confirmation of the levels at which they had filled us….

A., Which is probably what, was concerning me as much if not more than the market movement itself.

Q. Yes. Did you personally suspect that the banks had been engaged in front running the orders which had been made? Did you have that suspicion?

A. Are you asking me to speculate or give you an opinion?

Q. No, I am asking to you say what you recollect. If you don't recollect say "I don't recollect".

A. I know exactly what I thought and I am afraid, my Lady, I did think the worst of the banks." [emphasis added]

"*Q…So when you say there were a range of possibilities, and you didn't know for certain what was happening, as far as you were concerned you thought the worst of the banks and you thought that they were engaged in market manipulation, is that correct?*

A. Yes. I think that is probably fair. I didn't have too many other explanations for what I saw within the markets and then when I saw the rates at which we were filled, that did nothing to dispel my suspicions.

Q. Yes.

A. In fact, it only helped to make them worse, really." [emphasis added]

263. Mr Hughes' evidence was that he would have shared his suspicions with Mr Petley and Mr MacKinnon. He said that he would have gone to seek out Mr Petley and would have been discussing it with Mr MacKinnon who worked in the same room as himself.

"*Q…So we can be as certain as we can be after all these years that you did discuss this with Mr Petley and with Mr MacKinnon, is that correct?*

A. Yes. As certain as we can be."

264. It was said by Mr Petley (paragraph 115 of his witness statement) that international investment banks were held in high regard at the time and it was "*unthinkable*" to colleagues that HSBC would lie:

> *"…I seem to recall conversations I had with each of Alexander Jones and Albemarle Cator (directors of ECU) telling me that there was no point in pursuing the matter. This was all at a time before the financial crisis when international investment banks were held in particularly high regard, and when the idea that a bank would engage in certain conduct and then lie about it was unthinkable to many people…"*

265. Mr Cator did not give evidence. However I note that contrary to the evidence of Mr Petley, Mr Jones in his call referred to above, did not appear to hold HSBC in "*high regard*":

> "*MP: [Mr Brown] keeps saying he hasn't investigated, which means he has and he can see that there's big profit there 'cause otherwise he would say I've investigated it and there's nothing there, you know...*
>
> *AJ: No, <u>they're not going to speak with unforked tongue</u>*." [emphasis added]

266. I also note from this exchange that Mr Petley did not appear to trust HSBC suggesting that Mr Brown had in fact investigated but was lying about it because HSBC was making a profit.

Conclusion on knowledge/belief of ECU

267. I find on the evidence that Mr Petley believed that the January 2006 Orders had been deliberately triggered by HBEU and HBUS and that this amounted to 'market abuse' and 'front running'. On the evidence this belief was shared by Mr Romilly, Mr De Klerk, Mr Hughes and it can be inferred by Mr Cooper and Ms Chapman.

268. I accept the submission for the Defendants that as far as knowledge is concerned, the knowledge of Mr Petley can be attributed to ECU and it is not necessary for the board of directors as a whole to have shared his belief in order for ECU to have knowledge for the purposes of limitation. As is clear from the evidence referred to above including the evidence of Ms Chapman, Mr Petley had a central and dominant role in ECU and further it is ECU's case that the board took the decision not to pursue the matter which one can infer was taken having considered the matter.

269. As to whether ECU accepted HSBC's response that is considered further below. However as discussed above, it would appear that Mr Petley did not accept the response nor did Mr Romilly. I also infer on the evidence referred to above, that Mr MacKinnon

and Mr Naughten did not accept the response and their concerns were only whether the claim could be proved.

The available evidence

270. It was submitted for ECU that a case cannot be pleaded on the basis of mere suspicion or belief held by one or more persons within ECU. Rather, it was submitted that credible evidence establishing an arguable case is required. In summary ECU raised three main objections:

270.1. the investigation by HSBC;

270.2. the lack of trading data;

270.3. that the circumstantial market data would not amount to evidence of dishonest front running by HSBC sufficient to enable such a case against HSBC to be pleaded, because it was also consistent with market movements caused by other market participants or market events.

The investigation by HSBC

271. On 2 May 2006 Mr Petley called Mr Whiting to confirm that ECU would not take matters further. ECU then sent a formal letter to HBPB dated 4 May 2006 and signed by Mr Petley and Mr Alexander Jones. The letter stated:

> *"…We have considered the matter carefully and have decided not to pursue the matter further.*
>
> *Please, therefore, take this letter as our confirmation that we now consider the matter closed"*

272. ECU submitted that:

272.1. by May 2006, HSBC's position as set out in its response was accepted;

272.2. HSBC, a major and (at that time) well regarded financial institution, had said that it had conducted a "*full and thorough investigation both in London and in New York*" and the ability to draw any inference would have to be weighed against the contents of that letter, including both the explanations given for the market movements and the fact that no wrongdoing had been found after an extensive investigation independently checked and verified by the compliance departments in both New York and London;

272.3. pleading dishonest front running would also involve the implicit allegation that the bank had concealed the wrongdoing by falsely stating that there was no evidence of inappropriate execution of the orders (Closing Submissions paragraph 398.4).

273. In cross examination Mr Petley's evidence was:

> *"At the time when we wrote the letter, in May 2006, ECU's position was that we had accepted that explanation and I personally had come to the conclusion that there was no other formal basis or evidence to suggest that the explanation given by the private bank, whom I trusted immensely, was wrong.*

Q. Let me re-pose the question. Did you accept the explanation which was given?

A. Not initially, in my own mind. But by May 2006 when I signed that letter, the answer is yes." [emphasis added]

274. I have already set out the reasons why I approach the evidence of Mr Petley with considerable caution. In my view his oral evidence is not supported by the contemporaneous evidence. Rather the telephone conversation with Mr Petley and Mr Whiting on 2 May 2006 (only 2 days before the letter) is contemporaneous evidence that Mr Petley did not accept the explanation which had been given and that ECU had decided not to pursue the matter for commercial reasons. The relevant extract is as follows:

> *"MP: The board's view is that – or shall I just say we concluded that it's time to draw a line under this. There are all sorts of pros and cons, and –*
>
> *SW: Well, look, I – yeah. I mean, I think, between you and I, the – the major reason for both of us drawing a line under this is that, you know, it is – it's probably a very profitable business for both of us and is not something that either of us would – would probably benefit from in the short term if we couldn't sort the problem out and –*
>
> *MP: No, I – I agree with that. But equally, sometimes there's a dismay where one feels that somebody has not behaved, perhaps, in accordance with the way things should have been done.*
>
> *SW: Yeah, yeah. No, I – I – and as I said to you, we'll all –*
>
> *MP: And we – we appreciated –*
>
> *SW: We'll always have a –*
>
> *MP: Yeah.*
>
> *SW: – difference of opinion there. But I mean that's something that we have to get on with, and – well, shall I – I tell you what, shall I –*
>
> *MP: But the – the important thing is – the important thing for us on this issue is our relationship with you –*
>
> *SW: Exactly.*
>
> *MP: – the private bank.*
>
> *SW: Yeah.*
>
> *MP: And we know and have always known and never had any doubt on the subject, that any misdemeanour or lack of duty of care or any – whichever way you might look at it, or any questionable issue that needed investigating –*
>
> *SW: Yeah.*
>
> *MP: – was – was not on your watch.*

SW: No, no. Sure, sure.

MP: And as such, we are not, if you like, prepared on – you know, on this – in this instance to go and hurt, you know, a very formidable ally –

SW: Yeah.

MP: – and a friend –

SW: Yeah.

MP: – in order to bring certain people to account…" [emphasis added]

275. In that conversation Mr Petley stated that:

"*the important thing for us on this issue is our relationship with you*".

This accords with the contemporaneous evidence of the conversation between Mr Naughten and Ms Chapman on 30 March 2006 referred to above, in which Ms Chapman referred to her notes of the last internal banking review and Mr Naughten said:

"Yeah, well I think it was kind of – it was a sort of – pretty much the consensus it was a no-brainer, really, in many ways because it's – there is nothing that could be done. And they have too big a kind of hold over us to be ever kind of rock the boat now. The biggest introducer and we sort of mess with that at our peril." [emphasis added]

It also accords with the evidence of Ms Chapman in her call with Ms Negre, also referred to above:

"we're agreeing because of the amount of business that we do"

276. In my view there is no reason to infer that the views of Mr Petley or ECU changed between the conversation on 2 May 2006 and the letter of 4 May 2006 (or from the earlier conversation on 30 March 2006). As for the letter of 4 May 2006 whilst it does say that ECU have decided not to pursue the matter further, it is notable that it does not state that the decision not to pursue the matter is in any way an acceptance of the response of HSBC or an acceptance of the findings of the investigation. I note that Mr Jones signed the letter but as already noted, has not given evidence to the court.

277. Mr Petley's evidence in cross examination was that:

"*Mr Alexander Jones and a number of my other colleagues felt it completely implausible that a number of senior legal and compliance people on both sides of the Atlantic would somehow get involved in some conspiracy to, you know, perjure themselves, if that is the right word, but in any way lie to cover up … what may have been some either an innocent or negligent miscommunication between the private bank and the investment bank or some sort of chancy behaviour by some cocky traders, perhaps*."

278. It was submitted for ECU that the ability to draw any inference (and thus properly to plead the claim) would have to be weighed against the fact that no wrongdoing was said to have been found by the HSBC investigation.

279. However the evidence shows that it is unlikely that the HSBC response would have been a barrier to concluding that there was credible evidence enabling a claim to be pleaded:

279.1. Mr Petley did not believe that HSBC had "*explicitly*" denied front running in that letter. Mr Romilly also thought that the letter did not "*really deny anything*" and "*was quite carefully crafted*".

279.2. Mr Naughten thought (even after the response had been received) they had "*a really good hand*" but his evidence was that the "*consensus*" was that there was nothing that could be done and HSBC have "*too big a hold*" over ECU.

279.3. Mr Jones has not given evidence but the only evidence we have suggests that he did not hold HSBC in high regard.

279.4. As discussed below, Mr Belchambers, a senior industry figure, was prepared to intercede on behalf of ECU. It seems likely that he was shown the HSBC letter and would have been aware that the investigation had been carried out: Mr Romilly expressly contemplated showing him the response and it seems unlikely that he would not have considered it given his involvement.

280. In relation to the submission for ECU that pleading front running would involve the implicit allegation that the bank had "*concealed the wrongdoing*" by "*falsely*" stating in its response to the complaint that there was no evidence of inappropriate execution of the orders, this is not a necessary inference from a plea of front running the January Trades or from the fact that, as stated in the response, "*extensive enquiries*" had been carried out. I note that Mr Petley in his witness statement (paragraph 119) only went so far as to state that there were grounds to believe that the misconduct had been "*covered up*" by "*an inadequate internal investigation*" and did not allege that the bank had deliberately concealed any wrongdoing. The fact that the "*detailed enquiries*" revealed no evidence of inappropriate execution of the orders is consistent with an honest response, albeit that Mr Petley now suggests it was the result of an "*inadequate investigation*".

281. As for the submission for ECU that the ability to draw an inference has to be weighed against the explanations given for the market movements given by HSBC in its response, these are considered below.

Available evidence-lack of trading data

282. Mr Petley's evidence in cross examination was:

"*By May [2006] I had reconciled in my own mind that I had nowhere to go. I had no evidence*."

283. For the reasons discussed above I approach Mr Petley's evidence with considerable caution. I note that the contemporaneous evidence in April 2006 would suggest that ECU believed that it did have "evidence" and there is no evidence to suggest that the evidential position changed between the response to the complaint and May 2006. In an email of 20 April 2006 Mr Romilly wrote to Mr Petley (amongst others):

"Anthony spoke to Alan Ramsay yesterday. AR said the bank was being "hard-nosed" about the matter and that he would revert to Anthony tomorrow.

I re-impressed on Anthony the strength of our relationship with the Private Bank and the impossible position they had been put in by the Investment Bank and that given the value of our business relationship with the Private Bank and the weight of evidence against the Investment Bank, being "hard-nosed" wasn't going to achieve anything, but an ex-gratia goodwill price improvement would." [emphasis added]

284. ECU submitted that the current claim in these proceedings was pleaded by reference to HSBC trading data obtained by way of pre-action disclosure and that without that data, ECU could only have sought to plead a claim by inference. It was submitted for ECU in oral closings that the court could not properly infer dishonest front running on the basis of the market data.

285. It was submitted for the Defendants that on the authorities the absence of trading data was not "*critical*". It might be critical to enable the court at trial to accept the claim as proved or not, but in order for the allegation to be launched that there had been manipulation of the market, ECU had evidence in the form of objective market data, namely the charts by which Mr Petley in his experience set so much store.

286. ECU submitted that the charts prepared by ECU:

286.1. gave no actual transaction information;

286.2. showed the movement in the market bid/offer prices, not whose buying or selling caused such movements;

286.3. gave no information as to the volume of currency being transacted by any particular counterparty or at all. (Closing Submissions paragraph 398)

287. As referred to above, when Mr Petley sent bar charts to Mr Brown with his email of 7 February 2006, Mr Petley said:

"*I think the price action illustrated is pretty conclusive of our position*."

288. In cross examination Mr Petley confirmed that he prepared the charts using CGQ (a charting analytical programme). He also confirmed that the charts showed midpoints on bids and offers and not trades but his evidence was that from the bid and offer information one can see price action in the market. His evidence was that if there is a dramatic spike or trough in price action that suggests that something is driving the price in the relevant direction: it could be a data release or dealers pushing the price.

289. In relation to the trade on 31 January 2006 ECU placed the Stop Loss order at 17:04:00, with instructions for the order to be "Valid only from 19:45 GMT 31/01/2006". It was executed at 19:49:59 on 31 January 2006. It was Mr Petley's evidence in cross examination that given that he knew that of ECU's banks, only HSBC had an order which only became live at 19.45, he considered that this graph was (inferential) evidence that it was HSBC who was driving up the price.

290. In an email to Mr Whiting on 8 February 2006, copied to amongst others Mr MacKinnon, Mr Hughes, Mr Romilly and Mr Jones, Mr Petley largely reproduced the email to Mr Brown and repeated the statement:

"*I think the price action illustrated is pretty conclusive of our position*."

291. Mr Petley was asked in cross examination about the transcript of the conversation between Mr Romilly and Ms Zarbafi in which Mr Romilly referred to "charts". It is likely given the context that the reference is to the charts sent by Mr Petley to Mr Brown. Mr Petley's evidence was as follows:

"Q. *We can see that at this time, from looking at that paragraph, that Mr Romilly considered that these charts were evidence of front running?*

A. Yes, that seems to be his opinion.

Q. You shared that opinion at the time, did you not?

A. I did.

Q. Indeed as we have seen from the correspondence you had with the bank, thought they were pretty conclusive of front running, didn't you?

A. I thought that somebody somewhere had front run those trades, yes

Q. Somebody somewhere at HSBC Canary Wharf or somebody at HSBC New York. That is what you thought at the time, isn't it?

A. I thought that was the greater likelihood but I didn't completely divorce perhaps the possibility of somebody else having done it either with or without a tip-off from the bank."

292. As noted earlier when assessing the credibility of Mr Petley's evidence, Mr Petley accepted in cross examination that:

"...as at 7 February all my focus was on HSBC, correct."

293. It was put to Mr Petley that Mr Belchambers was only going to see HSBC *"because at that time it was HSBC that you thought was the guilty party?"* which he accepted.

294. I note from this exchange that Mr Petley did not dispute that the charts were evidence of front running but merely sought to say that another bank could have been responsible. I also note that Mr Petley described what he could see through CQG or Bloomberg as the midpoint between the bid and offer spreads given by multi major banks in the foreign exchange industry and described this as "*technically indicative but very, very precisely indicative of the majority of the major players transacting foreign exchange*"

295. ECU submitted (paragraph 398.1 of Closing Submissions) that counsel would not have been able to plead the relevant claims in 2006 as (amongst other things) ECU had "*no evidence of the actual trades HSBC had transacted prior to the trigger*." ECU referred to the evidence of Mr McEvoy in cross examination as follows:

"*Q.* "*for example, if you want to examine the proprietary of a particular trade to see if had been front run or whether there had been margin added or something of that sort, you need to see the blotters and P&L, don't you*?"

1. Well, yes, I guess you would in those ... yes.

Q. Without that information, which obviously is confidential or may be confidential, then an outside party can't know the circumstances of a particular given trade?

A. Correct" [emphasis added]

296. In this case the pre-action disclosure gave ECU trading data for some but not all of the trades. However the blotters (described by Mr Brown as the "*record of the individual transactions done by a trader*") have not been retained and were therefore not disclosed. ECU seeks to persuade the court to accept its substantive claim even though the blotters are not available on the trial of this action. I do not therefore accept that the claim could not have been pleaded without the blotters being available.

297. ECU also point to the absence of trading data in 2006 and the evidence of Mr Brown in this regard. In cross examination it was put to Mr Brown:

"*The only party that knew with any confidence as to how HSBC had executed the stop loss orders was HSBC itself*?

Mr Brown responded:

"Inasmuch as they had access to the information of the trade data, yes.

Q. Yes. And without that, there was no way of knowing how the trades had been executed, correct?

A. Erm, that is correct."

298. However I note that even though trading data was obtained through a pre-action disclosure application (as referred to below) the data available at trial is incomplete. At paragraph 6 of the Joint Report the experts stated:

"*Mr Gladwin and Mr Moore agree that there are limitations to the HSBC trading data (including the Dealhub (HBEU) and TREATS (HBUS) data), and it is likely the HSBC data is incomplete and excludes the trade record resulting from the ECU order and the trade records for other customer orders. This means that it is not possible to be certain on the conclusions related to this data*."

Again however ECU seeks to persuade the court to accept its substantive claim even though the data is incomplete.

299. Further even in the absence of trading data in his report, Mr Gladwin was prepared to draw inferences on Trade 11**.** At page 183 of his report Mr Gladwin stated that for that trade:

"*No Hong Kong and Shanghai Bank ("HBHK") trading data has been disclosed by the Defendants so I cannot use HBHK's recorded trades to estimate prevailing market prices. No Reuters trading or price data available*."

300. At paragraph 2.4.1 of his report for this trade (p206) Mr Gladwin stated:

"…Whilst I do not have access to the trading data showing the specific activity of HBHK's traders, I conclude that HBHK must have traded ahead of the trigger. This inference is based on (i) the confirmation in the contemporaneous audio recording that HBHK executed the order overnight, (ii) the EBS data showing that most trading activity in both USD/CHF and EUR/CHF happened ahead of the trigger, (iii) the substantial size of ECU's order compared to the prevailing liquidity conditions, and (iv) the highly suspicious contemporaneous price action in the relevant currency pairs, resulting in the increase in GBP/CHF in the short period before the trigger followed by its fall swiftly after the trigger."

301. It was submitted for ECU in oral closing that the inference in this trade is drawn from the fact that we know from the trading data that HSBC traded ahead in relation to "*almost every trade*" after Trade 2. It was submitted (paragraph 398.7 of Closing Submissions) that ECU did not have any HSBC trading data from any other ECU trades that it could use to support the inference of wrongdoing in relation to the January Trades and in particular that HSBC traded ahead and front ran "*many of ECU's orders*".

302. I have discussed elsewhere the admission of Mr Brown in relation to trading ahead of orders. I have also discussed below the inference which could be drawn from the "*coincidence"* of the three January Trades. In my view the significance of Trade 11 in this context is that from the report it is clear that Mr Gladwin is able to draw conclusions without HBHK trading data, based on the activity in the market leading up to the trigger, the size of the order compared to the prevailing liquidity conditions and the "*suspicious*" price action of an increase in the price shortly before the trigger followed by a fall swiftly after the trigger. All of these are matters which could and did enable professionals at ECU to draw conclusions of front running in 2006 and would have enabled counsel to plead a case in 2006.

303. Further even where there has been disclosure of trading data, the experts have not been able to reconstruct the traders' positions and do not know precisely what other external factors were affecting the market. Accordingly to reach their conclusions, the experts are having to draw inferences (and in most of the trades are able to do so) from the available data and without having the complete picture. Paragraph 36 of the Joint Report states:

"As explained in paragraph 6, there are limitations to the data disclosed by HSBC that prevent a full reconstruction of the trader position. It is also not possible to know with certainty, at this distance in time, precisely what other factors (such as economic releases, world events, etc.) were affecting the trajectory of the FX market at the time of every ECU order execution. In some instances, it is possible to identify economic releases or world events based on communications and other records." [emphasis added]

304. As set out above ECU did not have to be able to prove its case in 2006 before it would have knowledge sufficient to satisfy the "pleading test" for the purposes of section 32. In order for ECU to have material on which a case could properly be pleaded, ECU did not have to be able to establish with certainty what other factors were affecting the FX market

at the time. Noting the limitation in paragraph 36 of the Joint Report, it could be said however that ECU in 2006 were better placed than the experts in 2021 to know what other factors were affecting the trajectory of the FX market at the time of execution of the ECU orders.

305. In relation to the Stop Loss Order on 31 January 2006, Mr Petley's rationale for placing the time condition on HSBC was said by him in cross examination to be the need to wait for the market to absorb the announcement of the US interest rates at 7.15pm. This evidence would suggest that in the opinion of Mr Petley the immediate volatility caused by the US interest rates was not the reason for the Stop Loss Order on 31 January being triggered. His evidence was:

"*As I recall, it was because the HSBC order was for one single bank, pretty well half of the entirety of our book, and we wanted to ensure that a very large order at a thinner part in time, advancing perhaps our concern that large orders were becoming a magnet, that that would not be triggered until a good half an hour after a known event that was a news event was coming out at 7.15, I recall, pm. So sometimes volatility in the market in the immediate aftermath of any announcement, which I believe was regarding US interest rates, would not trigger prior to or be active until 7.45 pm, thus half an hour later*" [emphasis added]

Inferences from available data

306. As noted above, ECU submitted that "*circumstantial market data*" would not amount to evidence sufficient to enable its case to be pleaded in 2006. ECU relied on *Three Rivers v Bank of England* [2003] 2 AC 1 at [186]:

"It is not open to the court to infer dishonesty …from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty and this fact must be both pleaded and proved".

307. Accordingly it was submitted for ECU that the correct test is whether on the basis of the primary facts pleaded the inference of dishonesty is more likely than any honest explanation.

308. ECU relied on *King v Stiefel* [2021] EWHC 1045 at [378] as authority for this proposition. Paragraph 378 of the judgment in that case is in fact a cross reference to the judgment of Birss J in *Barrowfen Properties v Patel* [2020] EWHC 1145 (Ch), at [7], which in turn is a summary of Flaux J in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm). It is therefore helpful to set out the test as formulated by Flaux J at [20]:

"*The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge."* [emphasis added]

309. It was further submitted for ECU that (Closing Submissions paragraphs 398.5 (2), (6) and (7)):

309.1. whilst the bid/offer data showed the market moving towards the trigger and falling back thereafter, this did not give rise to a more likely than not inference of front running, still less front running by HSBC.

309.2. HSBC's contemporaneous reaction is that it did not regard such market data as evidence at all, since it concluded that there was "*no evidence of inappropriate execution of the orders in question"*.

309.3. Market movements could be explained by external market factors and large customer orders and other banks trading ahead or front running.

310. Dealing with the submission that HSBC did not regard the market data as evidence, the response from HSBC stated:

"*Our detailed enquiries have revealed no evidence of inappropriate execution of the orders in question. We are fully satisfied that the FX Desks were not responsible for price manipulation or front-running of the company's orders. We are also satisfied that there was no evidence that the FX Desk failed to comply with any aspect of the specific client instructions*…"

311. When the HSBC response is considered in its entirety, I do not accept the submission that it can be inferred from that letter that HSBC did not regard such market data as "evidence". Although HSBC concluded there was "*no evidence of inappropriate execution of the orders in question*" it would seem from their letter that HSBC did not reject the market data but sought to address the market data relied upon by ECU.

312. The letter set out the allegation by ECU that

"*the FX Execution Desk of the Bank may have been responsible for the price movements observed in the market prior to ECU's stop-loss orders being triggered, by engaging in some form of order book management. In particular you state that you observed a 'swift and violent move towards the stop-loss levels soon after the orders were placed' and that the FX Desk was directly responsible for this market movement..."*

313. The letter then in effect responds to the "price movements" in relation to the trade on 6 January noting:

"Both the HSBC activity chart and the Market Activity chart show a significant leap in EUR/USD activity after 13:00 on the date in question. Further to this, external issues on the US non-farm payroll data had a direct impact on the market."

314. In relation to the trade on 31 January 2006 HSBC noted that:

"Significant price volatility was observed in the market as a whole on January 31st as a result of the FOMC announcement at 19:13, which affected liquidity in the late afternoon."

315. Although HSBC concluded that HSBC were not responsible for price manipulation or front running, it cannot be inferred from the letter that HSBC did not regard the market data as "evidence".

The totality of the evidence available

316. The question whether in 2006 there was credible evidence to plead a case in fraud has to be considered in the light of all the evidence at that time, including but not limited to the market data and the inferences which could be drawn from that evidence.

317. It was submitted for ECU (paragraph 392 of Closing Submissions) that the question is not whether Mr Petley considered the evidence to be strong evidence but whether, taking an objective view, the allegations could be properly pleaded.

318. In my view an objective assessment in 2006 as to whether the evidence justified an inference of front running by HSBC would take into account the views expressed by experienced FX professionals in Mr Petley, Mr Hughes and Mr de Klerk.

Views of Mr Petley, Mr Hughes and Mr De Klerk

319. Mr Petley had long experience in the currency markets having co-founded ECU in 1988 and serving as its Chief Executive (until 2003) and its Chief Investment Officer until 2008. His role in the MCDMP was to "*formulate and set the currency trading strategy*" with Mr MacKinnon. The evidence of Mr Petley's views in 2006 (as set out in the contemporaneous documents) as to the value of the data which was available and the inference of front running which could be drawn from the data and the circumstantial evidence were as follows:

319.1. Firstly, the market data showed the rapid rise in the market following the stop loss orders being placed. In his call with Mr Rumsey on 1 February 2006 Mr Petley referred to the fact that:

"*You are probably aware that when, in the last 3 stop orders given over to you, within a matter of minutes even though those distances were some way away, it was a matter of minutes rather than any hours or even half hours, or quarter of an hour, those, those levels had been hit*."

In relation to the trade on 31 January 2006 Mr Petley observed to Mr Rumsey that;

"*It went down, I mean, as I said, at, at quarter past, after the Fed's announcement we were in the range between 1.0225 and 1.0245 and so and then, in the, sort of, immediate aftermath and then as the, it just, it just went ballistic in the… minutes around 19:45."* [emphasis added]

319.2. Secondly, Mr Petley could see from the market data that the market hit the stop loss level and then stopped and fell back which, in his view, of itself suggested someone trading ahead with knowledge of the order. Mr Petley said:

"*…The canny, uncanny thing about the last three stops is not so much that, that the velocity to which, having given the order, it's got up there, but the fact that it has taken the stops out and that has been the high. Three times in a row*."

I note that this is consistent with Mr Petley's analysis on Trade 15 in his call with Mr MacKinnon on 17 February 2005 set out above:

"*I can't believe you can trade even half a billion at 54, which was the trigger... And to see only a two tick move…That, I don't believe is possible. Which means either somebody's. .. HSBC or somebody is thinking you know, we'll trade it earlier...."*

319.3. Thirdly, the level at which the stop loss order was to be triggered in relation to the 31 January 2006 order was not at a level which in the view of Mr Petley would naturally attract dealers in the market who were trying to anticipate or "hunt" stop loss orders:

"*…the level that I had chosen on CAD/ Swiss was not, not a big technical level by, by any means at all. This time round it was just not a key, key level, it wasn't an anything, so it wasn't as if, to me, that I would have thought there should have a been a lot of market participants looking at that and thinking oh, you know, we should be buying CAD/Yen through here…"*

319.4. Fourthly, in relation to the order on 31 January 2006, Mr Petley considered it significant that the other banks had not been given a stop loss order by ECU which only became effective at 19:45, only HSBC had such an order and it was only after 19:45 that the market reacted:

"…we were sitting there quite happily minding our own business and then, you know, this magical time of, of, of, you know, 19:45 looms and <u>all of a sudden there's an almighty move in something that was, you know hitherto that was quietly minding its own business and it just looks so illogical</u>, the thing goes up one percent, stops dead in its tracks and then comes straight back down again." [emphasis added]

319.5. Fifthly, Mr Petley had regard to the size of the stop loss order in the relevant currency pair and the market movement he would have expected to fill the order once the trigger had been hit:

"…on each of the last market order transactions due to the size of the position that we might be looking to put through, in, in very much, sort of, prime time, London dealing hours, how it is that we can be taking, you know, the best part of an hour or an hour and a half to clear through something to ensure that we don't make a market impact and even then, you, know, one is making a bit of a market impact and yet, on the one hand, and yet we can do <u>on the stop basis, there can be something which is, sort of, three times the amount all travelling through at once, at a single price, and in a, in a sort of known or volatile pair and yet that is the extent of it is the level of the stop, give or take a few ticks</u>." [emphasis added]

319.6. Sixthly, although some of the factors related only to the trade on 31 January 2006, Mr Petley had regard to the "*coincidence*" of what occurred in relation to the 3 January Trades in his call with Mr Rumsey on 1 February 2006:

"...but I have to say that <u>unless there are an awful lot of coincidences</u>, sort of, come about as of late, it does appear, on the face of it, that a, you know, a good degree of front running is occurring on these stops…

> *But the, the interesting thing is that within 2 minutes, only, of, on the time stamps of, of your guys being given the transaction, we have seen three extraordinary spikes, that have gone straight, straight, to the stop level. They have all been half a percent, or more, half to one percent away from the market price when, when issued and yet we have seen a market price that has gone straight up to the stop, a smidge through it, but nothing to write home about and then straight back in the range and it, it just, something is going wrong, it can't be such a coincidence. Three in a row? I mean, I think to myself, what are the odds of that? I have been running stops for 15 years and it is a new phenomenon and I just, I don't know how to explain it away."* [emphasis added]

320. On the evidence Mr Hughes also inferred from the market data and the circumstantial evidence that HSBC had front run the orders.

321. I have set out above the expertise of Mr Hughes and my assessment of his credibility. It is somewhat surprising to note that in their Closing Submissions ECU sought to circumscribe the weight to be given to the evidence of their own witnesses.

322. ECU submitted (paragraph 46.4 of Closing Submissions) that the evidence of Mr Hughes (and Mr de Klerk) whilst "*useful and largely helpful*" to ECU, "*self-evidently bears less closely on the key issues*" and the Court "*will take that very much into account when deciding what weight to give to aspects of each witness' evidence when he stepped outside the realm of his true expertise*" [emphasis added].

323. This submission was then developed later in ECU's Closing Submissions (paragraph 392.3) when addressing the lack of trading data, when it was submitted that Mr Hughes was "*not an expert FX trader*" and he had "*not ever acted as a full time FX trader, but rather only had some experience of covering for spot traders on holiday*".

324. In his witness statement Mr Hughes stated:

> "*My role as Head of Trading was to provide short term 'colour' on the currency markets based on my background as an FX trader and through my daily contact with bank traders and marketers. Mr Petley and Mr MacKinnon could then build a complete market picture, before deciding what orders should be placed, by combining my short-term analysis, Mr Petley's short-, medium-and long-term technical indicators and Mr MacKinnon's comprehensive economic analysis."*

325. Although prior to joining ECU Mr Hughes had not been a "*full time FX trader*", in my view it is to adopt an overly narrow view of Mr Hughes' experience in the currency markets to suggest that Mr Hughes could not give credible evidence on what he saw in the market at the time of the relevant trades and what inferences he drew. He had been a currency options trader and an FX rates and derivatives marketer. As set out in his witness statement his role at ECU was to advise ECU on what was happening in the currency markets. There is no evidence to infer that Mr Hughes was not qualified to carry out his stated role at ECU to analyse the markets. To the extent that ECU seek to submit that Mr Hughes was not well placed to understand and interpret the spot FX market, I reject that submission on the evidence. In my view his evidence is credible evidence which falls to be considered in relation to the state of knowledge of ECU in 2006 and which would have been part of the body of evidence available to any counsel who was asked to plead the claim in 2006.

326. As regards the substance of that evidence, notwithstanding the submissions for ECU apparently to the contrary, Mr Hughes' evidence did not relate solely to the "fills" on one of the January trades. His evidence in his witness statement was that:

"*In January 2006 I and my colleagues at ECU developed concerns regarding unusual price movements in market in respect of three orders placed with HBPB on 5, 6 and 31 January 2006. Mr Petley, Mr MacKinnon and I had been monitoring the markets and when the fills were reported for the January 2006 Orders, I was concerned as to whether the orders had been properly executed, given the market movements we had observed. There were a range of possibilities for the unusual price movement and we did not know for certain what had happened as we only had access to publicly available trading data"* [emphasis added]

327. Mr Hughes' evidence in cross examination in this regard is set out above. His concerns were the "*coincidence*" that very soon after placing the orders the markets started to move quickly in the direction of the stop loss orders as well as the levels at which the orders were filled. His evidence was clear:

"I know exactly what I thought and I am afraid, my Lady, I did think the worst of the banks."

328. As set out above, Mr Hughes referred in his witness statement to the "*range of possibilities for the unusual price movement*". However in cross examination his evidence was more direct:

"*Q…So when you say there were a range of possibilities, and you didn't know for certain what was happening, as far as you were concerned you thought the worst of the banks and you thought that they were engaged in market manipulation, is that correct?*

A. Yes. I think that is probably fair. I didn't have too many other explanations for what I saw within the markets and then when I saw the rates at which we were filled, that did nothing to dispel my suspicions.

Q. Yes.

A. In fact, it only helped to make them worse, really." [emphasis added]

329. Mr Hughes was asked in cross examination about paragraph 29 of his witness statement in which he said:

"*While I had my suspicions about the January 2006 Orders, we had no evidence of any wrongdoing*."

330. Mr Hughes was asked in cross examination to explain what he meant by the word *"evidence"*. He replied:

A. Erm, I could find no trades which showed that HSBC had been buying whatever the order was now, CAD/YEN or euro/yen or euro/dollar, in front of our trades, because we weren't privy to that sort of market information and I wasn't sitting obviously with HSBC when they executed it and they obviously weren't inclined to show us that sort of information. All I had was my gut feeling and an instinct and a knowledge that, particularly on one of those trades, there was just no way -- I mean just no way they

could have given us that fill if they didn't already have the currency to give us. There was just --it was, in my opinion, beyond belief.

Q. Yes. So in your experience from your time in the City with various institutions, and from acting as you had at ECU, your opinion was this was unbelievable and must be attributable to some form of wrongdoing, is that correct?

A. In my opinion, that is all I could -- that is where I went with all my thoughts.

Q. Yes. What you are saying is by evidence you meant that you didn't have any internal documentation from HSBC, is that correct?

A. Yes." [emphasis added]

331. ECU submitted (Paragraph 392.3 of Closing Submissions) that Mr Hughes' evidence that the level at which the order was filled on 31 January 2006 meant that HSBC must have traded ahead should be in effect discounted. It was submitted that there are other explanations which could account for the bank already having the currency.

332. Firstly, as discussed above, I do not accept that the evidence of Mr Hughes (ECU's own witness) should be rejected because he was "*not an expert FX trader*".

333. Secondly as this was ECU's witness it was not put to Mr Hughes (as now submitted for ECU) that his belief concerning the bank having purchased the currency ahead of the trigger was not supported by others within ECU nor was it put to him that Trade 18 is an illustration that a fill can be very close without any pre-hedging. (I note in passing that Trade 18 was executed in a very different market in terms of liquidity.)

334. Thirdly I note that support for Mr Hughes' opinion can be derived from the evidence of Mr Moore: in cross examination his evidence was:

"...it is clear to me, if you start from the basis that HSBC had the biggest orders, by far and away the biggest orders, two times, three times, ten times, multiples of the next order, ..., and if the hypothesis is that nobody should trade ahead, HSBC will always be providing the worst fill because they have a significant multiple of most at least two times all the other providers. What you see [from the table] is that their fills, I think four or five of the best, I think four of the worst although I think we discount, three are the worst and then some are in the middle. The fact that they are not the worst is the benefit of the pre-hedging because there is no way across the whole they could be providing the best fill if everybody has waited and HSBC has to buy multiples of the next or multiples of the smallest ones."

The table in Mr Moore's report referred to above shows that for the trade on 31 January 2006, HSBC was 2/6 that is, it provided the second tightest fill whilst according to the evidence of Mr Moore above, HSBC should have provided the worst fill.

335. As to the weight to be given to the views of Mr de Klerk, as referred to above, Mr de Klerk originally joined ECU in or around September 2001 as an authorised Foreign Exchange Trader and Analyst. His evidence (paragraph 13 of his witness statement) was that:

"*Although the MCDMP methodology and the terms of the orders were determined by Mr Petley and Mr MacKinnon, I worked closely with the Investment Committee and had a good understanding of the strategy of the MCDMP and the individual orders placed*."

336. His evidence (paragraph 26 of his witness statement) was that his role was to monitor the orders that were placed:

"*At ECU I had a Bloomberg screen, on which I followed the markets. This information was used to monitor the movement of the markets when we had placed orders. Part of my role was to make sure that the execution of orders was done properly by the Lenders' trading desks. If I had a concern I would raise it with Mr Petley and Mr MacKinnon, although they also had Bloomberg screens and monitored the markets themselves, so they would generally also be aware of any issues*." [emphasis added]

337. I infer from this evidence that Mr de Klerk believed that he was both competent to police the orders, and able to do so, by monitoring the market movements on his Bloomberg screen.

338. In relation to the January Orders his evidence (paragraph 46 and 47) was:

"46. Around this time, I was aware of concerns and suspicions within ECU that HBPB might have engaged in 'front running' of ECU's orders. I was monitoring the orders and I was suspicious as to what had happened with HBPB because of how quickly the January 2006 Orders were executed after being placed. By 'front running', I meant that I suspected they could be buying currencies ahead to trigger the orders at a certain level and sell them back to us; however I believe the term 'front running' was also used more loosely or to simply describe trading ahead.

47. I was party to some internal discussions about these suspicions, including with Mr Petley and Mike Hughes, although due to the passage of time I am unable to remember specific conversations and dates. My role in these discussions was to present the data from the HBPB orders and fills, and based on the limited evidence available, and the experience of others within ECU, we would try to work out what might have happened with the execution of the HBPB orders. Without evidence as to the actual trading HSBC had undertaken, I felt it was difficult to form any concrete opinion." [emphasis added]

339. As set out above, in cross examination, although Mr de Klerk said that there was a "*wide array of beliefs and suspicions*" within ECU, he accepted that his "*personal view*" was there was front running and that Mr Hughes shared that view. He also accepted that the explanation he offered at the time was that the banks had been front running the orders. His evidence was:

"*A. That seemed entirely possible to me.*

Q. Yes, and it seemed entirely possible to all your other colleagues, didn't it?

A. Yes."

Involvement of Mr Belchambers

340. Apart from the collective and cumulative evidence of the views which these experienced individuals within ECU formed based on the data available, there is also the involvement of Mr Belchambers and the inferences which can be drawn from his involvement.

341. Mr Belchambers at the material time was the Chief Executive Officer of the Futures and Options Association. As is clear from the contemporaneous evidence, Mr Belchambers only became involved after ECU had received the "official response" from HSBC. Mr Petley sent an email on 14 March 2006 in which Mr Petley circulated within ECU the response from HSBC and suggested that ECU should consider very carefully what they did next. Mr Romilly responded to that email in an email of 14 March 2006 to Mr Petley proposing that Mr Belchambers could get involved. He wrote:

"Andrew Belchambers, CEO of the FOA, is coming for lunch next week. He's a good friend and would I'm sure be happy to read HSBC's response and give us some informal guidance."

342. Mr Romilly then appeared to follow this up in an email of 22 March 2006 to Mr Jones and Mr Petley in which he said:

"*It occurs to me that Alan Ramsay, Head of Compliance for Investment Banking & Markets, at HSBC, is on the board of the FOA…*

Alan was formerly at the FSA where I always found him to be straightforward and helpful. I'm going to be out tomorrow morning and wondered if it might be a good idea for the three of us to meet this afternoon to discuss tactics and what, if anything, we want to say about this to Charles and Anthony?..."

343. In the transcript of a call on 16 March 2006 with Ms Zarbafi, Mr Romilly provided further detail as to the role of Mr Belchambers:

"CR: Well basically what Mickey has done is he's printed out charts and he's pointed out…

GZ: Yeah I saw all of that.

CR: And it's an absolute disgrace and the key to it is that whenever I was getting trouble from the FSA generally because they sent round somebody who simply didn't understand our business and then started writing rude and threatening letters, I'd pick up the phone to a guy called Alan Ramsey who was a sort of director of FSA simply because I liked him and I found him reasonable and straightforward. Anyway Alan is now, he's a director of HSBC and he's Head of Compliance at the Investment Bank and he also sits on Antony's board at the FOA so I kind of put two and two together and what we all agreed would be a good way forward is Antony's gone away with the evidence and he's going to go and see Alan and just say look I know these guys well, they are very angry and very upset at the way they've been treated and I don't think you want this going public. I think it's going to look very very bad indeed because front running is kind of a hot potato at the moment.

…

It's all over the MIFID stuff. Antony's just going to say you need to revisit this because you know they're good guys, they're not asking for any money, it's their clients who have been disadvantaged but you wouldn't want these images being banded around because it doesn't look you know.

…

…And the letter, did you see the letter, the letter doesn't actually really deny anything and was quite carefully crafted and we said look the one thing we don't want to do is beat up the guys at the private bank, you know, we don't want them getting upset, we don't want them put in the middle but we do want Alan Ramsey to come and look at the evidence and have a conversation you know, and the way we would like it presented back to the private bank is that they've further reviewed it and on reflection they do think that an ex gratia payment is due to the clients…"

344. Mr Romilly provided an update on Mr Belchambers' involvement in an email of 27 March 2006 in which he told Mr Petley:

"*I saw Anthony on Saturday. He has spoken to Alan Ramsay. Alan knew all about our dispute and said their investigation was ongoing. When Anthony described what he had seen Alan said he would ask for the complete file..."* [emphasis added]

345. Mr Petley's evidence in cross examination was that ECU was just seeking to get Mr Ramsey to check for himself the findings of HSBC. As referred to above when evaluating the credibility of Mr Petley's evidence in general, Mr Petley sought to present a picture of Mr Belchambers' involvement which is at odds with the contemporaneous evidence including the conversation of Mr Romilly with Ms Zarbafi and the reference to an ex-gratia payment and I do not accept it.

346. The contemporaneous evidence shows that there was then a further update from Mr Romilly on 20 April 2006 in an email to Mr Petley and Mr Jones:

"Anthony spoke to Alan Ramsay yesterday. AR said the bank was being "hard-nosed" about the matter and that he would revert to Anthony tomorrow.

I re-impressed on Anthony the strength of our relationship with the Private Bank and the impossible position they had been put in by the Investment Bank and that given the value of our business relationship with the Private Bank and the weight of evidence against the Investment Bank, being "hard-nosed" wasn't going to achieve anything, but an ex-gratia goodwill price improvement would."

347. Mr Petley's recollection in cross examination was that the matter went no further and they "*drew a blank*".

348. The involvement of Mr Belchambers on behalf of ECU is significant. It is surprising that Mr Petley made no reference to Mr Belchambers in his witness statement, notwithstanding the emails which were sent to him by Mr Romilly in relation to Mr Belchambers and the evidence of Mr Romilly that Mr Belchambers should approach Mr Ramsey which "*we all agreed would be a good way forward*". In my view one can infer from the fact that a senior industry figure was persuaded to intercede on behalf of ECU, that the material relied on by ECU and provided to Mr Belchambers as "*evidence*" was

sufficient to persuade Mr Belchambers not just to give "*guidance*", as suggested in Mr Romilly's original email to Mr Petley, but to go further and to intervene on behalf of ECU by contacting a director of HSBC and Head of Compliance. According to the contemporaneous evidence, it was contemplated that Mr Belchambers would go so far as to warn HSBC that they should consider an ex-gratia payment as "*you wouldn't want these images being banded around because it doesn't look [good] you know*".

349. As noted above, it was submitted for ECU that HSBC had said that it had conducted a "*full and thorough investigation both in London and in New York*" and the ability to draw any inference would have to be weighed against the contents of that letter, including both the explanations given for the market movements and the fact that no wrongdoing had been found after an extensive investigation independently checked and verified by the compliance departments in both New York and London. It is significant in my view that Mr Belchambers was prepared to intervene notwithstanding the response from HSBC and according to the contemporaneous evidence of Mr Romilly's call with Ms Zarbafi was prepared to seek on behalf of ECU an ex-gratia payment for the perceived market abuse (implicit in the reference to "*MIFID*").

Other evidence

350. As well as the available data and the inferences which could be drawn from that data, there was other evidence which existed in 2006 which could be taken into account in deciding whether there was sufficient credible evidence to plead the claim in front running:

350.1. Admission by Mr Brown of trading ahead;

350.2. The "trap" in relation to the Trade on 31 January 2006.

351. Although there is a separate claim for trading ahead, it is also relevant to consider in the context of front running the alleged admission by Mr Brown that there had been trading ahead of the ECU orders. In his email of 14 March 2006 sending the "*official response*" of HSBC to the ECU directors, Mr Petley wrote:

"*In essence, I believe Andrew Brown (who had already openly admitted front running our orders) has been silenced and now prevented from dealing with us direct in this matter…*"

352. Mr Romilly responded to Mr Petley and other ECU directors:

"*You're absolutely right about Andrew Brown. In the meeting he clearly stated that they started buying into the stop loss level rather than waiting for the market to trade there*."

353. It was submitted for ECU (Closing Submissions paragraph 392.4) that:

353.1. Mr Brown only discussed "*in general terms*" how he would expect a large stop loss order to have been executed and did not know how at least two of the trades were executed.

353.2. The meeting note does not refer to ECU having been told HSBC had traded ahead of the January Orders; and

353.3. The "*general conversation*" was superseded by the HSBC response.

354. Mr Petley's evidence in his witness statement (paragraph 99) was that:

> *"...whilst Mr Brown was clear that he could only speak in generalities, the ECU team and I left the meeting with the shared impression that Mr Brown had suggested that HSBC had traded ahead of ECU's January 2006 Orders for what he considered to be legitimate order management purposes."* [emphasis added]

355. In its Closing Submissions ECU appeared to disregard this evidence of Mr Petley. In my view whilst in general the contemporaneous documentation is more likely to be reliable than the evidence of Mr Petley for reasons discussed at the outset of this judgment, it is notable that even the evidence of ECU's principal witness is to the effect that HSBC had "*suggested*" that HSBC had traded ahead of the January Trades.

356. In cross examination Mr Petley attempted to distance himself from Mr Romilly's evidence on this issue stating that in his email Mr Romilly was "*speculating*" and that was not his "*understanding*".

357. Mr Petley in his witness statement sought to explain his own statement in the contemporaneous documentation of the email of 14 March 2006 stating that:

> *"...consistent with the meeting note prepared on the day (which does not refer to any admission ...), I think this may have overstated the position as I do recall Mr Brown being clear he had not yet seen any trading data relating to the January 2006 orders*."
>
> In cross examination in an attempt to explain this statement Mr Petley said: "*I don't think it is based on the content of that document, it was an overstatement from my recollection where I was pretty clear that they -- or Mr Brown had not referred directly to the three trades themselves*."

358. The contemporaneous evidence of Mr Romilly's email suggests that Mr Brown did accept at the meeting that HSBC had traded ahead of the January Trades.

359. The meeting note referred by way of background "*History of deal execution*" to HSBC having been forced to adopt a strategy of trading ahead in order to get tight fills. The relevant section read:

> *"There is a history of dissatisfaction on the part of ECU with HSBC deal execution, resulting in a number of meetings between MP and ourselves. At first we found that HSBC were executing stop loss orders at levels that compared unfavourably with fills elsewhere. On several occasions MP would demonstrate that his other counter-parties filled orders very close to the stop loss trigger, whereas we were consistently higher (lower).*
>
> *It appeared as though other banks were operating on a different basis to us, in order to achieve a close fill, rather than protecting the price level, although there was no way that we could evidence this. MP was not prepared to accept this premise and would repeatedly ask for disclosure of HSBC fx contracts to justify the price given. Needless to say, we were unable to oblige. Given these concerns, orders were subsequently managed to produce a 'tight' fill for the client. <u>Because of the large</u>*

> *bid/offer spread on a sizeable trade, this would have required some dealing ahead of the price trigger to protect HSBC from significant loss."* [emphasis added]

360. Although the section of the note dealing with the meeting itself does not refer expressly to whether ECU were told that there was trading ahead of the three orders and does refer to the advice from Compliance not to discuss the three trades, the note is not inconsistent with the evidence in the contemporaneous emails that Mr Brown admitted that orders were traded ahead, given the acknowledgement in the note that there had been a change in order management after Mr Petley's complaints and that sizeable trades required some dealing ahead of the price trigger.

361. ECU submitted that the contemporaneous evidence of Mr Romilly must be read as "*referring to the conversation in general terms*" and/or is "*overstatement*". Mr Romilly did not give evidence on behalf of ECU so the court was not able to form a view on Mr Romilly and the likelihood of overstatement. (In passing I note that it is somewhat striking that Mr Romilly appears to have been almost entirely ignored in ECU's Closing Submissions although he features on numerous occasions in the Defendants' Closing Submissions.) However I note that there is further contemporaneous evidence in the form of a call between Mr Romilly and Mr Petley on 14 March 2006 where Mr Romilly appeared to refer Mr Petley to the statement in his email that Mr Brown had stated that they were buying into the stop loss level and Mr Petley made no attempt to rebut or object to what Mr Romilly had said.

362. ECU also sought to rely on Mr Brown's evidence in cross examination as support for their submission that Mr Brown only discussed matters in general terms. Whilst I have concluded that Mr Brown was a careful and honest witness, I have also found that he had no particular recollection of events. In my view he is unlikely to have remembered the details of a conversation 15 years ago and this was his evidence in cross examination: in response to a question about the meeting note, he replied:

> "*I don't recall the exact details of the conversation…"*

363. Mr Brown's inability to recall the detail of the meeting is consistent with his witness statement (paragraph 24):

> "*From reviewing the call report and what I remember, I think it likely that I would have explained at the meeting the way that the orders had been managed to effect a tight and reasonable fill and how the traders would have managed their risk. I do not however specifically recall the discussion."*

364. If confirmation of Mr Brown's lack of recollection is needed, it was arguably evident from his statement in cross examination when he said that he would not have been part of the meeting unless the meeting was to discuss the January Trades, a statement which is at odds with the contemporaneous evidence of the instructions from Compliance not to do so.

365. Whilst in no way criticising Mr Brown for his inability to recall detailed conversations 15 years after the event, I do not therefore attach weight to his evidence in cross examination when he was in effect invited to speculate as to what might have been said at the meeting in February 2006.

366. I prefer the contemporaneous evidence of Mr Romilly's email as likely to be accurate. Further I do not accept the inconsistent attempts by Mr Petley in his witness statement and in cross examination to limit the import of his own contemporaneous statement, noting that there is nothing in the contemporaneous documentation, including the exchanges with Mr Romilly, to support Mr Petley's evidence many years after the event that Mr Petley had "*overstated*" the position in his own contemporaneous email.

367. ECU also submitted that Mr Brown did not know how the trades were executed in the US.

368. Mr Brown believed that he had a conversation with the US traders in response to a complaint being made. His evidence (paragraph 18 of his witness statement) was that he remembered having a call with Benjamin Welsh (the Head of FX in the US) to discuss the trades "*because ECU had asked us to do so*" and "*Mr Welsh was comfortable they were transacted in an appropriate manner.*"

369. ECU submitted that no complaint was made by ECU until 31 January 2006. HSBC suggested that there may have been an earlier complaint and referred to the conversation that Mr McEvoy had with Mr Rumsey on 31 January 2006 when Mr Rumsey passed on the details of the stop loss order for that evening (becoming live at 19:45). Mr Rumsey told Mr McEvoy there was:

"*something I need to talk to you about tomorrow… Because things have been said…this evening… it's nothing new. It's just…a rehash of what we've had before*."

370. In my view little if anything turns on the call with Mr Welsh in this regard and Mr Brown's evidence in relation to the meeting on 2 February 2006 is still significant. Although it seems unlikely that he can recollect the details of the conversation of the meeting his evidence in his witness statement (paragraph 24) was:

"From reviewing the call report and what I remember, I think it likely that I would have explained at the meeting the way that the orders had been managed to effect a tight and reasonable fill and how the traders would have managed their risk. I do not however specifically recall the discussion."

371. Asked about this passage in cross examination Mr Brown's evidence was:

"I think I was simply pointing out how a large stop loss would be transacted …in the market. To effect a fair and reasonable fill or a … tight and reasonable fill for the client."

372. It was specifically put to Mr Brown in cross examination that he personally did not know anything about at least two of those trades the time. His response was:

"But I could make a comment about generally how large transactions, large stop losses would be executed."

373. Mr Brown's evidence that large orders would have been pre-hedged is consistent with the reference in the meeting note that:

"...orders were subsequently managed to produce a 'tight' fill for the client. Because of the large bid/offer spread on a sizeable trade, this would have required some dealing ahead of the price trigger to protect HSBC from significant loss."

374. Each of the January Trades would appear to be "*sizeable trades*" being for the equivalent of approximately £115,000-£119,000 and thus according to the meeting note would have needed to be managed ahead of the order being executed to produce a tight fill.

375. I find on the evidence that at the meeting on 2 February 2006 Mr Brown admitted trading ahead generally and by inference in relation to the January Trades.

376. Even if counsel in 2006 had raised a concern that Mr Brown did not have direct knowledge of the execution of the US trades, the evidence that at the meeting Mr Brown had admitted trading ahead of the orders, even in general terms, was capable of supporting ECU's inference that it was HSBC which had been active in the market immediately ahead of the January Trades being triggered. The relevance of this to being able to plead a claim for front running in relation to the January Trades is that if there is trading ahead by HSBC, one can then draw inferences from the size of the order and the liquidity and volatility in the market as to whether the activity of trading ahead by HSBC caused the order to trigger.

377. I do not accept ECU's submission that the HSBC response to the complaint "*superseded"* the admission by Mr Brown as to trading ahead. As discussed, the HSBC response was not believed by Mr Petley and others at ECU. In those circumstances it did not prevent ECU from having sufficient knowledge to plead a claim.

378. The second piece of "evidence" was what the Defendants describe (paragraph 317(4) of Closing Submissions) as the "*trap*" which was set by ECU for HSBC in relation to the Trade on 31 January 2006, namely that only HSBC had an instruction which became live at 19:45. The Defendants submitted that this enabled ECU to eliminate trading by other banks as the cause of the rapid market move after 19:45 as by this time the order had already been live at the other banks for some time.

379. The time restriction was imposed on the HBPB order but not on any of the other banks. As set out above, in cross examination Mr Petley said that the rationale was to allow the market to settle after the volatility in the immediate aftermath of an announcement:

"*As I recall, it was because the HSBC order was for one single bank, pretty well half of the entirety of our book, and we wanted to ensure that a very large order at a thinner part in time, advancing perhaps our concern that large orders were becoming a magnet, that that would not be triggered until a good half an hour after a known event that was a news event was coming out at 7.15, I recall, pm. So sometimes volatility in the market in the immediate aftermath of any announcement, which I believe was regarding US interest rates, would not trigger prior to or be active until 7.45 pm, thus half an hour later*"

380. ECU submitted that the time restriction was not a "*trap*". However the contemporaneous evidence is that in a conversation with Mr Rumsey on 1 February 2006, Mr Petley was asked whether he gave the orders for 31 January at the same level to all the banks and Mr Petley responded:

"...I pulled the time limit off when we went, when cable went up as far as it did and CAD/Yen was down at 1.02, the figure, so that we were so far away from and, and Dollar/ Swiss was, you know, on the lows of the day, I took the time limit off the other two but obviously weren't able to do so with you." [emphasis added]

381. This evidence, that the time limit was removed from the other banks when the rate reached a particular level but ECU were unable to do so for HSBC, is inconsistent with the contemporaneous documentary evidence of the written instructions and the oral telephone instructions given to the other banks which makes no reference to a time condition (which could then be "*taken off*") and is also inconsistent with the explanation provided in cross examination that a time limit was placed on the HSBC order due to the size of the order and the fact that a news announcement was due at 19:15.

382. There is also the contemporaneous evidence of Mr Naughten in a phone call with Mr McKenzie on 7 March 2006 in which Mr McKenzie referred to the complaint from Mr Petley "*to do with front running*" and Mr Naughten told Mr McKenzie that there had been a "trap" set for HSBC*:*

"*Because I think they, basically they're a bit sneaky — they set a trap by how they gave the orders out...*

DM: *Is that right?*

CN: *...so there was only one set of dealers who had that order at the time it happened, and it was the third time on the trot, so it was, at that stage, as far as they were concerned, it was, well, you've fallen for it three times and you've done it and we kind of know it couldn't have been the others because they didn't have the order when you had it, so it's..."* [emphasis added]

383. In a telephone conversation with Mr McEvoy on 1 February 2006 Mr Rumsey repeated the account that the other banks had a limit which was removed. He said:

"*basically [Mr Petley is] saying that he has evidence ... - which suggests to him that the -- that New York are ramping up Canada-yen in advance of the trigger last night. And we're basically sort of frontrunning the order. In the lead up to becoming live...he suggests that, you know, it really was -- it was doing very little until a few minutes before that order came into being. He's pinning it -- he's suggesting this is a result of our action rather than any other banks. As later after we left, he went to his other banks and removed the trigger time, so in other words they were watching the order up until the rate announcement, unlike us, because he couldn't contact us..."*

384. In the light of the contemporaneous evidence of the instructions which were given to the other banks, Mr Rumsey's evidence, although contemporaneous, appears to be no more than repeating what he had been told by Mr Petley. Mr Rumsey did not know at that time the actual basis on which orders were given to the other banks.

385. Mr McEvoy asked Mr Rumsey in a later call on 3 February 2006 whether the order was a "*little test*" and Mr Rumsey repeated that Mr Petley:

"*changed his mind, but, you know, wasn't able to sort of change the criteria for us because he couldn't contact us*".

Again this is not independent evidence which refutes the evidence of Mr Naughten that a "*trap*" was set for HSBC as it appears merely to accept at face value the explanation given by Mr Petley.

386. It was submitted for ECU (paragraph 148 of Closing Submissions) that Mr Naughten *"had got the wrong end of the stick*" because Mr Naughten said there *"was only one set of dealers who had that order at the time it happened"* and in fact all the banks had the order at that time. In cross examination Mr Petley denied that it was a trap and said that Mr Naughten was "*speculating*".

387. Whilst I accept that Mr Naughten's statement is incorrect in relation to the precise mechanics of what had occurred (that is that the banks all had the order at the time), I do not accept that it follows that this was not a "*trap*" set by ECU. There is no basis to understand why Mr Naughten, the Head of Private Client Sales at ECU (somewhat dismissively referred to in ECU's submissions as "an ECU salesman") would have "*speculated*" about ECU setting a trap for HSBC. Further his call with Mr McKenzie is not expressed in terms that he had any doubt as to what had occurred. Mr Petley's evidence has to be weighed against the contemporaneous documentary evidence and in the light of the inconsistencies advanced by him in relation to what instructions he had given and why.

388. The significance of what happened at 19:45 is spelt out by Mr Petley in his call to Mr Rumsey on 1 February 2006:

"*It went down, I mean, as I said, at, at quarter past, after the Fed's announcement we were in the range between 1.0225 and 1.0245 and so and then, in the, sort of, immediate aftermath and then as the, it just, it just went ballistic in the… minutes around 19:45*." [emphasis added]

In other words Mr Petley identifies the sharp rise around 19:45 with the order being triggered a few minutes later (at or around 19:49:28/19.49:59).

389. Mr Rumsey pointed out in that conversation that other banks had the order to which Mr Petley responded:

"*But it was bobbing along, it was bobbing along quite nicely, in fact moving in the other direction up until when that order became valid and then it just…*

I mean, as I said, at, at quarter past, after the Fed's announcement we were in the range between 1.0225 and 1.0245 and so and then, in the, sort of, immediate aftermath and then as the, it just, it just went ballistic in the, sort of, the, the minutes around 19:45" [emphasis added]

390. It seems therefore that Mr Petley's view at the time was that the time limit on HSBC which did not apply to the other banks did mean that it was a reasonable inference that trading by HSBC, rather than other banks, was the cause of the rapid market move after 19:45 as by this time the order had already been live at the other banks for some time.

391. On balance I find that it is likely that ECU did set a "*trap*" for HSBC but even if it did not, the inference to be drawn from the circumstances of HSBC being subject to a time limit and the sharp spike which occurred only when the HSBC order became live, is a

matter which could be taken into account by counsel as supporting an arguable case of front running by HSBC.

Conclusion on "sufficient knowledge to plead a claim" in relation to front running of the January 2006 Trades

392. It was submitted for ECU that the only "actual evidence" ECU had in relation to the January 2006 Orders was circumstantial market data showing the market moving towards the stop loss levels prior to trigger with little price action thereafter.

393. As set out above, in order to plead front running in 2006 ECU needed to have material which objectively counsel judged to be reasonably credible and which appeared to justify the allegation; the requirement is not that counsel should have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it. In relation to the inference of dishonesty, as stated by Flaux J: "*The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty*".

394. In my view that requirement was satisfied:

394.1. The market data analysed by Mr Petley and distilled into the charts that he sent to Mr Brown showed a sharp rise in the market until the stop loss was hit and then the market fell back. Mr Petley's evidence was that if there is a dramatic spike or trough in price action that suggests that something is driving the price in the relevant direction: it could be a data release or dealers pushing the price.

394.2. In the case of the 31 January 2006 order in Mr Petley's view this could not be explained by other dealers in the market "hunting" stops.

394.3. It was striking that in the case of the 31 January 2006 order the rise in the market happened only after the 19:45 time limit had passed (a condition which did not apply to the other banks with whom ECU had placed the same level of stop loss order which had therefore had the order for some time before 19:45).

394.4. Mr Brown had admitted trading ahead (if not specifically in relation to the January Trades, then inferentially) from which one can infer that HSBC was trading in the market ahead of the trigger.

394.5. The fact that the order on 31 January 2006 had been subject to a condition which according to Mr Petley was to allow the market to adjust for the news event at 19:15 so in the view of ECU it was not attributable to the market event. Mr Petley's evidence was that the market:

"*... was bobbing along, it was bobbing along quite nicely, in fact moving in the other direction up until when that order became valid and then it just... went ballistic in the, sort of, the, the minutes around 19:45*"

394.6. The size of the stop loss order in the relevant currency pair and the market movement which was not as great as Mr Petley would have expected in order to fill the order once the trigger had been hit.

394.7. Mr Hughes, an experienced professional employed by ECU to advise on market movements, regarded the movements as explicable only on the basis that HSBC had engaged in market manipulation; his evidence was that he did not have "*too many other explanations for what [he] saw within the markets*".

394.8. Mr de Klerk, another experienced professional in the market, was of the view that there had been front running.

394.9. Mr Belchambers, a senior industry figure, independent of ECU was prepared to get involved and intercede on behalf of ECU at a senior level within HSBC. I infer from the evidence that Mr Belchambers did so having formed his own view on the basis of the evidence presented to him at the time by ECU. He cannot be regarded as anything other than objective and, I infer from his role in the industry, well placed to form a view as to whether the evidence was sufficient to support allegations of front running against HSBC being pursued by him on behalf of ECU with Mr Ramsay, a director of HSBC.

394.10. This was not a single incident which was being alleged but three occasions in January 2006. ECU submitted on several occasions that the court should not consider the trades in "silos" criticising Mr Moore in particular because "*what he doesn't do is to add up the conduct when looking at motive, he silos and he looks at things on a very narrow basis*". In considering the knowledge of ECU in 2006 and the inferences as to motive that can be drawn from the data, it is clear that the "*coincidence*" of the 3 stop orders being hit a "*matter of minutes*" after the 3 stop loss orders were given to HSBC was a key factor in the mind of Mr Petley and it supports the inference which can be drawn from the market data on the individual trades.

394.11. Further in addition to the "*coincidence*" of the January Trades being hit in a matter of minutes there is the evidence (referred to above) of the earlier concerns which Mr Petley had throughout 2005 as to its stop loss orders. As Mr Petley said in cross examination the background to his concerns (as early as February 2005) were the frequency with which stops were being hit measured against ECU's track record:

"*…the frequency at which wherever I am putting the stops they are getting done anyway, which is an unusual development for me; you will have seen our track record over the previous years, which was very, very good and that is as a result of having very well, if I may say so, identified correct levels to hide behind which have been borne out then, in terms of risk management anyway, then allowed us to remain in that trade and allow us not to have too much frequency of switching*."

395. The fact that HSBC denied wrongdoing cannot prevent time from starting to run as the truth of the facts relied upon is not the relevant issue for the purposes of limitation; rather the issue is whether the claimant could have commenced proceedings. As stated in *FII*:

"201 Hence the situation which may seem paradoxical, but sometimes arises in practice (as, for example, in Law Society v Sephton & Co [2004] PNLR27), where in a trial on limitation the defendant disputes the claimant's assertion that he could not have known or discovered a fact which, in relation to the merits of the claim, the defendant denies is a fact at all. <u>There is in reality no paradox, because at the stage of an inquiry into limitation the existence of the cause of action, and therefore the truth of the facts relied on by the claimant to establish it, is not the relevant issue</u>. Put in general terms, <u>the</u>

question is not whether the claimant could have established his cause of action more than six years (or whatever other limitation period might be relevant) before he issued his claim, but whether he could have commenced proceedings more than six years before he issued his claim. The existence of the constituents of the cause of action-such as fraud or mistake-as verified facts is not the issue." [emphasis added]

396. ECU submitted that particulars of facts which are consistent with honesty are not sufficient and it submitted that in this case it is also consistent with market movements caused by other market participants or external market factors. ECU pointed (paragraphs 398.5 (7) and (8) of Closing Submissions) to external market factors raised in the response from HSBC in relation to Trade 28 (the release of the US non-farm payroll data) and Trade 29 (significant price volatility as a result of the FOMC announcement) and the "*difficulties of seeking to infer front running from the market movements*". ECU also submitted that large client orders (referred to in the HSBC response) would have made an inference of front running "*weaker*".

397. In light of the evidence I find that the inference of dishonest front running could have been pleaded in 2006 since objectively it could be said that it was more likely from the evidence than any honest explanations. I have already set out the evidence in relation to the market effect of the FOMC announcement on the trade of 31 January 2006. ECU would have been aware of the release of data on Trade 28 but the professionals at ECU did not believe this was the reason for the trigger being hit. Similarly ECU considered other explanations: Mr Hughes referred to a "*range of possibilities for the unusual price movement*" but his evidence was that he "*didn't have too many other explanations for what I saw within the markets*"; as referred to above Mr Petley and Mr Hughes took into account the level reached by the market when the order was triggered.

398. The denial of wrongdoing by HSBC and the explanations provided have to be weighed against the inferences to be drawn from the available data and the evidence of market professionals, Mr Petley, Mr Hughes and Mr de Klerk as to the inferences which can be drawn from the data and the circumstantial evidence. The evidence shows that the results of the investigation by HSBC were not believed by ECU and Mr Belchambers, an independent industry figure, was prepared to get involved after the response and explanation had been received from HSBC. As stated in *FII* at [199]:

"*Section 32(1)(a) applies where "the action is based upon the fraud of the defendant" ... If the action runs its full course, it may transpire that there was no fraud ..., indeed no cause of action at all. But where, at the stage of an inquiry into the defendant's plea that the action is time-barred, the claimant relies on section 32(1)(a) ..., the question is not whether there was in reality any fraud ...: that will not be established unless and until the court issues a judgment on the merits of the case. The question under section 32(1)(a) ...of the1980 Act is whether, upon the assumption that there was fraud ..., as identified by the claimant in the way in which he pleads his case, it was discovered or could with reasonable diligence have been discovered at such a time as would render the claim time-barred*." [emphasis added]

399. There is one further matter which needs to be addressed in the context of limitation which occurred post 2006. This is the proceedings in the United States against certain former traders of HSBC which according to Mr Petley led him to raise the matter with the Board of Directors of ECU and led to a pre-action disclosure application by ECU in 2017 (the "Pre-action Disclosure Application").

400. In the Particulars of Claim ECU alleges that a large proportion of the trading in relation to the trade on 6 January 2006 was carried out by a single trader, Mr Stuart Scott, formerly the European Head of FX Trading at HBEU. ECU relies on the fact that by the Deferred Prosecution Agreement, HSBC Holdings Plc accepted that Mr Scott had (i) been guilty of the fraudulent 'front-running' of a client FX order in 2011, and (ii) had made or caused to be made misrepresentations to that client to conceal his misconduct on that occasion.

401. In relation to the alleged unlawful means conspiracy ECU also relies on (amongst other things):

"*The recent acknowledgment by HSBC of multiple instances of historic misconduct by its FX traders over the period (at least) from 2008 to 2013, and in particular the combination of its FX traders (including senior traders) in furtherance of the same, as evidenced by the Final Notice issued by the Financial Conduct Authority on 11 November 2014 (the "FCA Final Notice"), the issuance of an order on HBEU by the Commodity and Futures Trading Commission on the same day, the Statement of Facts, submitted as Attachment A to the DPA of 17 January 2018, and the order to Cease and Desist served on HBUS and HSBC Holdings plc on 29 September 2017*." (paragraph 97 (b) of the Particulars of Claim)

402. The significance of the US proceedings was said by Mr Petley in his witness statement (paragraphs 119-121) to be that it "*reminded him of ECU's experience*" and gave rise to grounds that HSBC had covered up the misconduct in 2006. His evidence in this regard was as follows:

"*119. In or around July 2016, I learnt of the indictment issued by the US Department of Justice against two senior HSBC FX traders: Mark Johnson, HSBC's former Global Head of FX, and Stuart Scott, HSBC's former Head of FX EMEA. The indictment concerned allegations of deliberate and fraudulent front-running of client orders by those HSBC traders in 2011, and the subsequent cover-up of that 'front-running' by the bank after an internal investigation had indicated no finding of misconduct.*

120.The reported facts of that case reminded me of ECU's experience 10 years earlier. If HSBC's trading desk was guilty of front-running and deliberate concealment in 2011, there would be grounds to believe that HSBC had been guilty of misconduct, perhaps even fraudulent or criminal misconduct, in 2006, and that this had been covered-up by reference to an inadequate internal investigation that had cleared the traders involved.

121. I therefore brought this development to the attention of ECU's board, which decided to seek external legal advice. In due course, ECU issued its application for pre-action disclosure on 23 May 2017."

403. It was submitted for ECU (paragraph 398.6(5) that "*the importance of these matters as support for an inference of wrongdoing*" is highlighted by the conclusions of HHJ Waksman QC in his judgment on the Pre-action Disclosure Application and in particular his conclusion (at [35]) that the "*regulatory findings*" showed that the intended claim "*is not fanciful*".

404. It should be noted that although ECU referred in its submissions both to the US indictment against Mr Scott, the conviction of Mr Johnson in the US and the admissions of HSBC in the Deferred Prosecution Agreement, at the time of the Pre-action Disclosure Application in May 2017 (which according to Mr Petley was triggered by the indictment of Mr Scott and Mr Johnson) the Deferred Prosecution Agreement had not been entered into and Mr Johnson had not been convicted. By the time of the judgment on the Pre-action Disclosure Application Mr Johnson had been convicted but as HHJ Waksman noted, Mr Johnson was not at HSBC in 2006.

405. In any event the issue for this court having considered the evidence now before this court, is whether ECU had sufficient knowledge for the purposes of section 32. That was not the issue before HHJ Waksman and he did not have the benefit of the evidence including the contemporaneous documentation now before this court. I note in particular at [8] of the judgment that it records the evidence of ECU which was before the court at that time:

"*ECU's evidence is that although it was not entirely satisfied by this response it felt that was not in a position to take the allegation further and it did not do so. It makes the point that this was in the pre-2008 crash period where assurances given by banks were more likely to be taken at face value than later. Indeed there was no independent way of ECU checking what had happened before and when the Trades were activated because all of the relevant information and documents were internal to HSBC*."

406. This court has been able to consider that evidence and reach its own conclusions with the benefit of fuller evidence, as set out above, than was before the court on the Pre-action Disclosure Application. I do not therefore accept that any support can be derived from the reasoning or conclusion of the judgment on the Pre-action Disclosure Application as to the significance of the various regulatory proceedings to the issue of limitation for the purposes of section 32.

407. Further submissions were made by both sides in relation to the evidence that was before the court on the Pre-action Disclosure Application and the submissions that were made to the court at that time.

408. It was submitted for ECU that submissions HSBC now makes were "*wholly inconsistent*" with what it previously said and with what HSBC previously told the court: in the Defendants' skeleton for the Pre-action Disclosure Application, leading counsel for HSBC described it as: "*A highly speculative claim did not make more credible by the whiff of fraud in the air.*" It was submitted for ECU that the fact that HSBC's counsel submitted on instructions to the court that ECU had no evidence even in 2017 was "*fatal to the bank's limitation defence*".

409. The submissions made by counsel for HSBC in 2017 do not affect the findings of this court based on the contemporaneous documentation from 2004-2006 and the evidence of the witnesses to this court. Further the submissions for HSBC as to lack of evidence were not the totality of the case advanced by the Defendants before HHJ Waksman. The Defendants also raised the issue of limitation and I note the following passage in the judgment in which, dealing with limitation, the judge proceeded on the basis that ECU "*felt it could not push the matter further*" and had been "*put off the scent*":

"*40. However, HSBC next argues that if the relevant concealed fact was the existence of front-running, then ECU had already discovered it back in 2006. It had observed the spikes in the trading and had found them to be so suspicious that they required a full explanation from HSBC. Indeed, they referred specifically to the possibility of front-running. I see all of that but in truth ECU had not discovered the fact of front-running -it had its suspicions but felt it could not push the matter further after receipt of the letter of 9 March. It had, in effect, been "put off the scent"; for an analogous case see JD Wetherspoon v Van Den Berg [2007] EWHC 207. And at the end of the day, the question is why the spikes occurred -which ECU did not then know*." [emphasis added]

With the benefit of the evidence before this court and as discussed above, it is now clear that ECU had not been "*put off the scent*" nor did it feel it "*could not push the matter further*". Ultimately as discussed above, in my view business considerations prevailed.

410. In support of their submissions, the Defendants relied on statements in the witness statement filed by ECU's then solicitor in the Pre-action Disclosure Application including that in 2006 there was "*strong prima facie evidence supportive of deliberate price manipulation*."

411. The relevant passages are as follows:

"35. *In fact, on 14 March 2006, Mr Petley also requested the details of the compliance and legal professionals who had been involved in preparing the report. However, in response to this request and in a telephone conversation instigated by Mr Whiting from his mobile telephone to Mr Petley's mobile telephone, Mr Whiting informed Mr Petley that HSBC would not entertain any further requests into this matter and that, as far as the bank was concerned, having completed their extensive enquiries and found no evidence or reason to support any of the claims made by ECU, the matter was now definitively closed. He explained to Mr Petley that HSBC was ultimately no longer prepared to engage with ECU in respect of this matter, upon any basis. Ultimately, and despite what seemed to be strong prima facie evidence supportive of deliberate price manipulation, which entailed front-running, having occurred, Mr Petley and his colleagues at ECU had to accept HSBC's assurance that it had not been guilty of price manipulation or front-running.*

36. Although the close correlation between the placing of the Trades and the sudden price spikes seemed highly unusual, and appeared to ECU to suggest market manipulation (involving front-running), ECU felt it had to accept that HSBC was telling the truth when it stated that the price movements were unrelated to its own activities. I understand that Mr Petley has, in connection with this application, spoken with Mr Whiting. Mr Whiting has confirmed that, so far as he believed at the time, ECU had accepted HSBC's explanation and moved on. A contemporaneous note of that meeting and the matters discussed was prepared." [emphasis added]

412. It was submitted for ECU (paragraph 398.5(11) of Closing Submissions) that this evidence does not take the matter any further as the question is not what ECU's perception was; it describes the position before the response from HSBC and that the statement did not say that there was evidence of front running by HSBC.

413. In my view the statement that ECU had "*strong prima facie evidence*" at the time is consistent with the conclusion reached above on the evidence now before this court and provides some support for that conclusion, albeit fairly limited. The reason given in the witness statement for not pursuing the claim namely that Mr Petley and his colleagues "*had to accept HSBC's assurance that it had not been guilty of price manipulation or front-running*" and "*ECU felt it had to accept that HSBC was telling the truth when it stated that the price movements were unrelated to its own activities*" implies that in the face of the denial ECU felt it had to accept the explanation. However, as discussed above, the evidence shows that the reason ECU decided not to pursue the matter in 2006 was largely, if not wholly, business considerations. A striking omission from the witness statement placed before the court in 2017 is the absence of any mention of the steps taken by Mr Belchambers whose intervention only occurred after the response from HSBC had been received. I also note the reliance in this witness statement on the confirmation said to have been given by Mr Whiting and merely note the observations made at the outset concerning the evidence in this regard.

414. For the reasons discussed above, I find that for the purposes of section 32, ECU had sufficient knowledge in 2006 to plead the claim in front running in relation to the January 2006 Trades.

Did ECU have sufficient knowledge to plead a claim in relation to front running of the Further Orders?

415. During the period between 4 February 2004 and 17 August 2006, ECU placed a total of 34 Stop Loss Orders with HBPB, of which the January 2006 Orders comprised three. Over the period, ECU also placed 20 Market Orders. In relation to the other 29 Stop Loss Orders (the "Further Orders") and the Market Orders, the pleaded case is based on inferences from the matters relied on in relation to the January Trades. The relevant pleading (Particulars of Claim paragraph 105) is as follows:

"*Those 29 'stop-loss' orders (together, the "Further Orders") and the 20 'market' orders (the "Market Orders") are set out at Schedule 2 to these Particulars of Claim. As to these orders: (1) In light of the matters set out at paragraphs 85-103 above, it is to be inferred that HBPB and/or HBEU and/or HBUS and/or HBPB's other agents also handled and executed each of the Further Orders in a manner that was: (i) not in accordance with ECU's and/or the HBPB Loan Customers' instructions; and/or (ii) in breach of HSBC's contractual and/or tortious and/or other duties owed to ECU and to the HBPB Loan Customers. (2) In light of the matters set out at paragraphs 75-76 and 80 above, it is to be inferred that HBPB also misreported to ECU (in its own capacity and on behalf of the HBPB Loan Customers) the execution prices that it received from either HBEU or HBUS or its other agents in respect of each of the Further Orders and the Market Orders*."

416. It was submitted for the Defendants that no primary facts have been pleaded and ECU could have issued proceedings in relation to these Further Orders since it has been able to plead its case on the basis of inference.

417. It was submitted for ECU (paragraph 404 of Closing Submissions) that the inference in relation to the Further Orders was based on the trading data disclosed by way of pre-action disclosure in relation to the January 2006 Orders as well as the regulatory findings. It was further submitted that any case on the Further Orders would have to be inferred

from that inferred wrongdoing and no reasonable barrister would have been willing to "*pil[e] inference atop inference in this way*".

418. I find that ECU had sufficient knowledge in 2006 to plead the claim in front running in respect of the Further Orders for the following reasons:

418.1. Firstly, I have found that the absence of the trading data in relation to the January Trades did not prevent ECU from having sufficient knowledge of front running to plead the claim in relation to the January 2006 Trades. The claim in respect of the Further Orders is now pleaded by inference: it should be noted that the trading data disclosed as a result of the pre-action disclosure was only in relation to the January 2006 Trades. Thus it would appear to follow that if counsel was prepared to plead a case in relation to the Further Trades by inference in 2019 once satisfied that there was evidence to support an arguable case in respect of the January Trades, it would follow that if objectively there was material to support an arguable case in 2006 in relation to the January 2006 Trades, a claim could be pleaded in 2006 in respect of the Further Trades by making inferences from the January 2006 Trades.

418.2. Secondly, if, as I have found, the evidence in 2006 was sufficient to plead the case in relation to the January 2006 Trades, the regulatory findings (taken at their highest) would appear only to be "*facts which merely improve prospects of success*" and as such, "*not facts relevant to the claimant's right of action*": *Arcadia Group Brands* (cited by Bryan J in *Libyan Investment Authority* and set out above).

418.3. Thirdly the "*historic misconduct*" said to be evidenced by the FCA Final Notice and the Statement of Facts attached to the Deferred Prosecution Agreement (amongst other things) are themselves only matters from which ECU invite the court to draw inferences (see paragraph 97(1) of the Particulars of Claim). The "*historic misconduct*" acknowledged by HSBC relates to the period 2008-2013 and not to 2004-2006 or to the trades in issue. This would seem to suggest that counsel felt able to plead a case in 2019 in relation to the Further Orders by piling "*inference atop inference*" by relying on the inferences to be drawn from the trading data for the January 2006 Trades as well as from the regulatory findings.

418.4. Fourthly, the contemporaneous evidence shows that Mr Petley had in mind the other trades and his concerns were not limited to the January 2006 Trades:

418.4.1. As referred to above, the note of the meeting on 2 February 2006 referred to "*a history of dissatisfaction on the part of ECU with HSBC deal execution, resulting in a number of meetings between MP and ourselves*". The note also recorded:

"It appeared as though other banks were operating on a different basis to us, in order to achieve a close fill, rather than protecting the price level, although there was no way that we could evidence this. MP was not prepared to accept this premise and would repeatedly ask for disclosure of HSBC fx contracts to justify the price given. Needless to say, we were unable to oblige." [emphasis added]

418.4.2. Mr Petley discussed with Mr Jones on 7 February 2006 his strategy to reach a settlement on the January Trades which could encompass the other trades:

"*MP: …The price action leads me to believe that HSBC must have profited out of that activity, because if they're buying something low and pushing the price up and then they've dumped the position on us and had an exit strategy they have benefitted by definition, they must have done…*

If you analyse it, of course they have but what I think is fair under the circumstances, is that these 3 transactions are fresh and that best interests of all parties given the relationship overall, there's no reason why they should benefit from those 3 orders. It's not going to be material to their global P&L or anything, it's not causing them any loss, I'm just suggesting that any benefit derived out of those 3 orders should be handed over to us.

AJ: I wouldn't mention compliance or anything else yet, just say we reserve the right to take this issue, to take this matter further, if we can't find an acceptable solution we reserve the right to take....

MP: What I'm suggesting to him is if we do find an acceptable one, because the first thing they'll be worried about is the, the, if you like, the, it might open a Pandora's box so they'll resist it heavily so what I'm trying to say is look

AJ Make a settlement...

MP If we do, (talking over each other) on just these 3, in a full open and transparent way and fair way and we will limit, we will then consider the matter closed." [emphasis added]

418.4.3. In his email of 7 February 2006 to Mr Brown, Mr Petley wrote:

"…We all appreciate that there may be concerns at your end as to the extent of any liability that this may open HSBC up to but, in both our long term interests and aspirations for our future dealings with one another, I am happy to confirm that, in return for a swift, open and fair handling of our position in respect of these particular three transactions we would consider the matter closed - and any subsequent ex gratia payments that may then be agreed between us in respect of such be in full and final settlement of any and all claims surrounding our past executions…" [emphasis added]

418.4.4. The fact that Mr Petley's concerns extended to the other trades is supported by ECU's own letter before action dated 30 January 2017 in which ECU's then solicitors stated:

"*As early as April 2005, ECU began to have concerns about HSBC's execution of its FX orders, because of unusual price movements taking place shortly before the relevant orders were executed. These concerns remained throughout the course of 2005 and were expressed to HSBC Private both orally and in writing*."

418.5. Fifthly ECU has not sought to limit its Front Running Claims in these proceedings to certain trades but has included all trades that were carried out between 4 February 2004 and 17 August 2006 which it believed had been carried out by an HSBC entity (although some front running claims are now no longer pursued).

419. Accordingly I find that the Front Running Claims in respect of the January 2006 Orders and the Further Orders are time barred.

Sufficient knowledge to plead a claim that HSBC traded ahead

420. As discussed above, it was the belief of Mr Petley and others at ECU based on the level at which orders were being filled that HSBC was trading ahead of the orders and I have found that Mr Brown admitted at the meeting in February 2006 that HSBC traded ahead of orders generally and by inference the January 2006 Trades.

421. I find on the evidence that ECU had sufficient knowledge of the facts in 2006 to enable it to plead a claim that HSBC was trading ahead of the January 2006 Trades and to plead its case by inference (as it did in 2019) in relation to the Further Orders. Accordingly I find that the Trading Ahead Claims in respect of the January 2006 Orders and the Further Orders are time barred.

Margin Claims

422. The "Margin Claims" are in essence whether HBPB (by its own actions or the acts of HBUS and/or HBEU) breached any duties it owed to (i) ECU and/or (ii) the Assignors by HBEU, HBPB or HBUS charging undisclosed fees and/or mark-ups and/or 'dealing spreads' in addition to the agreed fee of £125 per currency switch per account. The Margin Claims extend to both the Stop Loss Orders and the Market Orders.

423. It was accepted for the Defendants (paragraph 324 of Closing Submissions) that the evidence available to ECU in 2006 in support of the Margin and Confidence Claims was less than that supporting the Trading Ahead Claims and Front Running Claims. However the Defendants point to the concerns expressed in 2005 that pips were being '*loaded*' to the rates obtained from HBPB and evidence suggesting that Mr Whiting met with Mr Petley at the time of the complaint in April 2005 in order to discuss the issue of the addition of margin by HBPB.

424. It was acknowledged for ECU (paragraph 407 of Closing Submissions) that ECU had raised queries as to whether mark-ups were being applied by way of the complaint in relation to the trades in April 2005 but it submitted that ECU had been assured that no mark-ups were being applied, both in response to that complaint and by way of the letter of 7 September 2005 from HBPB. It was submitted (paragraph 406 of Closing Submissions) that ECU had not discovered and was not in any way aware of the HBPB '*pip thefts'* or false reporting of fills in relation to any of the orders.

425. Considering the evidence in relation to the Margin Claims I note that:

425.1. on 12 April 2005 Mr Petley emailed Mr Rumsey about the three most recent stop loss orders (executed on 22 March, 5 April and 12 April 2005) referring to:

"…our growing concerns … that the HSBC'S FX rates have progressively been moving wider and wider from the mark. The pattern is now quite alarming with HSBC having recorded the worst executed rates on each of the last three stop-loss orders in a row out of all our relationship banks…. I am simply not able at this moment in time to be satisfied that the executed rate given was an actual inter-bank market rate executed in line with our instructions…" [emphasis added]

425.2. In a telephone conversation between Mr Petley and Mr Rumsey on 14 April 2005 Mr Petley expressed concern about the "fills" that they had received on recent orders:

"DR: ...Now then, you're sort of unhappy with sort of fills which are about 9 points off your stop loss order.

MP: We had three in a row that are 9 points off, but given that a lot of ours - and it's difficult for us, because I don't - I don't consider that, you know, 200 and - well, $0.25 billion dollars isn't - isn't necessarily a big one on these occasions. And with UBS we've got upwards of $200 million going on a trading platform at the same time, and we're getting on the head or one or two pips away from -

DR: So you've got orders, then, of a similar size at the same level elsewhere in the market that -

MP: Well, you know we have.

...

MP: -you have a fee, I can only think, to be honest, that Canary Wharf were loading it up, or they were very - that something's going wrong in the - for the methodology of the switch quotes. You've only got to look at the time and sales on these deals to see how - quite how many - there's quite active trade but having come up best part of 100 pips anyway, the 1.2000 sort of handle on dollar-swiss is quite an aggressively fought battleground. And there were just so many hits at and around the figure within a 2-pip up and below range, and then down again, then up and up through it, up to about 1.2004 and so on, all the way through on, you know, four occasions, then coming back down to 1.1989, 90-odd, and then coming back up again, that I just for the life of me can't see how 1.2009 -

...

I cannot see how, three times in a row, a bank of your size can come out with the worst fill. And the last time it happened, I asked Andre to do an analysis on it, and it actually showed that HSBC were, you know, 10 out of 14 times, either the worst or the second worst -

...

MP:...my question is very simple: are HSBC in Canary Wharf - are we getting the market rate, or are they loading it?" [emphasis added]

Mr Rumsey's response was to deny this:

"*No. I believe that we are protecting your stop loss order…"*

However it is clear from the transcript of the call that Mr Petley did not accept this as he continued to ask for sight of the underlying trades (a request which Mr Rumsey said could not be granted) and to discuss the levels at which he had been filled by reference to what ECU could see in the market and other banks:

"… Neil has the EBS data from Bloomberg, just confirming Bloomberg is in fact EBS [inaudible] that he has. High 1.2006, and that's at 13:57 for a period of two seconds. That was seven minutes later than when it went through 1.2000. Spot subsequently oscillated above and below the figure on several occasions, but never higher than 1.20006. Spoke to UBS, who themselves had over 200 and – $200 million orders through 120 on the nose. They filled them all first-time spot went through 120 at 1.20003 at 13:50."

425.3. Subsequently, on 21 April 2005, Mr de Klerk sent Mr Petley an analysis of the notional switch cost for the last 15 orders and commented that HSBC was now "*back in line*". His evidence in cross examination was the fills provided by HSBC still "*needed monitoring*".

425.4. On 6 July 2005 ECU asked HBPB to send it a letter confirming:

"…the precise methodology you adopt in respect of (a) setting your "base cost" of funds in each currency and (b) handling the FX orders within the HSBC Group. This I hope will get us round the "disclosure" issue that is bugging us. Given the FSA's current mission to deal with non-disclosure and fraud with regard to mortgages we feel that a clear and unequivocal statement by you on these two issues that sets out exactly what you do in an open and transparent way will suffice and settle the current compliance concerns we have…"

426. It is notable that the email refers to the letter which was being sought being "*to settle the current compliance concerns we have…"*. The evidence of Mr Petley in cross examination was as follows:

Q….So you were asking HBPB to help ECU out by providing a letter which somehow could go to satisfy ECU's obligations in relation to queries that the FSA might have, is that right?

A. Well, yes, I would agree with that. But it also was to specifically incorporate for our own benefit, given <u>the concerns that we had had as to whether or not the wider group were adding pips, which had remained a concern for us to have this properly set out</u>."

427. In its letter of 7 September 2005 Mr Whiting of HBPB wrote:

"*The Bank will charge each client a fee of £125 for every switch transaction undertaken. There will not be any mark up to the rate of the FX transactions undertaken."*

428. In his witness statement (paragraph 83) Mr Petley said that he was

"… <u>reassured by the statements in Mr Whiting's letter</u> and ECU continued to place orders with HBPB on the basis that these would be passed to HSBC's G10 FX desk. For example, in respect of the market orders placed through HBPB on 22 September 2005 I remarked to Mr Rumsey that I was happy with the price that was given to ECU."

429. For reasons already discussed I approach the evidence of Mr Petley with considerable caution and do not accept his oral evidence that he was "*reassured by the statements in Mr Whiting's letter*".

430. In the note of the meeting on 2 February 2006 prepared by Mr Rumsey, Mr Rumsey referred to the "*history of dissatisfaction*" with HSBC "*deal execution*" and in particular Mr Petley's concern with the level of fills by HSBC and that Mr Petley:

"would repeatedly ask for disclosure of HSBC fx contracts to justify the price given."

431. I also note that these concerns and requests on the part of ECU as to the price at which the orders were filled were apparently supported by evidence produced by Mr Petley. In the meeting note Mr Rumsey stated:

"…On several occasions MP would demonstrate that his other counter-parties filled orders very close to the stop loss trigger, whereas we were consistently higher (lower)…" [emphasis added]

432. This evidence supports a conclusion that Mr Petley was analysing the level of fills by reference to the rates provided by the other banks and was therefore able to draw conclusions as to the margin above the prevailing market rate which was being taken by HSBC on ECU's trades.

Conclusion on "sufficient knowledge" to plead the Margin Claims

433. As discussed above, on execution of the January 2006 Trades Mr Petley's principal concern was that there was front running. The level at which the January 2006 Trades were filled were a key consideration but as set out above, ECU's focus was on front running.

434. Whilst ECU had some evidence namely the comparison of the fills provided by other banks to support its Margin Claims, on balance I find that ECU did not have knowledge in 2006 sufficient to plead the Margin Claims and had not discovered the fraud or concealment in that regard within the meaning of section 32.

Confidence Claims

435. The "*core issues*" in relation to the alleged breach of the various duties alleged to be owed to ECU are said by ECU (paragraph 38 of Closing Submissions) to "*include*" Issue 16. Issue 16 is in the following terms:

"*Did HBEU and/or HBUS breach their duties of confidence owed to ECU and the Assignors by misusing their confidential information, including by (i) exploiting the terms of the January 2006 Orders and Further Orders for the benefit of HBEU and/or HBUS and/or (ii) disclosing the terms of the January 2006 Orders and Further Orders to traders and/or individuals or entities within or outside the Relevant HSBC Entities who were not responsible for handling or executing such orders and/or other than for the purposes of handling and executing such orders?*" (Issue 16). [emphasis added]

436. In relation to "*Breach of confidence*" the pleaded case (paragraph 91 of the Particulars of Claim) is in general terms:

"*The matters at paragraphs 85-86 above amounted to a misuse by HBEU and HBUS of ECU's and/or the Assignors' confidential information: see paragraph 44 above. That abuse extended to: (i) the exploitation of that information for the benefit of HBEU and/or HBUS (see paragraphs 85(1)(a)(i) to 85(1)(a)(v) above); and*

(ECU infers) (ii) the sharing of that confidential information with traders or entities other than those responsible for the orders' handling and execution and/or other than for the purposes of executing the order (such as, ECU infers, the sharing of information about ECU's EUR/USD Order with trader 'P-BOWDENP' for the benefit of that trader's own personal proprietary trading book). For the avoidance of doubt, and in the light of the PAD Disclosure and the terms of the FCA Final Notice, ECU infers that the above confidential information was also provided to other individuals and/or entities within the HSBC Group (and/or to other individuals and/or entities outside the HSBC Group) for the purpose of those individuals and/or entities trading on that information for their own account." [emphasis added]

437. In the Reply (paragraph 47) there is a general statement that proprietary trading is a breach of confidence.

438. It is relevant to compare the way in which the Confidence Claims are developed in ECU's Closing Submissions with what is actually pleaded:

438.1. ECU submitted (paragraph 247 of Closing Submissions) that its order information was market sensitive and there was a duty not to misuse the information. It was submitted (paragraph 252.3 of Closing submissions) that "*if a trader used ECU's information to effect proprietary trades to generate a profit*" that was not use for the purposes of management or execution of the order. It was a misuse of the information to generate a profit for the bank out of ECU's and the client's confidential information and gives rise to a claim.

438.2. This was then developed at paragraph 332 of its Closing Submissions where ECU submitted:

"*As for the allegations against HBEU and HBUS for collateral proprietary trading, these give rise to causes of action in misuses of confidential information (as to which see paragraph 252.3 above) and breach of fiduciary duty*."

438.3. And at 334:

"*In the present case, the collateral proprietary trading amounted to an improper exploitation of the confidential order information of ECU and the HBPB Loan Customers for HBEU's and HBUS's own purposes. Moreover, there was a relevant combination for the purposes of ECU's claims in unlawful means conspiracy by virtue of (i) the proprietary trading being co-ordinated with front-running or trading ahead, or (ii) the inference that the disclosure to the trader engaged in proprietary trading was part of a scheme to enable that person to engage in such unlawful proprietary trading to the Bank's profit: see paragraph 346.1 below."* [emphasis added]

438.4. At paragraph 70.2 ECU invites the court to draw an inference from the absence of the traders as witnesses in this case, to the effect that:

"*where front-running or trading ahead was conducted alongside proprietary trading by the same or other traders, it is inferred that such traders traded in light of and with knowledge of ECU's orders, that the proprietary trading was co-ordinated with the front-running or trading ahead and/or that the disclosure of ECU's order information to the*

trader engaged in proprietary trading was part of a scheme to enable that person to engage in such unlawful proprietary trading for the Bank's benefit" [emphasis added]

438.5. Paragraph 346.1 is addressing the claims in tort of unlawful means conspiracy and procuring breach of contract. ECU submitted that:

"*the traders within HBEU and/or HBUS conspired and did so on a systematic basis. Mr Gladwin's analysis repeatedly shows traders acting in concert to seek to trigger those orders. As such:*

(1) Where traders co-ordinated their trading activities (for example, one by front-running and another by conducting parallel proprietary trading), it is clear that there was a relevant combination, and that the traders' intention was to trigger ECU's order, contrary to its interests. On the rare occasions where only one trader was involved, he nonetheless conspired together with his employers (i.e. HBEU and HBUS) by using their systems to perpetrate a fraud whose beneficiaries were both HSBC and the trader himself (via a profit on his proprietary trading account, which would in due course materially increase the size of his bonus)…"

439. The significant point for the purposes of considering limitation is that when one looks at the pleadings for *"the allegations against HBEU and HBUS for collateral proprietary trading"*(referred to in paragraphs 332 and 334 of ECU's Closing Submissions) the only particularised allegations in the Particulars of Claim are in relation to the January Trades under "*Unlawful means conspiracy*" (paragraph 97), allegations that Mr Scott and Mr Bowden engaged in "*collateral proprietary trading*" in relation to the EUR/USD order and that "*the manner of the conspirators' trading,…was calculated to trigger (and did in fact trigger) the relevant orders…*" and under "*Breach of Confidence*" in relation to Mr Bowden. There are no particulars of collateral proprietary trading for other trades merely general allegations that the traders in effect conspired "*to use unlawful means to cause harm to and injure ECU*" (paragraph 96 of the Particulars of Claim) and an inference in respect of the January Trades (paragraph 97(1)(d)) that the traders combined to "*target*" ECU's stop loss orders.

440. In oral closing submissions it was submitted for HSBC that ECU had not properly particularised its case. It was submitted for HSBC that:

"…the allegations of illegitimate secondary trading … find their particularisation for the first time in Mr Gladwin's report. And if we go back and look at the allegations of breach of confidence which one finds in [paragraph 91 of the Particulars of Claim], one sees that is the extent of the allegation of breach of confidence. And you will look in vain for any of the detailed allegations and assertions that Mr Gladwin has seen fit to make about any of the traders, such as Mr Nettleingham, Mr Barnet, Mr Sarramegna..."

441. In its oral reply it was submitted that ECU had properly particularised its case in relation to the Further Orders and reliance was placed on the further information served in November 2020 (the "RFI"). However it was not submitted for ECU that the RFI gave particulars of the traders other than in relation to their involvement in the allegations of front running. ECU did not respond to the point made in oral closing for HSBC concerning the failure to particularise the alleged illegitimate secondary trading.

442. In this regard it is striking that the opening paragraphs of ECU's closing submissions (paragraphs 2 and 3) state that "*the number of HSBC traders who engaged in illegitimate proprietary trading parallel to the execution of ECU's orders*" is "*striking*" and yet for the "*detailed misconduct by HSBC's traders*" the court is referred to an Appendix 1 to the Closing Submissions which sets out a table of alleged "*misconduct*" not by reference to any pleading but by cross referring to statements in the report of Mr Gladwin.

443. I have considered in detail the differences between the pleaded case and the case advanced in submissions because it seems to me that it is relevant to consider the pleaded case (and not any broader unpleaded case) when the court considers the issue of limitation and whether ECU had sufficient knowledge to plead the Confidence Claims.

444. I note that in *Three Rivers* the House of Lords said at [186]:

> *"…At trial the court will not normally allow proof of primary facts which have not been pleaded and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded…".*

445. The Defendants referred the court to the statement of Carr J in *Baturina v Chistyakov* [2017] EWHC 1049 at [126] that:

> "*where it is intended to advance specific matters of dishonesty based on a particular set of facts, such matters should, as a matter of fairness, be pleaded*"

446. It was submitted for ECU that the Defendants had not been prejudiced since the facts relied on were set out in the report of Mr Gladwin to which Mr Moore had responded.

447. It is difficult to see how ECU can sustain an argument that the Confidence Claims could not have been pleaded in 2006 given the paucity of the currently pleaded case in relation to the Confidence Claims and the reliance at trial on the allegations against individual traders in most part particularised only by Mr Gladwin in his report. It is left to submissions for ECU to advance its definition of what constitutes "*collateral proprietary trading*" (paragraph 252.3 in its Closing Submissions).

Conclusion on "sufficient knowledge" to plead the Confidence Claims

448. Assuming the current pleadings are sufficient to permit the Confidence Claims to be advanced (as to which I have strong doubts having regard to the statement in *Three Rivers* above), there would not appear to be any other facts which were required to be known in order to plead the Confidence Claims in 2006. The only traders identified are in relation to the January 2006 Trades, specifically Trade 28. In my view ECU could have pleaded the allegations of proprietary trading in 2006 as it subsequently pleaded the Confidence Claims in these proceedings and I find that the Confidence Claims are time barred.

Unlawful means conspiracy

449. To the extent that ECU alleged that the traders conspired to trigger the Stop Loss Orders that is in my view merely part of the Front Running Claims for the purposes of "discovery" and limitation and accordingly I find it is time barred.

Reasonable diligence

450. Given my findings on limitation above in relation to the front running and trading ahead of both the January 2006 Trades and the Further Trades, it is not necessary to

address the alternative defence based on "*reasonable diligence*" in relation to the Front Running Claims and Trading Ahead Claims. However it is necessary to consider the limitation defence advanced by HSBC based on "*reasonable diligence*" in relation to the Margin Claims (both the Stop Loss Orders and the Market Orders). In relation to the Confidence Claims and claim for unlawful means conspiracy, I propose to consider the defence based on reasonable diligence in the alternative to my finding that there was actual knowledge sufficient to plead the claim.

Relevant law

451. Section 32 provides that:

> *"...the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."*

452. In *OT Computers* the Court of Appeal considered the test for "reasonable diligence":

> *[30] ...it is undoubtedly correct that what reasonable diligence requires in any situation must depend upon the circumstances.*
>
> *[31] The claimant in Paragon Finance Plc v DB Thakerar & Co [1999] 1 All ER 400 was a mortgage lending company which sought to amend its pleadings to allege a case of fraud after the expiry of the primary limitation period of six years. Millett LJ formulated a test which has been repeatedly applied in the later cases:*
>
> *"The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."*
>
> *32.This passage was cited with approval by Neuberger LJ in Law Society v Sephton, who described it at [110] as "authoritative guidance". He continued:*
>
> *"116. ... the judge was right in his conclusion that it is inherent in section 32(1) of the 1980 Act, particularly after considering the way in which Millett LJ expressed himself in Paragon Finance Plc v DB Thakerar & Co [1999]1 All ER 400, that there must be an assumption that the claimant desires to discover whether or not there has been a fraud. Not making any such assumption would rob the effect of the word 'could', as emphasised by Millett LJ, of much of its significance. Further, the concept of 'reasonable diligence' carries with it, as the judge said, the notion of a desire to know, and indeed, to investigate."*
>
> *[48] ...while the use of the words "could with reasonable diligence" make clear that the question is objective, in the sense that the section is concerned with what the*

claimant could have learned and not merely with what he did in fact learn, the question remains what the claimant (or in the terminology of the section, "the plaintiff") could have learned if he had exercised such reasonable diligence. That must refer to the actual claimant, in this case OTC, and not to some hypothetical claimant.

[53] ...Before January 2002 OTC was an active purchaser of DRAM, engaged in the assembly and sale of computers. Any consideration of what it could have discovered with the exercise of reasonable diligence would therefore depend upon what could reasonably have been discovered by a company carrying on that business and acquiring the information which such a company could reasonably be expected to acquire from contacts in the business and from trade publications. In the case of a corporate claimant such as OTC, the question will be what could reasonably have been discovered by the officers and employees of OTC whose knowledge was to be attributed to the company…". [emphasis added]

Submissions

453. It was submitted for the Defendants (paragraph 325 and 326 of Closing Submissions) that:

453.1. the material facts of the Margin and Confidence Claims were not matters of which ECU was wholly ignorant until it issued these proceedings and obtained disclosure, but were further types of perceived misconduct about which it had concerns and suspicions at the material time;

453.2. had ECU issued the Trading Ahead and Front Running Claims, then, as it has in these proceedings, ECU would have obtained through disclosure the evidence on which it now bases the Margin and Confidence Claims and amended its pleading accordingly. That disclosure would have included data showing the trading undertaken by the HSBC parties to execute the orders, including the time and rates at which that trading occurred. From that data ECU could then see, as it has in these proceedings, whether margin was added to the rates at which the switches were effected by HBPB and whether there was any secondary trading around the trigger levels.

454. It was submitted for ECU (paragraph 423.3 of Closing Submissions) that:

454.1. reasonable diligence could not have required ECU to pursue trading ahead claims for the collateral purpose of seeking disclosure that might reveal "*pip thefts*" or collateral proprietary trading.

454.2. if ECU was wholly unaware of those frauds or of the need to investigate them reasonable diligence could not have required ECU to issue proceedings for trading ahead for the collateral purpose of obtaining disclosure that would have revealed the "*pip thefts*" and collateral proprietary trading.

454.3. reasonable diligence did not require ECU to go so far as to issue claims for trading ahead on the "*off chance*" that it might reveal other wrongdoing of which ECU was wholly unaware.

455. ECU submitted (paragraph 407 of Closing Submissions) that as regards the HBEU/HBUS mark-ups, ECU had raised queries as to whether mark-ups were being applied by way of the April 2005 Complaint but had been assured that no mark-ups were being applied, both in response to that complaint and by way of the September 2005 letter; ECU had not discovered and could not have pleaded such mark-ups.

456. ECU submitted (paragraph 378.2 (a) of Closing Submissions) that the test is whether there is:

"... something on the facts which objectively puts "the claimant on notice as to the need to investigate, to which the statutory reasonable diligence requirement would then attach" (emphasis added) relying on *Granville* at [45] and said to be approved in *OT Computers* at [35].

457. It was submitted for the Defendants that if the exercise of reasonable diligence would have led to a claimant obtaining evidence in support of another claim, then the claimant is to be taken to have knowledge of both claims: *Biggs v Sotnicks* [2002] Lloyd's Rep. PN 331 at [65]:

".. So far as that file is concerned, if it was appropriate to obtain it, then it seems to me that exercising reasonable diligence the solicitors would have sought to obtain it in February 1991. It can be said that they had not at that stage received the letter of 7th July 1992 containing Mr Froud's false statement which put them on the tracks of dishonesty. But the position is that they were considering a negligence claim. It seems to me that acting with reasonable diligence, solicitors acting for Mr and Mrs Biggs in this situation would have sought to obtain the conveyancing file for the purposes of that claim, even if it was only a negligence claim."

458. It was submitted for ECU (Closing Submissions paragraph 378.2 (h)) that *Biggs* does not assist because in that case it was held that the relevant claim in fraud could have been pleaded (and hence was discovered) more than six years previously. It was submitted that it was then "*suggested*" in the judgment that if it had been necessary to obtain further documents in order to plead fraud, these would have been obtained by the exercise of reasonable diligence in the context of a negligence claim (see [65]). However ECU submitted that such statements were *obiter* and are not (and do not purport to be) authority for any general proposition.

459. It was further submitted for the Defendants that even if the passage is *obiter*, it is correct, otherwise one would find oneself in the absurd position of claimants such as ECU knowing enough to obtain the underlying trading data, taking no steps to do so for their own commercial reasons and then being entitled 15 years later, to say that ECU did not know about these facts, even though it would have discovered them had it taken steps to obtain the material which was necessary in order to pursue the claims that it decided to drop. It was submitted that that was not consistent with the purpose of the limitation statute.

460. It was further submitted for ECU (Closing Submissions 378.2(g)) that the only case relied upon by HSBC as regards litigation steps is *Libyan Investment Authority v. JP Morgan* [2019] EWHC 1452 where in reliance upon *Chodiev v Stein* [2015] EWHC 1428, Bryan J suggested (at [32]) that the exercise of reasonable diligence may require legal proceedings to be instituted to obtain disclosure. It was submitted that neither case

concerned issuing a bitterly contested pre-action disclosure application against the wrongdoer itself, still less issuing substantive proceedings against the wrongdoer itself based on a different cause of action for the purpose of obtaining disclosure to enable fraud to be pleaded.

Discussion

461. Whilst noting the caution expressed in *Law Society v Sephton* that words must not be implied into the statutory test (*OT Computers* at [33]), there must be an assumption that the claimant desires to discover whether or not there has been a fraud; the concept of reasonable diligence carries with it a desire to know and to investigate (*Law Society* at [116]).

462. It was submitted that the claimant must be "*on notice as to the need to investigate*". However in *OT Computers* Males LJ at [47] stated that the correct approach was as follows:

> *"...although the question what reasonable diligence requires may have to be asked at two distinct stages,(1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn*." [emphasis added]

463. Adopting that formulation, if ECU had been "*reasonably attentive*" it would have become aware of the things which a reasonably attentive person would learn: ECU was concerned about the rates of fills throughout 2005 and I do not accept the evidence that Mr Petley was reassured by the letter of September 2005; ECU thought it was most likely to be front running which caused the January 2006 Trades to trigger but Mr Petley believed that HSBC were profiting from the front running or trading ahead. In the circumstances a company like ECU acting with reasonable diligence would investigate the fills. The claim for unlawful means conspiracy insofar as the pleaded claim is a conspiracy to trigger the orders is inextricably linked to the front running claim. Accordingly this would not be a situation where ECU would be issuing a claim on the "*off chance*" it might reveal other wrongdoing.

464. As to the collateral trading it is clear on the evidence set out above, that ECU believed that HSBC were carrying out proprietary trades ahead of the trigger and profiting –i.e. that trading ahead was occurring (whether for the purpose of subsequently filling the ECU orders or for collateral purposes); it was aware of the circumstances and if it had acted with reasonable diligence ECU would have learnt enough to prompt it to investigate, even if the "*precise wrongdoing*" of the Confidence Claims had not been identified. To the extent that it can be said that ECU did not know more at that point, it did not become aware of the things which a reasonably attentive person would have learnt because it decided not to pursue the matter.

465. As to what steps ECU would then have taken, reasonable diligence means not the doing of everything possible, but it means objectively exercising reasonable diligence. In my view if ECU had wanted to know what had happened and exercised reasonable diligence, it would have sought legal advice and taken steps to pursue the claims for trading ahead and front running; yet Mr Petley's evidence is that he did not seek legal advice and as discussed above, ECU decided not to take any further steps in response to the HSBC response in March 2006 once the intervention of Mr Belchambers appeared to stall. It decided to let its complaint drop.

466. It was submitted for ECU (paragraph 378.2 (f) of Closing Submissions) that ECU is not aware of any case in which it has been held that reasonable diligence requires an application for pre-action disclosure to be made against a defendant who has deliberately concealed the relevant facts, still less substantive proceedings to be issued against such a defendant which has deliberately concealed the wrongdoing.

467. However as stated by Males LJ in *OT Computers* at [49]

> *"…the section applies to all kinds of claim where there is fraud, concealment or mistake. There is no warrant in the language of the section for a different test to be applied in certain kinds of case, such as cases where the claimant is carrying on business. The application of the test will differ according to the circumstances, but there is a single test."* [emphasis added]

468. The question is what ECU could have discovered in 2006 with reasonable diligence. As noted by Bryan J at [31] in *Libyan Investment Authority* it is a question of fact in each case and the precise meaning must vary with the context:

> *"Henderson LJ [in Gresport Finance Ltd v Carlo Battalagia [2018] EWCA Civ 540] emphasised that it was a question of fact in each case whether the claimant could not with reasonable diligence have discovered the fraud, concealment or mistake, and endorsed the statement by Webster J in Peco Arts Inc v Hazlitt Gallery Ltd [1983] 3 All ER 193 at 199, that: "…it is impossible to devise a meaning to put on those words [reasonable diligence] which can be generally applied in all contexts because, as it seems to me, the precise meaning to be given to them must vary with the particular context in which they are to be applied. In the context to which I have to apply them, in my judgment, I conclude that reasonable diligence means not the doing of everything possible, not necessarily the using of any means at the plaintiff's disposal, not even necessarily the doing of anything at all, but that it means the doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase".* [emphasis added]

469. Accordingly neither the facts in *Libyan Investment Authority* nor in *Chodiev v Stein* provide assistance to the determination of the factual question in the circumstances of this case.

470. The application of the test to the claimant was explained in *OT Computers* at [59]:

> *"…The section requires an objective standard (what the claimant could have discovered with the exercise of reasonable diligence) but what assumptions are appropriate in the case of a claimant from whom wrongdoing has been deliberately*

concealed and the degree to which they reflect the actual situation of that claimant will depend upon why the law imports an objective standard. Here, the purpose of the section is to ensure that the claimant –the actual claimant and not a hypothetical claimant–is not disadvantaged by the concealment. In achieving that purpose it is appropriate to set an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position who can reasonably be expected to look out for their own interests…" [emphasis added]

471. As set out above, in *OT Computers* at [53] the court stated that:

"*Any consideration of what it could have discovered with the exercise of reasonable diligence would therefore depend upon what could reasonably have been discovered by a company carrying on that business and acquiring the information which such a company could reasonably be expected to acquire from contacts in the business…"*

472. In relation to the Margin Claims ECU could have contacted other banks with which it dealt and had a relationship, for information about the level of fills. The evidence is that Mr Hughes had contacts with other banks and could obtain information from them- in cross examination Mr Hughes was asked:

> "*Q. Yes. If at any stage, and not just in relation to this particular query, Mr Petley had asked you to get trading data, market trading data, you had an intro to Deutsche Bank and UBS and you could have gone to your contacts to ask them to get you trading data, is that right?*
>
> *A. Yes*"

473. I note for completeness that (if contrary to my finding above) ECU did not have sufficient evidence to plead its case on trading ahead in 2006 that such enquiries of other banks would also have given it additional information about the level of fills in the market from which it could draw inferences as to whether trading ahead had occurred.

474. In relation to the Confidence Claims and the Margin Claims, the only way to obtain the data which would show the trades that HSBC had entered into and the purpose of the trades (i.e. whether the traders were filling customer orders, were trading ahead in order to fill the ECU order or were trading for their own collateral account) was from the records of HSBC and HSBC had previously refused to reveal details of its trading on the basis it was confidential.

475. However if in 2006 (or within the normal limitation period) ECU had pursued the claims which I have found that it had "discovered" for front running and/or trading ahead, it could have obtained the HSBC trading data through normal disclosure. I accept the submission for the Defendants that a party receiving disclosed documents will not breach CPR 31.22 if it uses the documents to raise new causes of action which relate to the same proceedings against either the existing or a new defendant: *Grosvenor Chemicals v UPL Europe* [2017] EWHC 1893 at [148].

476. I do not accept the submission for ECU that bringing proceedings for trading ahead and/or front running would amount to a "*device*" in order to obtain disclosure that might allow ECU to plead a claim on a different basis. In my view the facts of the claims are

evidently closely linked and a conclusion that ECU should have sought to bring proceedings for front running and/or trading ahead is consistent with the approach stated in *Biggs*, albeit *obiter*, and consistent with the purpose of section 32. The Margin Claims are linked to the Trading Ahead Claims as they relate to the rate which was obtained on the orders, the unlawful means conspiracy is said to be a conspiracy to trigger the Stop Loss Orders and the Confidence Claims (to the extent they are pleaded) relate to using information from the Stop Loss Orders. I note that the allegations in respect of the Market Orders (including the allegations that the execution prices of such Market Orders were misreported) were pleaded only by inference based on the January 2006 Trades and no additional facts were relied upon in the pleadings.

477. In relation to bringing substantive proceedings Mr Petley had been told by Mr Manduca that he had a claim for damages for breach of confidence if there had been front running so he was aware of the legal basis for bringing a claim. The transcript of the contemporaneous call included the following exchange:

"*MP: It is but it's not illegal, that's the annoying thing.*

CM: No, but it gives rise to breach of contract, breach of, its breach of their fiduciary duties to you and its...

MP: Well if there's no insider dealing rules

CM: It's a breach of their duty of confidence. Very serious, gives rise to straight damages..."

478. Alternatively, and if I were wrong that issuing of substantive proceedings would amount to the exercise of reasonable diligence in relation to the Confidence Claims and the Margin Claims, in my view for the reasons discussed below, in the circumstances ECU has not shown that it could not have discovered the fraud if it had made an application for pre-action disclosure nor has ECU established that such an application by ECU was not within the scope of "*reasonable diligence*" under section 32.

479. Whilst ECU had previously asked to be shown HSBC's records and HSBC had refused (as referred to above in a telephone call with Mr Rumsey on 14 April 2005 and at the meeting on 2 February 2006), ECU did not pursue this request after the HSBC response in March 2006 by making any pre action disclosure application in 2006 (or threat to bring such an action). It is difficult for ECU to discharge the burden on it under section 32 when apparently it took no steps even to obtain legal advice as to the merits of such a course. There is no evidence to suggest that ECU would not have had the resources or the staff to pursue such an application. I accept the submission for the Defendants that ECU was a sophisticated commercial player with access to lawyers: in particular Mr Petley had access to Mr Manduca, a banking partner in a City law firm (until April 2006 and thereafter working for ECU) and a client and friend of Mr Petley. As referred to above, in March 2006 he told Mr Romilly:

"...I'll get Manduca involved; he's the best litigation lawyer there is in banking, I reckon. And he has had – I mean we couldn't afford anybody else on that basis. It's part of the – part and parcel, with the relationship that he and I have, that he – he does the opening salvo on this sort of thing…" [emphasis added]

480. Further ECU had had previous disputes with other banks and was aware of the possibility of pre action disclosure. As Mr Petley told Mr Romilly (having received the response from HSBC on 13 March 2006):

"…I am so sure, with all what I've learned and done over the years, I am so sure that if this went to some form of pre-action disclosure, a judge would demand to look at their order books…"

481. It has not been suggested that an application for pre-action disclosure would not meet the requirements of CPR 31.16. Whilst such an application may well have been opposed by HSBC, this does not discharge the burden on ECU to show that in the circumstances making such an application would be beyond the exercise of reasonable diligence or that it would not have obtained sufficient material to enable it to plead the claims.

482. The evidence which could have been relied upon by ECU in 2006 for such an application would be the evidence identified above which, as discussed above, is different from the evidence put before the court in 2017. The reasoning therefore of the court in 2017 in relation to the Pre-Action Disclosure Application is of little, if any, significance. I note that on the Pre-action Disclosure Application, Waksman HHJ found that the front running claims were **"***given additional support by the events of 2016*" (an apparent reference to the US proceedings issued against Mr Johnson and Mr Scott and possibly the other regulatory investigations and findings in 2014 and 2017, as referred to at [9] of the judgment). At [35] Waksman HHJ said:

"*The putative claim is backed up, now, by evidence of precisely the sort of conduct it seeks to allege against HSBC albeit at different times and in relation to a different client. There can be arguments about how strong any inferential case may be (apparently, for example, Mr Johnson was not at HSBC in 2006) but at least it shows that the intended claim is not fanciful. Nor has it been dreamt up now."*

However his conclusions were on the basis of the evidence before him that:

"[40] …[ECU] had its suspicions but felt it could not push the matter further after receipt of the letter of 9 March. It had, in effect, been "put off the scent"; for an analogous case see JD Wetherspoon v Van Den Berg [2007] EWHC 207. And at the end of the day, the question is why the spikes occurred -which ECU did not then know."

483. As found above, whilst ECU may not have had the evidence to prove its case in 2006, contrary to what the court was led to believe in 2017, it is not the position that ECU believed the response from HSBC in March 2006 or "*felt it could not push the matter further*": it enlisted the help of Mr Belchambers and when his efforts stalled, ECU took a commercial decision not to pursue the matter further.

484. Had ECU issued proceedings and obtained documents through discovery or made a pre action disclosure application, ECU would have been in a position to plead its claims as it was in 2019. In fact ECU is likely to have received more documents in 2006 than were available in 2019 given that it is likely that it would not be hampered by documents lost over time.

Conclusion on "reasonable diligence".

485. I have found that ECU had sufficient knowledge in 2006 to plead the Trading Ahead Claim and the Front Running Claims in relation to the January 2006 Trades and the Further Trades. Part of ECU's knowledge of this wrongdoing was the profits that ECU believed HSBC was making out of its orders. However ECU decided not to pursue any of the alleged wrongdoing for commercial reasons. ECU has not shown that in the circumstances the exercise of reasonable diligence did not extend either to issuing proceedings for the claim in front running and/or trading ahead or making an application for pre-action disclosure. Had it taken either of these routes, ECU could with reasonable diligence have discovered the Margin Claims (including the claims in respect of the Market Orders), and (if I am wrong on sufficient actual knowledge) the claim for unlawful means conspiracy and the Confidence Claims within the meaning of section 32.

486. As stated in *OT Computers* at [25], the purpose of section 32 is to avoid unfairness and to ensure that a claimant is not disadvantaged by reason of time starting to run before he could reasonably be aware of the circumstances giving rise to his right of action. Further the purpose of the section is to ensure that the actual claimant and not a hypothetical claimant is not disadvantaged by the concealment (*OT Computers* at [59]). In my view on the evidence before the court, the conclusion reached is consistent with the purpose of section 32.

487. Accordingly I find for the reasons discussed above, that the Margin Claims (including the claims in respect of the Market Orders), and (if I am wrong on sufficient actual knowledge) the claim for unlawful means conspiracy and the Confidence Claims are time barred.

Claims based on false representation

488. It is alleged by ECU that each time that HBPB reported a trade execution to ECU, it represented expressly and/or impliedly that the trade had been properly executed in accordance with the instructions that it had received. The express and implied representations which are alleged to be false include (i) that HBPB and/or those through whom it executed the order had not manipulated the prevailing spot FX price; (ii) that the relevant currency had been acquired by HBEU or HBUS at the rate reported; and (iii) that the relevant currency had been acquired by HBPB at the rate reported.

489. In my view the claims based on false representation fall to be considered for the purposes of limitation and "knowledge" as part of the Trading Ahead Claims and Front Running Claims (in relation to (i)) and in relation to the Margin Claims (in relation to (ii) and (iii)).

490. Accordingly I find that the claims based on false representations are time barred for the reasons set out above in relation to the Trading Ahead Claims, Front Running Claims and Margin Claims respectively.

Misuse of confidential information

491. Given my findings on limitation it is not necessary to make findings on the substantive allegations of the various claims. However as the Front Running Claims were the central plank of ECU's claim, I propose to address certain of the allegations of front running on the basis of the alleged misuse of confidential information and consider the issue of causation in particular.

The relevant law

492. The relevant legal principles concerning misuse of confidential information were not in dispute in any respect which was material to the conclusions in this case.

493. It was submitted for ECU (ECU Opening skeleton paragraph 205) that although ECU pursues claims in respect of the misconduct via a range of causes of action, the "*simplest analysis*" of its trading claim is via breach of confidence. ECU's case is that its order information was in the nature of a trade secret. It was submitted that the information was market-sensitive and represented the core of ECU's business model, amply satisfying the classic definition of a trade secret.

494. For the Defendants it was accepted (Opening Submissions paragraphs 399-400) that a claim for breach of an equitable duty of confidence requires the Claimant to demonstrate that:

494.1. the information in issue is confidential.

494.2. the information was imparted in confidential circumstances (that is, that the defendant owed a duty of confidence).

494.3. that there has been unauthorised and illegitimate use or disclosure.

495. It was also accepted for the Defendants that in this case the first and second elements are not in issue and the issue in dispute is whether there was any misuse of confidential information by HBEU or HBUS when executing the Stop Loss Orders.

496. It was submitted for ECU (ECU Opening skeleton paragraph 207.2) that wherever any of the defendant HSBC entities used the order information for any purpose other than legitimate management and execution of the order in accordance with its terms, both ECU and the Assignors (i.e. ECU's clients) will have a cause of action in at least equity for equitable compensation and/or an account of profits. (ECU also alleges equivalent contractual duties of confidence.)

497. It was submitted for the Defendants that as regards the Front Running and Trading Ahead Claims:

497.1. the trading ahead of the Stop Loss Orders was pre-hedging and not front running. It was not a breach of confidence to pre-hedge, because pre-hedging is a legitimate order management technique which HBEU and HBUS were entitled to adopt when executing the Stop Loss Orders.

497.2. In any event, the Front Running and Trading Ahead Claims fail on causation grounds as neither ECU nor the Loan Customers can demonstrate any detriment as a result of the alleged misuse of confidential information because the market would have traded through the stop loss levels on the same or the next day in all cases.

Front running

498. Front running involves ECU establishing on a balance of probabilities that:

498.1. for the relevant trade there was trading ahead of the order which was not legitimate;

498.2. the trader(s) involved intended by trading ahead to trigger the Stop Loss Order.

499. The court therefore has to consider whether it is satisfied on the balance of probabilities in relation to the individual Trade in issue that:

499.1. trading ahead of the stop loss order occurred;

499.2. such trading was not for legitimate purposes;

499.3. such trading had a material effect on the triggering of the order;

499.4. the trader intended to trigger the order by trading ahead.

500. In relation to front running Mr Brown provided the following description of the distinction between a trader taking a position ahead of an order and "*front running*" (paragraph 12 of his witness statement):

> "*I should make clear that a trader positioning ahead of an order being triggered was different from front-running or unreasonably forcing the stop to be executed. By front-running I refer to trading behaviour that was deliberately intended to trigger the stop-loss to the detriment of the client….*"

501. I note that in its Opening Submissions (paragraph 13.2) ECU stated that:

> "*the distinction between trading ahead and front-running is that the effect of the latter was to manipulate the prevailing spot FX rate to trigger a client order*."
>
> However it is clear in my view (and I believe common ground) that it is not solely the "*effect*" of the trading which is in issue but also (as stated in paragraph 13.2) whether the trader "*trading intentionally caused the market to trade through the trigger price.*"

502. If there is a distinction being drawn by ECU between whether the trading was intentional and thereby caused the order to be triggered and whether the triggering of the order was intentional, it is not supported by Mr Gladwin who in his report (paragraph 2.1.4) described "*front running*" as

> "*…[trading ahead] done in a manner deliberately intended to trigger the order*."

503. If the trading ahead had been deliberately intended to trigger the Stop Loss Orders it appeared to be common ground that that would amount to a misuse of confidential information.

504. It was submitted for ECU (Closing Submissions paragraph 27.2(2)) that Mr Moore in oral evidence, conceded that the fact that HSBC had been instructed not to trade ahead would point to front running as being the motive. This is not a fair reflection of his evidence. Mr Moore was being asked about Trade 17 and the possible explanations for trading which he had identified. He agreed that if trading ahead was prohibited the trader could not be trading to minimise slippage. However when it was put to him that this meant that the "*driver*" behind the trading was triggering the stop to secure a profit he replied:

"*Assuming it was related to the ECU Order*"

505. As discussed below, the experts are agreed that even if there was a valid instruction to HSBC not to trade ahead, trading to fill customer orders or to adjust the trader's own position was legitimate.

506. Accordingly even if the court were to find that (by reason of a binding instruction to HSBC) HBEU and HBUS traders were not entitled to minimise slippage by trading ahead, this would not "*point to front running being the motive*" for trading ahead of the trigger as there could be these other legitimate reasons for the trading.

507. Absent an instruction to HBEU/HBUS which was binding on it, Mr Moore described pre-hedging as "*routine*" in order to minimise slippage. His evidence was:

"*…If I think of trading as a trader, leave aside the terms of this order, as a stop loss order approached when I was trading, if I reached a judgment, for whatever reason, this is going to go through, I would begin to trade to restrict slippage on the order and my act of trading would be profitable to me*."

508. Mr Moore said that balancing the bank's interest against the customer was:

"... a judgment that you -- in those days was left to the discretion of the trader at the time".

509. Even if an instruction had been validly given to HSBC traders by ECU not to trade ahead, it is likely that in relation to some trades at least that the traders acted in breach of that instruction in order to minimise slippage: the evidence is that HSBC received complaints from ECU about the level at which they were filling the orders and trading ahead would be a means to reduce slippage and improve the rate at which the orders were filled. As set out above, in the note of the meeting on 2 February 2006, Mr Rumsey stated that HSBC had been trading ahead to minimise slippage:

"...orders were subsequently managed to produce a 'tight' fill for the client. Because of the large bid/offer spread on a sizeable trade, this would have required some dealing ahead of the price trigger to protect HSBC from significant loss."

510. This is also consistent with the evidence of the conversation between Mr Rumsey and Mr McEvoy on 1 February 2006 in advance of the meeting where Mr Rumsey apparently told Mr McEvoy that HSBC were trading ahead to minimise slippage:

"...you know, when [Mr Petley] started to complain about the level of the fill, we said, "Okay, well, we'll see what we can do", and then we sort of basically reverted to the way that we felt other banks were executing, by sort of, you know, placing -- getting some of it done before the level was reached…"

511. In cross examination Mr McEvoy was asked about this conversation. His evidence, when asked whether HSBC were pre-hedging, was as follows:

A. Well, I don't know what the traders did, so I can only assume there might have been pre-hedging. I don't know for sure.

Q. All right. Let me ask you this then. Where would Mr Rumsey have got the belief that was what was happening from?

A. Because we'd discussed in the past that we thought other banks were pre-hedging.

Q. I see.

A. On many occasions. And we assumed that that was the only way they could achieve those fills.

Q. So you would do it yourselves as well?

A. Well, yes.

512. The intention of HSBC in trading ahead, notwithstanding the instructions said to have been given by ECU, was encapsulated in the evidence of Mr McEvoy when it was put to him in cross examination that:

"...the reason why you didn't want to talk about pre-positioning in the forthcoming meeting was because you knew that that would be activity directly contrary to the instructions as to how the trades were to be executed?"

513. Mr McEvoy replied that:

"... we as a market maker, were entitled to execute the trades as we thought appropriate, given the risk in the market. And to achieve the -- to achieve the fills he wanted, that is the only way they could be achieved.

Q. The only way to achieve what he wanted by way of fill, you say, was to disobey the instructions as to the way in which the trades should be executed?

A. You could look at it that way.

Q. Yes. Which other way would you look at it?

A. Well, if we filled the trades the way he wanted them filled, we would have filled them 15 points away because that is the only way we could have done it. Then we would have had even stronger complaint that he wasn't happy with the fills and the slippage. So he didn't want us to buy but he didn't want a fill there. We couldn't -- the two don't match. That was the problem and that was the ongoing problem throughout the whole period." [emphasis added]

514. In light of the evidence that HSBC had been trading ahead because HSBC took the view that it was a way to address Mr Petley's complaints about the level of fills, in my view the issue of whether ECU had validly given an instruction to HSBC not to trade ahead of its orders does not have to be resolved by the court in order to determine the issue of whether front running has occurred on the ECU trades. On the evidence, trading ahead is consistent with a legitimate intention to restrict slippage as well as an illegitimate intention to trigger the order and the question of whether such trading ahead was validly prohibited by ECU does not assist in reaching a conclusion as to the motive of the HSBC traders on a particular trade given the evidence that HSBC was trading ahead on ECU

trades to minimise slippage even though it was contrary to ECU's instructions (whether binding or not).

Causation

515. It is the Defendants' case that the Trades would have been triggered in any event and therefore no loss has been caused to ECU or the Loan Customers as a result of the alleged misuse of confidential information.

516. It was submitted for ECU in summary that:

516.1. the correct approach is to determine the question of causation by reference to the principles of equitable compensation, read against the approach in the law of contract and not by reference to the law of tort: *Kitechnology BV v. Unicor GmbH Plastmaschien* [1994] I.L.Pr. 568 (Closing Submissions paragraph 359);

516.2. it is appropriate to ignore the hypothetical counterfactual in the case of fraud or where there were (as here) deliberate and dishonest breaches; public policy considerations would impose a right to recover compensation in order to deter the conduct: *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2015] A.C. 1503 at [62] and [133] (Closing Submissions paragraph 367):

"[62] *There are arguments to be made both ways, as the continuing debate among scholars has shown, but absent fraud, which might give rise to other public policy considerations that are not present in this case, it would not in my opinion be right to impose or maintain a rule that gives redress to a beneficiary for loss which would have been suffered if the trustee had properly performed its duties*." [emphasis added]

"[133] *Notwithstanding some differences, there appears to be a broad measure of consensus across a number of common law jurisdictions that the correct general approach to the assessment of equitable compensation for breach of trust is that described by McLachlin J in Canson Enterprises and endorsed by Lord Browne-Wilkinson in Target Holdings. In Canada itself, McLachlin J's approach appears to have gained greater acceptance in the more recent case law, and it is common ground that equitable compensation and damages for tort or breach of contract may differ where different policy objectives are applicable*." [emphasis added]

516.3. the court should award equitable compensation to make it clear that "*wholesale misconduct*" is not to be tolerated by reference to the movement in the market price;

516.4. in any event the future movements of the FX markets were an "*unknowable*" contingency (Closing Submissions paragraph 367.1);

516.5. the remedy of equitable compensation is compatible with the rule for the contractual assessment of loss in a liquid market namely the difference between the contract price and the market price and where currency is bought at an artificially inflated price that is a loss that can never be made wholly good (Closing Submissions paragraph 367.2).

517. It was submitted for the Defendants (paragraph 430 of Opening Submissions) that for non-contractual claims, the test for factual causation asks whether the loss claimed would

have occurred but for the wrong; so in this case the question is what would have happened but for the pre-hedging/front running: *Clerk & Lindsell on Torts*, 23rd Edition, [2-09], [26-34]. In contractual claims the test asks whether the loss claimed would have occurred had the defendant performed its contract: *The Law of Contract Damages*, 2nd Edition, [1-35] to [1-38]. But it was submitted that in the present case there is no difference between the two, as asking what would have happened had the HSBC parties complied with their contractual obligation not to pre-hedge/front run is the same as asking what would have happened but for the pre-hedging/front running.

518. It was submitted for HSBC (paragraphs 433-434 of Opening Submissions) that in relation to all or nearly all the Stop Loss Orders the Loan Customers' position was no different to the position they would have occupied but for the pre-hedging/ front running and therefore the Loan Customers did not suffer any loss.

519. It was submitted for ECU (paragraph 276.4 Closing Submissions) that:

519.1. the court should have regard to the "*wider nature of the relationship*" between HBPB and its Loan Customers and that the Loan Customers were part of the Bank's private wealth arm, and HBPB acted as their trusted financial advisor, owing concomitant fiduciary duties in and about the management of their wealth.

519.2. The parties had multi-faceted relationships, whereby some parts of the relationship are fiduciary and others are not, HSBC substantially understates that proximity and trust between HBPB and its private wealth customers by comparing them to ordinary current account holders.

520. The test is as set out in by Millet LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18: a fiduciary "*is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*".

521. Whether or not there was a separate wealth management advisory relationship between Loan Customers and HBPB (as to which I have no evidence), in my view (as discussed below) the relationship between HBPB and the Loan Customers in relation to the Facility Agreements was a commercial relationship at arms' length and the appropriate measure of compensation is not the same as for breach of trust. The Loan Customers relied on ECU to exercise its discretion and expertise in managing the Facility pursuant to the MCDMP (and paid fees accordingly) and there was no relationship of trust and confidence with HBPB (or any other HSBC entity) in relation to the Facility Agreement and the loans such as to create a fiduciary relationship (see further the discussion below in the context of the Margin Claims).

522. In my view there was no fiduciary relationship between ECU and HSBC or between the Loan Customers and HSBC and the comparison which ECU sought to draw with cases concerning misuse of trust property is therefore inapposite.

523. Even if the trust cases have relevance for the determination of equitable compensation, the authorities do not go so far as to establish that ECU is entitled to recover even where it has suffered no loss: *AIB* at [135]:

> "*The measure of compensation should therefore normally be assessed at the date of trial, with the benefit of hindsight. The foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must flow directly from it. Losses resulting from unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour, and not from the breach. The requirement that the loss should flow directly from the breach is also the key to determining whether causation has been interrupted by the acts of third parties. The point is illustrated by the contrast between Caffrey v Darby, where the trustee's neglect enabled a third party to default on payments due to the trust, and Canson Enterprises, where the wrongful conduct by the third parties occurred after the plaintiff had taken control of the property and was unrelated to the defendants' earlier breach of fiduciary duty*." [emphasis added]

524. In *Target Holdings v Redfern* [1996] AC 421 Lord Browne Wilkinson said (at 439B) that:

> "*Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests; to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach*"

525. ECU submitted (Closing Submissions paragraph 367.1(4)) that HSBC were "*repeatedly front running trades*" such that the conduct can be said to be "*systematic and systemic*" and that this justified an award even where no loss has been caused. As discussed elsewhere in this judgment, only 16 of the original 32 Trades in respect of which front running was alleged by ECU are now supported by Mr Gladwin and notwithstanding the statements of Mr Gladwin in his report, I find that there is no discernible pattern to the trades in which front running is alleged and supported by Mr Gladwin. Thus even if there is a rule of public policy which might allow for such an award where the actions of HSBC had caused no loss, on the evidence the circumstances said by ECU to justify such an award have not been established.

526. Further, although Mr Moore did say (paragraph 35 of his report) that it was "*unknowable*" how the FX currency pair would have traded absent HSBC trading, he was able to assess the volume and timing of HSBC trading in relation to the prevailing liquidity in the FX market and form a view as to whether the FX rate movements would be materially different. He was able to reach a conclusion (paragraphs 38 and 39 of his report) and identify those trades where HBEU or HBUS trading ahead may have materially influenced the timing of the order execution and further to reach the conclusion that in those orders the order level would have been reached "*in all circumstances*" on the following trading day "*regardless of HBEU or HBUS management of the orders*".

Account of profits

527. It was submitted for ECU that the court should order an account of profits (paragraph 349 of Closing Submissions) and this would be the "*just response*". ECU advanced its claim for an account of profits on three bases:

527.1. breach of fiduciary duty,

527.2. misuse of confidential information and/or

527.3. breach of contract.

528. The law concerning an account of profits is set out in *Toulson & Phipps on Confidentiality* at [6-113-114]:

"A breach of confidentiality does not give to the claimant an automatic right to an account of profits in preference to compensatory damages. The question is one for the court's discretion, as was held in Vercoe v Rutland Fund Management Ltd…

The question was whether the claimant's interest in the performance of the obligation (whether contractual or equitable) made it just and equitable that the defendant should receive no benefit from his conduct. The law of confidentiality covered a wide range of different relationships and the strength of the argument in favour of a particular remedy might vary across the range. In some cases the nature of the relationship would be very close to a fiduciary relationship, where the appropriate remedy might be the same as for a breach of trust; in some it would be a commercial relationship at arm's length, in which the appropriate remedy might be similar to the ordinary remedies for breach of contract; and in some cases, where the law of confidentiality was used to protect private information obtained by a stranger, the most appropriate analogy might be with the law of tort." [emphasis added]

529. It is clear on the authorities that the question whether to offer a claimant the right to elect for an account of profits is for the discretion of the court: *CF Partners (UK) v Barclays Bank* [2014] EWHC 3049 (Ch) at [1167].

530. In *Vercoe v Rutland* [2010] EWHC 424 Sales J set out the principles which would apply to the exercise of that discretion:

"In my view, Lord Nicholls' speech in Blake has opened the way to a more principled examination of the circumstances in which an account of profits will be ordered by the courts and where it will not. His reasoning at p. 285C-E, comparing remedies available in contract and for breach of confidence in relation to the same underlying facts, flows in both directions. It both opens up the possibility of an award of an account of profits in relation to breach of contract relating to confidential information and also opens up the possibility for a more principled debate about when an account of profits should be refused in relation to a breach of confidence, and a damages award (typically assessed by reference to a notional reasonable price to buy release from the claimant's rights, similar to the award made in Wrotham Park and Seager v Copydex) made instead. Both in cases of breach of contract and in cases of breach of confidence, the question (at a high level of generality) is, what is the just response to the wrong in question (cf Lord Nicholls at p. 284H, set out above)? In both cases, to adapt Lord Nicholls' formulation at p. 285A, the test is whether the claimant's interest in performance of the obligation in question (whether regarded as an equitable obligation or a contractual obligation) makes it just and equitable that the defendant should retain no benefit from his breach of that obligation. Again, I think that there is a broad parallel with the way in which the courts will, as in Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344, control the amount of damages to be awarded in a contract case by reference to the strength of the claimant's interest in performance of a contractual obligation, judged on an objective basis and weighing that against countervailing legitimate interests of the defendant, to ensure that the remedy awarded is not oppressive and is properly

proportionate to the wrong done to the claimant. 340.Although in a certain sense the courts' decisions about these matters might be described as discretionary, in truth I think the courts are now seeking to articulate underlying principles which will govern the choices to be made as to the remedy or remedies available in any given case. In some situations, where the rights of the claimant are of a particularly powerful kind and his interest in full performance is recognised as being particularly strong, there may well be a tendency to recognise that the claimant should be entitled to a choice of remedy (both as between damages and an account of profits, and also possibly as between different bases of calculation of damages, such as by reference to loss actually suffered or by reference to a notional reasonable agreement to buy release from his rights). There are indications in the authorities that this may more readily be found to be appropriate in cases involving infringement of property rights (see, for an historic example, Siddell v Vickers, and also Blake at 278D-280F and Devenish Nutrition Ltd v Sanofi-Aventis SA [2008] EWCA Civ 1086; [2009] Ch 390, at [75] and [155], cf [144]). This may reflect the particular importance usually attached to property rights and the extent of protection they are to be afforded in law - although one might think that in relation to ordinary rights in relation to property of a kind which is regularly bought and sold in a market, damages assessed by reference to a notional buy-out fee may often represent an appropriate and fair remedy, and it is possible that the law may develop in that way. By contrast, it may be more appropriate to award an account of profits where the right in question is of a kind where it would never be reasonable to expect that it could be bought out for some reasonable fee, so that it is accordingly deserving of a particularly high level of protection (such as the promise to keep state secrets which was in issue in Blake, which was classified as an exceptional case meriting such an award, and rights to protection under established fiduciary relationships, where trust between the parties rather than a purely commercial relationship is regarded as central to the obligations in question)" [emphasis added]

531. I have already rejected the submission that there was a fiduciary relationship in relation to the Facility Agreement and the loans between HBPB and the Loan Customers. There is also no basis on the evidence for a fiduciary relationship between ECU and HBPB.

532. In support of its submission for an account of profits based on misuse of confidential information, it was submitted for ECU (paragraph 350.2 of Closing Submissions) that the relationship between the parties was "*characterised by a high degree of trust*" and "*vulnerability*" on the part of ECU and its Loan Customers and that ECU and the Loan Customers were "*captive*" clients because they had to place the FX orders with HBPB.

533. In my view the Loan Customers were exactly that: customers of a lender who for commercial reasons chose to take out these multicurrency loans from HBPB. The Loan Customers took out loans which were capable of being switched between currencies in order to obtain better returns (i.e. lower interest rates and principal repayments). Having decided to take out such multicurrency loans with the right to switch currencies for commercial reasons, it is misleading to describe the Loan Customers of HBPB, who were borrowers under an arms' length lending arrangement, as "*captive*" clients of the lender (HBPB). Further I reject the submission for ECU that the Loan Customers (far less ECU) were "*vulnerable*". The Loan Customers relied on ECU to manage the currency exposure and to use its expertise to switch currencies where ECU considered it would provide the

greatest benefit to the client. In return for management fees and performance fees linked to the savings achieved, ECU agreed (in its agreement with the Loan Customer):

"To seek to denominate the Loan in the currency …which, in the opinion of ECU and at ECU's absolute discretion, are considered to be practical and provide the greatest perceived benefit to the Client by way of interest rate saving and /or debt reduction potential." [emphasis added]

534. For ECU to describe the Loan Customers (Closing Submissions paragraph 350.2(3)) as "*retail customers*" being "*exploited*" in respect of the "*management of the mortgages on their homes*" is a complete mischaracterisation of the lending arrangements in this case which was in the form of a sophisticated financial product and for which the objectives and risks were acknowledged by the Loan Customers in the agreement with ECU as follows:

"ECU is proceeding on the basis that the Client is seeking to derive benefit from reductions in the capital value of his Loan arising from beneficial foreign exchange rate movements and of interest rate savings and the Client both understands and accepts the risks associated with pursuing these objectives."

535. The sophisticated nature of the product and the need for the Loan Customer to be sophisticated enough to understand the risks is illustrated by the warranty which the Loan Customers were required to give to ECU in the agreement with ECU:

"The Client also warrants to ECU that the Client has taken independent advice regarding his financial suitability for borrowing in foreign currencies and the high degree of risks associated therein and the Client understands and accepts such risks and understands that capital losses may arise from Currency movements which may be greater than interest rate savings available from borrowing in foreign currencies. The Client also warrants that he considers himself to be financially suitable for borrowing in foreign currencies." [emphasis added]

536. I then turn to deal with the submissions for ECU (Closing Submissions paragraph 350.3) that an account of profits should be awarded for "*cynical*" breach of contract.

537. Firstly, there was no pleaded case that there had been a "*systematic*" fraud and as discussed above, no such "*systematic*" fraud can be maintained on the evidence.

538. Secondly, ECU rely on the letter of 7 September 2005 in which HBPB wrote:

> "*With regard to all FX transactions, and in particular orders of a 'stoploss' nature, orders will be executed on the best terms we can secure given the prevailing market conditions…*
>
> *We, and/or our agent will at all times work to safeguard the best interests of the client"*

539. ECU relies on this letter as a "*recognised example*" of a circumstance where a liability to give an account of profits will arise and cites *McGregor on Damages* at [15-020]

540. That paragraph in McGregor states (so far as relevant):

> "*In summary then, the most common instances where a person will have a legitimate interest to prevent a defendant's profit-making activity is where there is an express or implied contractual undertaking that: (i) the defendant will not profit from the conduct which constitutes the breach; (ii) the defendant will not put themselves in a position of conflict by that conduct; or (iii) the defendant will act in the best interests of the claimant. It is strictly unnecessary that the defendant be characterised as a "fiduciary" which is a label that can sometimes raise more questions than it answers. But the underlying idea behind the "fiduciary" label points to the effective agreement by a defendant to give up part of their ability to act in their own self-interest and therefore the legitimacy in depriving the defendant of profits made…"* [emphasis added]

541. In my view the letter of 7 September 2005 falls far short of an agreement that in the circumstances of the Facility Agreement HBPB (or any other HSBC entity) was giving up its commercial interests and that HBPB undertook on behalf of HBEU and HBUS that HBEU and HBUS would not act in their own commercial self-interest and would not profit from the switch instructions.

542. ECU also seek to rely on the "*extent of the misconduct*" and the "*cynical intention to breach the contract and profit from it*" and rely on *Esso Petroleum Co Ltd v Niad Ltd* [2001] EWHC Ch 458.

543. However even if this allegation could be made out on the facts, this particular authority is described in *McGregor* at [15-21] as a "*questionable example*" and in McGregor it is said to be contrasted with *Morris-Garner v One-Step (Support) Ltd* where the trial judge refused disgorgement damages even though the breaches were deliberate, and the Court of Appeal ([2016] EWCA Civ 180) did not doubt that conclusion.

544. Fourthly, I reject the submission that this is an exceptional case by reason of the secretive nature of the fraud. As found above, the allegations could have been discovered by ECU had it not decided not to pursue the claim for commercial reasons.

545. Applying the principles identified in *Vercoe* in my view this is not a case where "*the rights of the claimant are of a particularly powerful kind and his interest in full performance is recognised as being particularly strong*". I find that (had the Front Running Claims not been barred by limitation) this is not a case where the court should order an account of profits (or a right to elect for such an account) and in the circumstances "*the just response*" is that ECU could only recover equitable compensation or damages for the Front Running Claims if it could show that the Loan Customers suffered loss as a result of the front running of the particular trades.

Did ECU suffer loss as a result of the alleged front running of its trades?

546. Turning then to consider whether (had the Front Running Claims not been time barred) ECU has established that it suffered loss as a result of the alleged front running and whether the test of factual causation has been met in this case.

547. The key sections of ECU's pleaded case on loss (as set out in the Particulars of Claim) in relation to front running is as follows:

> "114. *Where the traders of HBEU and/or HBUS traded ahead of the January 2006 Orders or the Further Orders, the effect of that trading was materially to influence the*

inter-bank spot FX rate, resulting in the relevant 'stop-loss' order being triggered. Without that influence, the orders would not have been triggered or executed at the time at which they were in fact reported to have been triggered and executed.

…

118. *Accordingly, ECU measures the execution losses to its MCDMP as the difference between the prevailing level of the inter-bank spot FX rate at the time that each relevant order was placed by ECU and the level at which it was reported to have been executed (alternatively, between the rate which would have existed at the time of execution but for HSBC's manipulation and/or the rate at which the stop-loss orders were executed)."*

548. Thus the losses pleaded are:

548.1. EITHER the difference between the prevailing level of the inter-bank spot FX rate at the time that each relevant order was placed by ECU and the level at which it was reported to have been executed;

548.2. OR the difference between the rate which would have existed at the time of execution but for HSBC's manipulation and/or the rate at which the stop-loss orders were executed. [emphasis added]

549. However, as submitted by the Defendants, it was never the position that ECU would have switched customer balances at the level of the FX rate in the market when the order was placed. The essence of the Stop Loss Order was that ECU placed an order looking to the future level of the FX market and according to its pleaded case, identifying what ECU regarded as "*strategic levels*" for the currency pair such that if the market traded through that level that, in ECU's estimation, indicated a "*fundamental change*" in the prevailing market trend (Reply at paragraph 51).

550. In relation to the alternative basis of the pleaded loss, ECU seeks to recover the difference between the rate which would have existed at the time of execution but for HSBC's manipulation and the rate at which the stop-loss orders were executed. However ECU's Stop Loss Orders would never have achieved anything other than triggering the conversion of the loan balances if the rate ECU specified in its Stop Loss Order had been hit. It was never contemplated that ECU would convert other than at the then prevailing rate if the rate specified in the Stop Loss Order was reached in the market. Accordingly it seems to me that, as submitted for the Defendants (paragraph 676 of Closing Submissions), any trading ahead or front running by HSBC did not affect the rate at which the Stop Loss Orders were executed since the rate was specified by ECU when it gave the orders to HSBC and remained a constant but only affected the timing of when the Stop Loss order was triggered. (The issue of the rate passed onto ECU once the Stop Loss Order was triggered is a separate question and a separate claim namely the Margin Claim).

551. It was submitted for ECU that the triggering of the Stop Loss Orders denied ECU the opportunity to amend or cancel those orders in light of market movements such as to avoid those orders being triggered at all. However this submission is inconsistent with the pleaded case (and the evidence of Mr Petley) that stop loss orders were placed at strategic levels to identify changes in the directional trend of the market and thus I do not accept

that it was ECU's aim or strategy to prevent stop loss orders being triggered or to cancel the orders if market movements indicated that the orders would be triggered.

552. Further even if the action of HSBC traders had created what are alleged by ECU to be "*false technical indicators*" to other market participants for the relevant currency pair in the market, there would not appear to be any loss to ECU or its customers if the Stop Loss Order would have been triggered in any event (i.e. by reason of market movements absent, or unrelated to, the alleged wrongful trading) shortly thereafter.

553. To the extent therefore that the evidence is that the Trades would have been triggered in any event, ECU cannot establish its pleaded case (Reply at paragraph 51) that any "*artificial price behaviour*" generated by HSBC changed the subsequent trajectory of the market for the relevant currency pair.

554. In addition, if on the evidence the Stop Loss Orders would have been triggered in any event, ECU cannot make out its case (paragraph 119(1) of the Particulars of Claim) that it has paid a switch fee either to HSBC or another bank which it would not have paid absent the alleged front running.

555. Further, as referred to above, if the Stop Loss Orders would have triggered in any event it does not affect the rate at which the loan balances are switched which is the rate specified by ECU as the level at which the stop loss order would trigger. Therefore there is no basis for a claim for loss based on the difference between the contract price and the market price or the submission for ECU that where currency is bought at an artificially inflated price that is a loss that can never be made wholly good. On the facts this is not a case where currency is bought at an artificially inflated price: the loan balances are switched at the prevailing rate once the level specified by ECU has been hit. (The claim for losses incurred as a result of "misreporting" the "execution price" is a separate claim which does not affect the claim for front running and the issue of whether loss was caused by front running.)

556. For the reasons discussed above, I reject the proposition that any front running of the Stop Loss Orders (assuming it to have occurred) caused the loss expressly pleaded at paragraph 118 of the Particulars of Claim.

557. If there was any potential loss caused to ECU as a result of front running, it is not clearly identified in the pleadings. The Defendants accepted that there could be a "*timing*" issue as to when the trades were triggered and in my view (had the Front Running Claims not been time barred) ECU may have been able to establish a loss if the conversion of the loan balances occurred on a day earlier than the day on which the Stop Loss Order would otherwise have triggered absent front running, such that interest or fees became payable which would not otherwise have been payable.

558. Thus in the light of my conclusion on causation and loss, I propose only to consider the allegations of front running in respect of those trades which it is said by Mr Gladwin, would not have triggered on the day of execution. These are Trades 15, 16, 25, 28 and 29.

Trades which would not have triggered on the same day

559. In relation to the Front Running Claims, the trades in relation to which Mr Gladwin is of the view there was front running are Trades 7- 11, 14, 15-19, 25 and 26- 29. If there was front running of the 16 trades as now identified by Mr Gladwin, Mr Gladwin says

only 5 of the Trades (still pursued by ECU) would not have been triggered that day in any event.

560. ECU also maintain its allegations of front running in relation to Trades 10, 20, 21 and 23. Trade 20 is considered below.

561. In relation to Trade 10 there is an inconsistency between the Summary in Appendix 2.1 of ECU's Closing Submissions which states that the allegation of front running for Trade 10 is not pursued and the detailed submissions for Trade 10 in Appendix 2.1 (p33) which states that all claims for that trade are maintained. On the assumption that the claim is maintained, Mr Moore is of the view that the order would have been triggered in any event on the day it was executed (3 December 2004) and Mr Gladwin was unable to reach a conclusion due to insufficient data. Mr Gladwin did not consider the wider contextual evidence and in the light of Mr Moore's conclusion I do not propose to consider this trade further.

562. I referred above (in assessing the credibility of Mr Gladwin) to Trade 21 and the opinion of Mr Gladwin in his report. As set out in the Joint Report the experts are agreed that there is insufficient data to reach a conclusion on trading ahead, the impact of any such trading on the trigger and whether the order would have triggered in any event. I reject the submission for ECU (Appendix 2.1 of Closing Submissions) that the "*inferential case*" is sufficient to establish front running: there is no trading data and no evidence that HBHK traded ahead. Even if HBHK traded ahead, there is no evidence as to why such trading ahead occurred, its impact on the market or the motive of the trader. As noted below, in my view ECU's submission concerning Mr Moore's evidence on Trade 21 does not reflect his evidence. For these reasons I find ECU have not established its case on front running of Trade 21 and do not consider it further.

563. Trade 23 is identified in the Joint Report (paragraph 47) as a trade on which the experts do not agree whether the order would have been triggered irrespective of any identified trading ahead by the Defendants but Mr Moore's view is that it would have triggered on the same day (13 July 2005) and Mr Gladwin is of the view that there was insufficient data to reach an opinion. As in relation to Trade 10, in circumstances where Mr Moore has considered both the disclosed data and (unlike Mr Gladwin) the data which extends beyond the trading day in question I accept the evidence of Mr Moore and do not consider this trade further.

Points of general application

564. In considering the allegation of front running in respect of individual trades the court takes into account the following matters which are of general application:

564.1. The inconsistencies and omissions in the disclosed data identified by the experts which in the view of the experts (paragraph 7 of the Joint Report) "*reduce the certainty with which conclusions can be reached*";

564.2. On the evidence before the court (and in the absence of the relevant data) it is impossible to know whether at the relevant time traders had customer orders which they were seeking to fill or whether they had their own proprietary positions and thus (even assuming that ECU had given valid instructions to HSBC not to trade ahead) to be certain whether trading ahead of the trigger was for a legitimate or illegitimate purpose;

564.3. whether any trading ahead of the order by the Defendants had a material effect on the time at which the orders were triggered depends on the identification of the trigger time: in the case of certain currency pairs the trigger time cannot be identified from trading in a single market but only by considering the cross currency pair and according to the evidence of Mr Moore the precise trigger time is in any event uncertain being dependent on the trader's evaluation of the trading being carried out in the market (and is not limited to the data now before the court);

564.4. whether any trading ahead of the order by the Defendants had a material effect involves a value judgment as to the effect of any trading by HSBC on the market as a whole and the court does not have data showing the entirety of the trading in the market;

564.5. the impact of any trading by HSBC also requires an evaluation of the causes of the market movement and in some cases, there are clear instances of external factors such as governmental data releases and external events (e.g. reports of a missile strike) having had an impact on the market movements;

564.6. there was no evidence from the traders who carried out the trading as to their motive or intention for trading ahead of the order (assuming that there was trading ahead) other than limited evidence for some Trades in the form of transcripts of contemporaneous phone conversations/ electronic messaging.

The inconsistencies and omissions in the disclosed data

564. The experts mentioned 3 specific issues in the Joint Report as examples of inconsistencies and omissions in the disclosed data:

564.1. The absence of time stamped customer data.

564.2. The absence of an HBEU or HBUS orderbook.

564.3. The absence of Reuters data which was said to be particularly important for Commonwealth currencies.

565. As to the absence of time stamped customer data, this is said by the experts to be especially relevant to Trades 27 and 29 (paragraph 8 of Joint Report). However the experts are agreed in relation to Trades 27 and 29 that there was trading ahead and but for the trading ahead the orders would not have triggered at the time they did.

566. As to the absence of Reuters data, the two predominant data sources for trading are EBS and Reuters. As to Reuters, none has been disclosed. Reuters was the dominant system for pound/dollars and US dollars, Canadian dollars and other commonwealth currencies. It was submitted for the Defendants that Reuters data is not available due to the time elapsed.

567. In Closing Submissions (paragraph 27.2(2)(e)) it was submitted for ECU that:

"*in circumstances where those traders are alleged to have deliberately concealed numerous instances of misconduct, it is highly unattractive for the bank now to rely on an alleged lack of data in respect of other instances of related misconduct – where the*

evidence points firmly to the conclusion that ECU was defrauded, the Court should feel, ECU submits, no hesitation in reaching that view."

568. To the extent that by submitting that it is "*highly unattractive*" ECU is thus submitting that the court should draw inferences as to misconduct from the absence of data or that the absence of data supports a finding of misconduct, I do not accept that submission. There is no evidence to support any inference that the absence of data is due to any deliberate or intentional failings on the part of HSBC. This is a claim which was only brought well after the usual limitation period had expired and there is no reason to conclude that HSBC should have preserved records or data in anticipation of a claim being brought outside the normal limitation period. To the extent that the submission is that the court should draw inferences that traders intended to front run orders where "*related misconduct*" is found, this is considered below.

569. ECU "*invites the Court to make reasonable assumptions as to where the balance of probabilities lies*" and "*insofar as HSBC relies in its defence on any residual uncertainty arising from the effluxion of time, ECU invites the Court to resolve that uncertainty in its favour*." (paragraph 110 of Closing Submissions). In support of this submission ECU asserted that there was a principle that "*where a lack of evidence has been caused by the defendant's wrongdoing, the claimant should get the benefit of such doubt as may exist.*" ECU appeared to rely (paragraph 109 of Closing Submissions) as authority for this proposition on the fact that such a principle exists in the assessment of damages flowing from an established wrong. Whatever the relevant principle in the assessment of damages it has no relevance to the approach of the court in determining whether the Claimant has proved its case on liability on the balance of probabilities.

570. Although I accept that the experts have been able to express a view on the majority of the trades, it is however important in making findings to consider the degree of likelihood or probability for each trade expressed in the light of the data limitations for the particular trade. Further in my view given the shortcomings identified in the data, caution must be exercised in seeking to infer or extrapolate that misconduct which is dependent on inferences as to motive has occurred.

571. There was no data disclosed in relation to trades conducted in Hong Kong. Although ECU complained (paragraph 87.4 of Closing Submissions) that HBHK has not consented to EBS data being made available for the trades conducted in Hong Kong and that the explanation of regulatory reasons was advanced only in the Defendants' submissions, I note that HBHK is not a defendant in these proceedings. HBHK conducted the orders on 3 of the trades: 4, 11 and 21. In the circumstances in my view it is not appropriate to draw any adverse inferences from the absence of HBHK data but even if I were wrong on that, and it might indicate some wrongdoing on the part of HBHK traders, such an inference would be insufficient to justify a finding of front running on these or the other trades in issue, noting that ECU has dropped its Front Running Claims in relation to approximately half of the trades.

"Legitimate" trading ahead of the order

572. The experts are agreed that even if there was a valid instruction to HSBC not to trade ahead, trading to fill customer orders or to adjust the trader's own position was legitimate.

573. The Joint Report stated:

"26. Mr Gladwin and Mr Moore agree that pre-hedging some types of Stop Loss orders was, and is, a routine and permissible practice in the FX market. The purpose of a pre-hedge is to limit slippage on a customer order particularly in a fast-moving market.

27. Mr Gladwin and Mr Moore agree that in circumstances where a customer requests the bank to wait for the order level to trade, the bank should not pre-hedge the customer order. Mr Gladwin believes this applies to the orders left by ECU with HBEU and HBUS, as noted in paragraph 18 above. Mr Gladwin and Mr Moore agree that such an order does not prevent the trader servicing other customer business or electing to adjust their own position." [emphasis added]

574. The experts were also agreed that a trader could trade or adjust his position even as the order level approached although a trader should take care in doing so not to trigger an order in circumstances where it would not otherwise be triggered:

"30. Mr Gladwin and Mr Moore agree that the role of the spot dealer involves continuous engagement with the FX market and maintaining either a long or short position; rarely will the spot dealer not have a position. When a spot dealer receives a customer Stop Loss order this does not extinguish their right to trade or adjust the position even as the order level approaches.

31. Mr Gladwin and Mr Moore agree that care must be taken to ensure that the management of the trader position does not cause a Stop Loss order to be triggered in circumstances where it otherwise would not."

575. In order to find that there had been front running, the court has to assess whether it can be established on the balance of probabilities that the trading ahead of the order was illegitimate given the absence of relevant data as set out in the Joint Report. At paragraph 28 of the Joint Report the experts agreed that:

"... limitations of the data disclosed referred to in paragraph 6 above limit their ability to reliably reconstruct the HSBC trader position as the ECU Stop Loss order was executed and identify what, if any, other customer business was occurring at or around the same time as the ECU order was executed. The confidence in the conclusions reached by Mr Gladwin and Mr Moore are by necessity reduced by these limitations. Where the market activity by HBEU or HBUS is a good match for the ECU order it is possible to have a higher degree of confidence in the conclusions." [emphasis added]

576. The limitations referred to in paragraph 6 (cross referenced in paragraph 28) are that the experts agreed that:

"...there are limitations to the HSBC trading data (including the Dealhub (HBEU) and TREATS (HBUS) data), and it is likely the HSBC data is incomplete and excludes the trade record resulting from the ECU order and the trade records for other customer orders. This means that it is not possible to be certain on the conclusions related to this data."

577. With this caution, the conclusions reached by the experts as set out in the Joint Report (paragraph 33) in this regard were:

"Mr Moore's opinion is that within the trading ahead of the ECU order identified, there are examples where the likely explanation for the trading ahead observed is that the HSBC trading was exclusively related to the ECU order, for example Trade 29. There are also examples of trading ahead that are likely to be related to the management of the spot dealer position and therefore is not related to the ECU order, for example, Trades 6, 12, 22, 25, 31, and 32. Mr Gladwin's opinion is that even for orders where the trader does not cause the triggering of the order it is still possible that their trading was in relation to execution of ECU's order."

578. ECU stressed the content of the regulatory codes in place at the relevant time: in particular ECU relied on the Non-Investment Products Code drawn up by market practitioners in foreign exchange, money and bullion markets. The Code incorporated as an annex the earlier 2001 "Good Practice Guidelines" for foreign exchange trading. The 2001 Guidelines included a statement that:

"4. The handling of customer orders requires standards that strive for best execution for the customer in accordance with such orders subject to market conditions. In particular caution should be taken so that customers' interests are not exploited when financial intermediaries trade for their own accounts."

579. However I accept Mr Moore's evidence that this was guidance and whilst it might be "*aspirational*" it did not represent actual best practice at the time.

Trigger time

580. There were differences in some instances between the experts as to when the trigger occurred. Mr Moore's evidence was that today the available data does not show the full picture of what was happening in the market and does not reveal what matters the trader took into account in determining whether the trigger had been reached.

581. It was put to Mr Moore in cross examination that the "*pivot point*" for answering the question whether or not at the specific point of execution the trading by HBEU or HBUS could impact the precise prevailing rate, was the "*specific point of execution*".

582. Mr Moore's evidence was that this was subject to a "*practical judgment*" which he explained was that:

"*dealing in currencies to one ten thousandth of a fraction, in one second time slices with currency pairs that trade in multiple venues, depicts a level of precision in the FX market that isn't available to us looking at the data that we have, because FX is trading in multiple venues throughout the time and even the venues that we have, particularly EBS, is only showing us highest paid/lowest given and is not the full volume at the time. Therefore, there is a judgment required as to what was happening in the market that is broader than a simple interpretation of one system's data*." [emphasis added]

583. Mr Moore said that even if there was a fuller data set a judgment would be required. His evidence was:

"*Well, you would need to know in those circumstances what the spot dealer at the time took into account in making a judgment that the order had triggered. That may not even be a trade. He may see a colleague quote a different currency pair to a big customer, shade the price in a different direction, clearly illustrating that that customer is going to buy dollars and he may make a judgment that that is going to affect the market and trade. We won't ever have the full data set because we won't know what other banks have done, what was trading in Currenex, what was trading in Reuters, what was trading in FXAll and so on and so forth. So inevitably there is a judgment that is required*."

584. Mr Moore's evidence was that the question was "*capable of an answer but not an answer that is dependent on one second time slices to one ten thousandth of a fraction of a currency pair with a degree of precision that you suggest is possible*."

585. Mr Moore accepted that Mr Gladwin found it possible but he stated that he did not agree.

586. In my view because the court has limited data and the market is trading in multiple venues the court must proceed with extreme caution in making findings which are dependent on trigger times being correct to one second time slices. Further even if the court is able to form a view as to the likely trigger time, the court must also be cautious about finding an intention on the part of the trader to trigger the stop loss order in light of the evidence of Mr Moore that the trader was having to make a judgment (particularly on cross currency pairs) of whether the order had in fact triggered.

Impact of trading by HSBC on the trigger

587. There are two issues to consider in this regard:

587.1. The approach of Mr Moore;

587.2. Absence of data.

588. ECU submitted (Closing submissions paragraph 82.6) that Mr Moore "*imposed his own materiality threshold*" whereby he assessed whether the trading ahead affected the trigger by a "15-minute window".

589. In this regard the order for expert evidence was in the following terms:

"(3) Whether the defendants trading ahead of the claimant's stop loss orders (if any) materially influenced the designated currency pairs such that those orders would not but for that trading ahead have been triggered <u>at the time at which they were in fact reported to have been triggered</u>."

590. Paragraph 44 of the Joint Report stated:

"*Mr Moore has applied a materiality threshold to this judgment [which is the judgment set out above under paragraph 43] such that <u>where the potential impact of HBEU pre trigger trading is restricted to a matter of seconds or a few minutes</u>, Mr Moore considers that this trading did not have a material impact on the currency rate and/or time that the trigger rate traded. Mr Moore therefore only concludes that trading materially influenced*

the currency pair where the trigger time was affected by more than a few minutes." [emphasis added]

591. There was a difference of approach between Mr Moore and Mr Gladwin.

592. In his report Mr Moore said:

35. As my instructions specify an assessment of whether HBEU or HBUS trading materially affected the FX market rate, I am required to make a judgement on how the relevant FX currency pair would have traded absent HSBC trading. This is unknowable today, however throughout my report I consider the volume and timing of HSBC trading in relation to the prevailing liquidity in the relevant FX market and consider whether the FX rate movements (as depicted in the FX intraday rate charts within my report) would be materially different.

36.There is a judgement required on what constitutes "material". Wherever I identify a potential HSBC pre-hedge that may have affected the ECU Stop Loss order trigger by seconds or minutes I do not consider this to be material. Wherever I identify a potential HSBC pre-hedge where the impact may be longer than this time, say 15 minutes or more, I identify this and consider whether the effect of the trading was material.

593. Mr Moore conceded in cross examination that he could have expressed the executive summary better and it was not a substitute for reading the individual trade report. Mr Moore's explanation in cross examination was that he considered typically a standard period beforehand. He explained that:

"*Which I standardised at five minutes. But in certain circumstances that was shortened where relevant. We have an example of a trade where what was happening five minutes earlier was irrelevant because there were figures released, the market moved and I considered a period that I think was as short as ten seconds. And then I think on trade 29, because it was in a less liquid time zone and I am looking at a less frequently traded currency, I took a view that the trading over the previous 20 minutes was relevant. But I started that process with a five-minute time clock and then looked at the data for context*."

"... [five minutes] was my best estimate of where a trader might start looking at an order level based on a combination of where the market was, how close the market was to the order level and that typically would happen in five minutes but it could be shorter or could be longer...[five minutes] is when I as a trader would be thinking in, all other things being equal, is when I would expect a trader to be looking at the market."

594. In my view the submission for ECU that Mr Moore applied a "*15-minute window*" was shown in cross examination not to be the case. (This appears to be acknowledged by ECU in its Closing Submissions where it was said that Mr Moore applied the window "*inconsistently*".)

595. His evidence was that he

"...started with a five-minute period and looked at the data. Dependent on what the data told me, I would either go back longer and there are examples of that, or it would be much shorter and there are examples of that. Where I have varied that based on the market and the data that I saw."

596. It was put to Mr Moore in cross examination that Mr Gladwin "*adhered to the concept of a second-by-second market and asked himself whether the question was answered yes or no apropos the very point of trigger, and you have taken a broader look*". [emphasis added]

597. Mr Moore accepted this.

598. In my view the approach adopted by Mr Moore is one which I accept. It is wrong in my view to characterise this as attaching a materiality threshold. Nor do I accept the submission for ECU that Mr Moore has answered a different question. Rather, as Mr Moore explained, the precise trigger is not capable of that degree of precision. Mr Moore's evidence was:

Q. The question though is precise, isn't it? It is at the time at which they were in fact reported to have been triggered. That is not around the time, is it?

A. It is. It is not and it requires a degree of precision that in my judgment is -- was not available to the trader at the time and is only partially available to us today."

599. I note that Mr Gladwin does not agree but in my view the reasons given by Mr Moore namely the absence of full data and the inability to be precise in the circumstances as set out above are logical and rational. I also prefer the evidence of Mr Moore for reasons of general credibility discussed above.

The absence of data showing the market volume.

600. When considering the effect of the trading by HSBC traders, the ability to draw conclusions as to the impact is limited by the fact that FX trading was carried out on multiple venues. As noted above the evidence of Mr Moore was that:

"FX is trading in multiple venues throughout the time and even the venues that we have, particularly EBS, is only showing us highest paid/lowest given and is not the full volume at the time…"

External factors

601. The extent to which market movements were caused by or materially influenced by external factors is best considered in the context of individual trades. However I note the evidence of Mr Moore that the impact of an external event/announcement is not limited to the immediate period following the event but can create volatility in the market. In relation to Trade 14 where there was a report of an Iranian missile strike, Mr Moore's evidence in cross examination was as follows:

"What I would imagine the circumstance was, is the announcement came out, the news hit the headlines, there was an instant reaction…And the foreign exchange market doesn't work, although the instant reaction is in the seconds, candidly, after it comes out, that doesn't mean it has fully processed all the information and -- -- there will be presumably other news stories, subsequently one that denied that it was a missile strike. So it is tough to say. What it would have done is to create volatility and uncertainty and concern in the market…

…I think it is wrong to think you can just pick, here is ten seconds and here is this trading or that news item and one caused the other. I think you can create the

environment that that would have created, which would have been, you know, highly worrying for anyone with an exposure in financial markets and foreign exchange and other markets"

Adverse inferences

602. In relation to the absence of evidence from the traders ECU submit that an adverse inference should be drawn. ECU also submit that an adverse inference should be drawn from the subsequent regulatory findings/US proceedings.

Absence of traders

603. In relation to front running and the question of motive (as well as proprietary trading), ECU submitted that the court should draw adverse inferences on the basis of HSBC's failure to call any of the traders as witnesses or to provide any proper explanation or evidence as to why not a single one of those individuals was willing to give evidence.

604. It was submitted (paragraph 53 of Closing Submissions) for ECU that the absence of the traders was particularly notable because of HSBC's strategy of placing the alleged "*unknowability*" of the trader's motives at the heart of its defence.

605. The law on the drawing of adverse inferences by the court was common ground. As set out in *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, at page 340 the relevant principles are as follows:

"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

606. I also note the following in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at 154 of the judgment of Cockerill J:

i) This evidential "rule" is, as I have indicated above, a fairly narrow one. As I have noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken.

ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the "missing" witness would have material evidence to give on that issue and (iii)

why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.

iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of: a) the overriding objective; and b) an understanding that it arises against the background of an evidential world which shifts -both as to burden and as to the development of the case -during trial..."

607. ECU seeks an adverse inference in relation to the allegations of front running namely that the intention behind the trading ahead was deliberately to trigger the order.

608. It was submitted for the Defendants (paragraph 48 of Closing Submissions) that it was unrealistic to suggest that any of the traders would be able to give material evidence as to why they traded the way they did on specific days between 2004 and 2006.

609. Whilst it is superficially attractive to suggest that the traders could have had material evidence to give as to their motive for trading being the only ones who knew what their subjective intention was at the relevant time, absent an admission of wholesale front running of trades by all or any of the HSBC traders involved (as to which I note ECU has abandoned just under half of its original allegations of front running) it is in my view unrealistic to conclude that the traders would have been able to recollect the motives behind the numerous trades in the minutes and seconds leading up to the trigger. I note that they would not have access to their own records of trading ("blotters") to assist them (or the court) as these have not been retained over the period of time which has elapsed and the other data is incomplete to varying degrees. In my view their evidence would have been likely to result in speculation and hypotheses as to what the trader might have been thinking over the relevant minutes and seconds and in my view these witnesses could not be expected to have given material evidence.

610. Even if I were wrong on that and the traders "might" have been expected to give material evidence, in deciding whether to draw an adverse inference I have to consider the reason for their absence.

611. ECU submitted (paragraph 52 of Closing Submissions) that no trader has come to court to say, *"I am not guilty of that which is alleged against me"*. However in assessing the reason for the absence, I take into account that the traders are not defendants in this action and accordingly have no interest in the proceedings. It is the HSBC entities that are the defendants in this action and, as discussed elsewhere, the particular allegations against individuals of proprietary trading are made only in the expert report of Mr Gladwin and not in the pleaded case (other than in relation to Mr Bowden and Mr Scott). Mr Scott is mentioned by name in the pleaded case in connection with the allegation of front running of Trade 28 but in the light of the US proceedings taken against him one can readily infer why he may not be willing to be involved in assisting HSBC in defending these proceedings. Other traders are referred to in the Particulars of Claim but are identified by initials rather than named.

612. Where an individual is no longer employed by HSBC and has no reason to agree to participate in the proceedings other than that they may have wished to refute (largely unpleaded) allegations of personal wrongdoing, it is in my view understandable that the trader did not give evidence. I note that submissions were made for the Defendants as to the extent to which traders were contacted in 2020 and the Defendants offered in

Closing Submissions to provide a witness statement if required to evidence the submissions. In my view such a witness statement would have been helpful in advance of trial but is not necessary to resolve this issue. In reaching a conclusion on whether to draw an adverse inference I have regard to Cockerill J's observations in *Magdeev* concerning the background of a shifting evidential world and in my view, this is such a case, having regard to the fact that the allegations against individual traders were made only in the report of Mr Gladwin and not earlier in the proceedings.

613. In the circumstances of a case being brought to which the traders are not a party, in relation to events which occurred over 15 years ago and in relation to which by reason of the volume and frequency of the trading involved, the traders are unlikely to be able to have any independent recollection, I draw no adverse inference from the absence of the traders.

US proceedings and regulatory investigations

614. It was submitted for ECU (paragraph 9 of its Closing Submissions) that it is a matter of record that HSBC's FX trading desks were guilty of "*widespread historic misconduct*" and that (paragraph 11) the "*context*" in which ECU's allegations are made provides further "*strong support*" for ECU's case.

615. Amongst other things, ECU pointed to the small number of traders, around eight or nine, employed by the London FX trading desk and that of these individuals:

615.1. Mr Scott was indicted by the US Department of Justice in respect of front running of client orders on 2 occasions and this fraud was admitted by HSBC in its Deferred Prosecution Agreement and he was fired for misconduct in 2014.

615.2. Mr Sarramegna was suspended in January 2014 following an investigation into FX misconduct and subsequently fired.

615.3. the alleged illegitimate proprietary trading which ECU says is accepted by HSBC's own expert in relation to 6 of the traders (Mr Biggs, Mr Sarramegna, Mr Barnett, Mr Nettleingham, Mr Courtney and Mr Davies) as likely.

616. ECU also rely on the FCA Final Notice which it was submitted pointed to widespread misconduct and systemic failings in the FX business from 2008-2013.

617. I note the following passages from the FCA Final Notice:

"*The right values and culture were not sufficiently embedded in HSBC's G10 spot FX trading business, which resulted in it acting in HSBC's own interests as described in this Notice without proper regard for the interests of its clients, other market participants or the wider UK financial system. The lack of proper control by HSBC over the activities of its G10 spot FX traders in London undermined market integrity and meant that misconduct went undetected for a number of years."*

"4.31.HSBC's failure to identify, assess and manage appropriately the risks in its G10 spot FX trading business allowed the following behaviours to occur in that business: (1) Attempts to manipulate the WMR fix rate, alone or in collusion with traders at other firms, for HSBC's own benefit and to the potential detriment of certain of its clients and/or other market participants; (2) Attempts to trigger clients' stop loss

orders for HSBC's own benefit and to the potential detriment of those clients and/or other market participants; and(3) Inappropriate sharing of confidential information with traders at other firms, including specific client identities and, as part of (1) and (2) above, information about clients' orders." [emphasis added]

618. I also note this passage from the Deferred Prosecution Agreement statement of facts:

"*39. The London Spot FX Head, having learned that HSBC would likely be selling a large amount of cable, and despite knowing that this information was confidential, perpetrated a scheme to defraud Victim Company by misappropriating this confidential information for his own benefit and that of the bank in violation of the duty of trust and confidence that HSBC owed to Victim Company 2. Specifically, HSBC's London Spot FX Head, based on the confidential information of Victim Company 2 (that is, based on the fact that Victim Company 2 was to sell cable in the immediate future): (a) traded ahead of, or "front ran, "Victim Company 2 by placing proprietary trades in advance of the client with the expectation that HSBC's trading for Victim Company 2 would depress the price of cable in a manner that benefitted any "short" positions taken by HSBC; and (b) executed the Victim Company 2 FX Transaction in a manner designed to cause the price of Sterling to fall, thereby causing Victim Company 2 to transact at less favorable prices and allowing HSBC's London Spot FX Head to cover his short positions and to make money*."

619. As was stated at the outset of this judgment, the court rejects the somewhat remarkable submission for ECU (paragraph 14 of Closing Submissions) that the court should have in mind "*as a starting point*" that "*nearly all of the traders are (or are likely to be) guilty of some form of serious misconduc*t".

620. As to the significance of the FCA findings these relate to the period 2008 -2013 and cannot provide any real support for the position in 2004-2006. It is trite that any wrongdoing must have a starting point and there is no evidence to support an inference that any wrongdoing had already commenced in the period 2004-2006.

621. Mr Moore was asked about standards in the market over the decade but with due respect to Mr Moore this was a general response to a question which he had not been asked to address as an expert and for which there appeared to be no real evidential foundation. In any event his evidence referred to a decline over the decade which was too imprecise to form the basis of a substantive conclusion. Similarly I attach no weight to the exchanges in cross examination with Mr Moore that the conduct would be "*disgraceful*". The issue is whether ECU have established its allegations of misconduct not how such misconduct would be viewed by Mr Moore or anyone else.

622. Mr Scott was the subject of the US proceedings along with Mr Johnson. The court has not been taken to the detail of these proceedings. I note however that these relate to events in 2011 and whilst Mr Johnson was convicted in the United States, Mr Scott successfully resisted extradition (although I have not been taken to the basis for this) and has not been convicted. I note that in the Deferred Prosecution Agreement HSBC accepted that Mr Scott had perpetrated a fraud and front run a trade. However in my view little, if any, support for ECU's case on front running of Trade 28 (with which Mr Scott was directly involved) can be inferred from this acknowledgment by HSBC of wrongdoing by Mr Scott, given that the relevant events occurred in 2011 some 5 years after the events in issue in this trial. A broader inference of a "*culture of widespread*

misconduct" cannot in my view be justified in relation to other trades where front running was alleged and Mr Scott was not directly involved.

623. As to the submission that illegitimate proprietary trading is part of the "*context*" for the consideration of the front running claims, it was put to Mr Moore in cross examination that the fact that there is inappropriate or illegitimate collateral trading and trading ahead may inform as to the motive for the trading ahead. Mr Moore rejected the proposition. The relevant exchange was as follows:

"A. If I accept that there is illegitimate proprietary trading, does that inform my judgment?

Q. As to the motive behind the trading ahead.

A. Yes.

Q. Right. Does it make the trading ahead in those instances more likely to be front running than pre-hedging?

A. … I think it is not pre-hedging…because it is secondary trading and they are not necessarily involved in executing the order. If we use the definition that I provide that says it is trading if it is front running with an intention to trigger the order, I think that is not necessarily the case either. It is proprietary trading with a motive to profit. But it doesn't fall naturally into those two categories."

624. I accept the evidence of Mr Moore.

Cumulative effect of alleged wrongdoing

625. Throughout its oral and written submissions ECU has sought to rely on the "*cumulative effect*" of the wrongdoing as providing support for its allegations.

626. It was submitted for ECU (Closing Submissions paragraph 27.2 (2)) that Mr Moore "*has accepted that rate manipulation is the likely explanation for the execution of four trades*": Trade 7 (Mr Sarramegna), Trade 11 (HBHK), Trade 27 (Mr O'Sullivan and Mr Mehani) and Trade 29 (Mr Babich and Mr Mehani).

627. In my view this does not reflect Mr Moore's report and is not supported by the cross references identified by ECU in its written submissions. In his report (paragraph 37.2) Mr Moore found that in three trades (7, 27 and 29) there was trading ahead (referred to by Mr Moore as a prehedge but used interchangeably by him) and that this was:

"likely to have influenced the prevailing FX rate such that the identified pre-hedge caused the order to be triggered..."

628. However he did not state that there was an intention to trigger the order or to manipulate the rate, a necessary element of front running. (This is an inference which is for the court to draw if appropriate.)

629. In relation to Trade 11 ECU relied on Mr Moore's evidence in cross examination. However I do not accept that Mr Moore accepted that rate manipulation was the likely explanation for Trade 11. It was put to him in cross examination that he did not "*rule out the possibility*" that the trader traded ahead deliberately knowing that he would be

likely to trigger the order. Mr Moore responded that it did not provide the full picture. In re-examination Mr Moore explained that the trader would have seen other banks trading with him in the relevant currencies which would mean that the trader was likely to go out and establish a position and in addition the trigger time identified by Mr Gladwin was an estimate on incomplete data such that if it is in fact earlier, the trading would have occurred post the trigger. I note that Trade 11 was executed in Hong Kong and the experts do not have any data from HSBC Hong Kong which supports the conclusion that the precise trigger time cannot be identified (notwithstanding the evidence of a phone call between Mr McEvoy and Mr Rumsey which merely places the execution of the order around 4am).

630. To the extent that ECU submitted that the court should draw inferences that front running occurred from the fact that there was trading ahead and that this trading ahead caused the trade to be triggered, this does not establish an intention to trigger the stop loss order: trading ahead, even if in breach of valid instructions given by ECU, could still have been to reduce slippage or for other legitimate purposes.

Individual trades

631. I turn then to consider the 5 Trades where Mr Gladwin says the Trades would not have triggered on the date of execution of the order. (The allegation of front running in relation to Trade 4 is no longer pursued)

632. In considering the evidence I have in mind the assessment of the credibility of Mr Gladwin above and for the reasons set out above where there is a conflict between the views of the two experts, I prefer the evidence of Mr Moore. I also have in mind the general points discussed above in reaching findings as to whether ECU has established front running on individual trades.

Trade 15 (17 February 2005)-GBP/USD

633. This was a GBP/USD trade executed on 17 February 2005 for GBP 124,886,946 with a trigger rate at 1.8955 (above 1.8954) and the experts agree a trigger time of 16:42:39.

634. This is a trade where the experts agreed that there was trading ahead of the order by HBEU. Mr Gladwin identified Mr Courtney as buying GBP 44 million ahead of the trigger and Mr Moore identified a "*potential pre-hedge*" of GBP 41 million. Mr Gladwin and Mr Moore agreed that the trading by Mr Courtney/HBEU in the seconds before the order triggered may have caused the order to be triggered. Whilst Mr Gladwin's position was that it was "*very likely*", Mr Moore's opinion was that it was "*possible*" and that the trading was consistent with both the trader acting to minimise slippage in the belief that the order was about to trigger and was also consistent with the trader acting to ensure that the order was triggered securing a profit on the potential pre-hedge. Mr Moore's opinion was that the impact of six other institutions managing ECU orders may have been the catalyst for the HBEU trader to act.

635. The evidence of Mr Moore is that he referred to a "*potential prehedge*" due to:

> *"The uncertainty [that] the trading could be unrelated to ECU's order"*

636. This is a trade which would have traded on Reuters but we do not have the Reuters data which means that the court cannot know what proportion of the market the HSBC trading represented.

637. However Mr Moore accepted in cross examination that he could say "*with some confidence"* that the trading of Mr Courtney just before the trigger at a time of relatively low liquidity caused the rate to increase and the order to trigger.

638. Mr Moore also accepted that it was "*probable*" that there was little trading activity in the market at that time that was not connected to the ECU order.

639. ECU submitted that the likely explanation is front running:

639.1. It was a lower liquidity market at that time;

639.2. There was no sustained buying and selling through the trigger and beyond; the market fell after the trigger;

639.3. There was no need to pre-position in a slow market.

640. Mr Moore's evidence was:

"Now at the point that Mr Courtney is buying in the afternoon of 17 February, he has seen three of these moves higher but he doesn't know that it is going to taper off at that point, although that is what it subsequently does. We do know that it tapered off and didn't go any higher. Mr Courtney will have witnessed three legs up over the afternoon and he wouldn't know that that wasn't three of four or three of five.

Q. Yes. So? What are you saying? That that validates the thesis does it that he would have been, it would have been understandable if he was pre-hedging?

A. I think that would explain it but it also, simply from the data, doesn't allow us to condemn him."

641. Mr Moore's evidence was that holding a position of GBP40 million would not be a substantial position in the world of foreign exchange although he accepted that there was an "*incentive*" for Mr Courtney not to be left holding that position.

642. It was put to Mr Moore that it was "*likely*" that Mr Courtney conducted $22 million of trading knowing that would trigger the trade. Mr Moore's evidence was that it was one of two or three plausible explanations, the other explanations being that he could have seen other activity in the market and believed that the trigger was about to occur. However when it was put to him:

"...whether in your judgment it is more probable than not that when Mr Courtney conducted the $22 million of trading that ultimately triggered the trade, he did so knowing that that would be the consequence?"

Mr Moore's response was

" That is true"

643. I find on the evidence that it is likely that Mr Courtney was trading in relation to ECU's order but that it was more likely that Mr Courtney was acting to reduce slippage rather than with the intention deliberately to trigger the order for the following reasons:

643.1. On Trade 15 the initial trading by Mr Courtney at 16:39:25 was then followed by selling at 16:40:03, further purchases at 16:40:38 and further sales at 16:41:19: I accept the submission that selling is inconsistent with trying to drive up the market i.e. front running ECU's trade. It cannot be established from the initial trading that he formed an intention to drive the market up by this trading.

643.2. He then started to buy at 16:42:28. The evidence shows that the market rose sharply twice in the course of that afternoon and then a third upward move appeared to have started. Mr Courtney did not know whether the rate would continue to rise.

643.3. Mr Moore's evidence that it was probable that Mr Courtney "*knew*" the trading would trigger the trade but that in my view is not the same as "front running". Front running was defined by Mr Gladwin as *"...[trading ahead] done in a manner deliberately intended to trigger the order.*" and in its Closing Submissions (paragraph 70) ECU appears to accept that front running requires evidence or an inference of an intention deliberately to trigger the order.

643.4. Mr Moore's evidence (paragraph 523 of his report) is that at the time HBEU was managing the ECU order there were 6 other institutions also managing an order at the same GBP/USD order level in the less liquid time period at the end of the London day. In his opinion (paragraph 526 of his report) it is likely that those banks managing the ECU order began requesting prices from the limited cohort of New York liquidity providers as the GBP/USD rate approached the ECU order trigger. These liquidity providers may then have reacted to these price requests and taken them as a signal to purchase GBP/USD for their own account.

643.5. Looking at the wider "*context*" and for the reasons discussed above, there is no reason in my view to attribute an intention to trigger the Stop Loss Order by trading ahead to Mr Courtney on the basis of his absence as a witness in these proceedings or the regulatory investigation/US proceedings (noting in particular that Mr Courtney was not directly implicated in the US proceedings).

643.6. Further in my view there is no evidence to infer misconduct based on his actions on other trades. The only direct evidence the court has in relation to the attitude of Mr Courtney and whether he might engage in manipulation of the market is in relation to Trade 14, executed the day before Trade 15, where the court has the contemporaneous evidence of a telephone conversation between Mr Courtney and an unknown person. From the audio recording I infer that on Trade 14 at the material time Mr Courtney was someone who was under pressure as the market moved rapidly and who "*scrambled*" to trade as the market moved. The conversation is informal and between people who apparently knew each other such that there is no reason to believe it does not reflect his honest account of what occurred on that Trade.

644. In my view ECU have not established that it is more likely than not that Mr Courtney intended to trigger the Stop Loss Order and thus the allegation of front running of Trade 15 is not made out.

645. If I were wrong on that I accept the evidence of Mr Moore that the trade would have triggered the following day (paragraph 706 of his report).

Trade 16 (22 March 2005 USD/CHF)

646. This was a USD/CHF trade for USD 255,545,997 executed on 22 March 2005 where the trigger was 1.1906 (order to trade above 1.1905) and the trigger time was 19:56:37 according to Mr Gladwin and 19:56:35 according to Mr Moore. There was an announcement by the US Federal Reserve of a decision to raise interest rates at about 19:15 on that day.

647. In the Joint Report Mr Moore said there was insufficient data to reach an opinion on whether there was trading ahead or whether the trading ahead had a material influence such that the orders would not have been triggered. By contrast Mr Gladwin was of the view that it was "*very likely*" that the Defendants' trading ahead had a material influence on the trigger: Mr Gladwin identified trading by Mr O'Sullivan in HBUS as being responsible for "*100% of the visible trading activity on EBS in the 5 seconds prior to the trigger"* and that *"Mr O'Sullivan buys USD 51m of USD/CHF in the 10 seconds prior to the trigger over which time the price moves from 1.1890 to 1.1905"*

648. However Mr Gladwin's view was based on three assumptions, as set out in the Joint Report:

648.1. Firstly, all disclosed HBUS sales were purchases.

648.2. Secondly, Mr O'Sullivan's trading (representing less than 25% of the trades and volume) exerted a material impact on the market.

648.3. Thirdly, that other institutions managing ECU orders of more than US$200m did not react to the US Federal Reserve decision to raise interest rates and affect the market.

649. Subsequent to the Joint Report and shortly before trial, further data was received by the experts and Mr Moore had a limited opportunity to revisit his conclusions in the light of the data prior to giving evidence, producing a three-paragraph addendum on the first day of giving evidence (12 July 2021). In particular his evidence in cross examination was that the new data allowed him to identify that in relation to this trade there was a purchase and not a sale of $52 million. However Mr Moore was unable to say whether Mr Gladwin was correct that HSBC made $111 million of consecutive purchases before 19:56:37.

650. In his evidence in cross examination Mr Moore accepted that this was a time of less liquidity and the potential for trading to have more impact as a result.

651. Mr Moore further accepted that HBUS purchased $51 million in the 10 seconds before the trigger.

652. It was put to him that this scale of trading was sufficient to move a currency pair in a low liquidity market.

653. Mr Moore's evidence was:

"*So I am looking at an environment where all of those providing liquidity and the main market-makers are likely to be buying dollar/Swiss or selling dollar/euro, reacting to this Federal Reserve interest rate announcement and if I am Mr O'Sullivan in that*

seat, and that market is moving up that quickly, what I am panicked by is that that move continues on through and I would think that most spot dealers with that order with that speed of move would not wait -- would start to trade at some point thinking that the order was about to trigger. So I don't necessarily think you can conclude that $50 million in some way was the cause of 15 points of the move. I think that is a degree of precision that is not possible."

654. It was then put to Mr Moore that between 19:56:32 and 19:56:37 i.e. 5 seconds HBUS was the only purchaser and by purchasing $18 million, HBUS was able to "*push*" the market by 10 pips.

655. Mr Moore disagreed. His explanation was that:

"Because we -- the EBS is not the sole venue or sole place for dollar/Swiss trading. We don't know what was happening -- I would accept and it is in fact the main inter-bank venue, we have no idea what is happening in futures, foreign exchange trading in futures, we have no idea what is happening in Currenex, we have no idea what is happening FXAll, we have no idea what is happening between bank to bank, no idea what is happening between bank and any customer, no idea what is happening between bank and any other customer system. All of which would have been visible to the trader doing this trading and it may be that if he hadn't bought the dollars somebody else would have bought them, almost certainly somebody else would have bought them." [emphasis added]

656. Further Mr Moore rejected the proposition that one entity moved the market by 10 pips by buying $18 million in 5 seconds. His evidence was that the data was known to be inaccurate. It was put to him that one would expect to see the highest bid, which is a snapshot, to be at or below the lowest price transacted. Mr Moore's evidence was:

" We know that that is the trading that they had done. We know the rates at which they had done it. I just don't -- I don't agree with the tone of pushing the market when I have to imagine what the environment was that that dealer was living with at that time, in that environment. We are attributing, in less time than it took you to ask me the question, we are attributing these motives to traders who aren't here to defend themselves and I think it is unreasonable and unfair. I mean, in that environment the market would have been moving up incredibly sharply. He would have had a stop loss, he would have been somewhat panicked by that, and if that line continued up another 50 points instead of stopping, which we know it did, he would have been looking at a very bad fill for the client. So those are -- the facts you present to me, Mr Lissack, are accurate. The negative connotation on the trader might be unfair." [emphasis added]

657. Mr Moore broadly agreed that the market experienced a spike that triggered the ECU stop loss order and after a short period the rate fell back. It was put to Mr Moore that *"... something caused the temporary spike in the prevailing rate that triggered ECU's stop loss order and the question is what it was?"*

658. Mr Moore's evidence was that:

"I think that question presupposes there is always a rational explanation for every movement you see on an FX chart and that isn't the case. There may be but there is not

-- every day somebody pays the high at the top on a spike and probably somebody hits the low at the bottom."

659. It was put to Mr Moore that his own explanation was the Federal Reserve interest rate rise but Mr Moore said this could not be attributed to specific points of movement in the market. It was also put to Mr Moore that the announcement was about 7:15 London time and the trading by Mr O'Sullivan began about 30 minutes after the release of the trading information. Mr Moore's evidence was that the reaction of the market to a "*shock*" or piece of information depended on the nature of the shock.

660. It was put to Mr Moore that:

"...The picture is consistent with this: HBUS, Mr O'Sullivan, trading ahead of the order which pushes the rate to the trigger. The order is triggered in what is a low liquidity session and then a second wave of buying arrives as ECU's other orders are in turn triggered."

661. Mr Moore's evidence, taking into account the period of time before there was further trading after the trigger, was:

"*I don't think that is impossible but it is probably not likely*…"

662. It was put to Mr Moore that Mr O'Sullivan had a "*powerful motivation*" to front run this trade based on the profit which Mr Gladwin calculated Mr O'Sullivan would make on $111 million.

663. Mr Moore's view was that the trading was not all buying and that it was "*highly unlikely*" that trading 40/50 points from the trigger was related to the ECU order. It was put to him that Mr O'Sullivan had built up a long position of $19 million prior to the purchase of 51 million and he stood to make a substantial profit if the stop was triggered.

664. Mr Moore's evidence was that *"...the position size is not particularly large. I would imagine he has a position of that or larger most days that he is trading."* and that in his view he did not think that sort of long position "*would be a powerful driving motivation*"

665. ECU are particularly critical of Mr Moore's evidence in relation to this trade (Appendix 2.1 of Closing Submissions) submitting that he made a "*desperate bid*" to defend his position and gave an "*unhelpful answer that did not address the point*". I have already considered above and set out my reasons why I have rejected the submission for ECU that Mr Moore was "*inclined to defend the traders*". I accept the evidence of Mr Moore as reliable and credible. In particular I accept his evidence that:

665.1. The size of the position which is likely to have been held by Mr O'Sullivan was not a "*powerful driving motivation*";

665.2. other participants are likely to have been active in the market reacting to the Federal Reserve interest rate announcement and the market was moving up quickly;

665.3. the move observed on 22 March 2005 was the beginning of a sustained move higher as the USD/CHF rate traded above the order level on the following 20 trading days.

666. This was a trade in which the EBS data shows a sharp move upwards in the USD/CHF rate between 19:18:40 and 19:56:49 (a rise of more than 1% in 38 minutes: paragraph 717 of Mr Moore's report). Mr Moore has identified in his report that the sharp rise in the USD/CHF rate reflected the announcement by the US Federal Reserve of an interest rate rise which Mr Moore believes was likely to have been published around 19:15. Against the background of the sharply rising market and having regard to the evidence of Mr Moore in my view ECU have not established that Mr O'Sullivan's trading ahead of the trigger was the cause of the market movement or that it was the intention of Mr O'Sullivan to drive the market through the trigger.

667. For these reasons I find that Trade 16 was not front run.

668. Even if I were wrong on this, in my view Trade 16 would have triggered on the same day and therefore falls into the category of trades where ECU have failed to show that it suffered loss.

669. Mr Moore's evidence in his report (paragraph 716) was that:

"*Following the execution of the ECU Stop Loss order, the USD/CHF rate then moved below the order level briefly, before again moving upwards and trading at a high of 1.1920. The rate then retraced and finished the New York trading day (22:00:00) around 1.1880.*"

670. It was put to Mr Moore in cross examination that Mr O'Sullivan pushed the rate to the trigger and then a second wave of buying occurred as ECU's other orders were triggered. Mr Moore's view was that this was "*not likely*" and in particular he identified the time gap of 20 minutes which was not consistent with that hypothesis. He also rejected the proposition that the fact that the price then fell back was "*key*". Mr Moore said that this was a pattern which was evidenced in a number of the charts of the trades.

671. I accept Mr Moore's evidence on this issue.

Trade 25 EUR/GBP (12 September 2005)

672. This was a EUR/GBP trade executed on 12 September 2005 for €286,600,452 at a trigger rate of 0.6751. Mr Gladwin places the trigger time at 16:27:19 whilst Mr Moore places the trigger time at 16:27:03.

673. This is a trade on which Mr Gladwin concluded that whilst there was insufficient trading data disclosed to prove conclusively that HBUS influenced the currency sufficiently to affect the trigger there was direct evidence of HBUS trading ahead and the price movements observed in the market were not consistent with the execution of an order after the trigger.

674. Mr Moore said there was insufficient data to reach an opinion – there was no HBUS TREATS data.

675. I accept (as did Mr Moore in cross examination) that there is no evidence of any news event or other reason why the euro sterling rate would have moved suddenly at this time after the end of the main trading day for both euro and sterling.

676. Mr Moore also accepted in cross examination that "*one explanation*" of the upward movement observed and assuming that HBUS traded ahead of this order, was that HSBC's trading ahead moved the spot rate up and through ECU's trigger level.

677. It was put to Mr Moore that since he agreed with Mr Gladwin that Mr Courtney conducted €19 million of illegitimate proprietary trading ahead of the trigger that supported a conclusion of front running by HBUS.

678. However Mr Moore's evidence was:

> *"...the things that I also noted is this order was passed to ten banks according to -- so we don't know what nine of those banks were doing. One of those banks was Kleinwort Benson and I think they had an order for 114 million euros. We don't know where that order was and who was managing it. The hypothesis that HBUS traded ahead, their trading ahead moved the market is not an implausible hypothesis but not one that you can reach from the data that we have got."* [emphasis added]

679. Mr Moore's evidence was that to get to that conclusion from Mr Courtney's activity you have to make a number of assumptions: none of the other banks traded -- none of the other banks with an ECU order were active and there was no other activity going on and it was HBUS's activity that was driving the market.

680. I note that Mr Gladwin in the Joint Report was of the view that the trading ahead by Mr Courtney of HBEU was in a size unlikely to materially impact the price of the currency pair. I also note that Mr Gladwin accepted that there was no evidence of any direct communications between Mr Courtney and anyone at HBUS in New York. Therefore the question is what HBUS did and whether this impacted the market.

681. Mr Moore accepted that it would be relatively easy to push the market at the relevant time (after the end of the London trading day) when there was highly reduced liquidity and that it would be highly profitable.

682. However in my view it cannot be said that front running has been established because to do so would be profitable: front running was clearly contrary to accepted market practice and if discovered, is likely to have led to disciplinary action (or more) against the relevant trader. On this trade there was no Reuters data which would have given information about what else was happening in the market and no HBUS trading data. I accept the evidence of Mr Moore that:

> *"trading ahead moved the market is not an implausible hypothesis but not one that you can reach from the data that we have got*."

683. ECU have to show that there was trading ahead by HBUS (not Mr Courtney) and there is no data to support this. ECU have to show that the trading ahead moved the market, that is dependent on the assumption that there was trading ahead and as Mr Moore states this is a hypothesis but not one that can be supported on the data. Finally ECU have to show an intention to trigger the Stop Loss Order and the mere fact that it could

have been triggered in a reduced liquidity market does not establish (on the balance of probabilities) that it was in fact the intention of the traders at HBUS. I have considered above the adverse inferences that ECU invite the court to draw and set out why I have rejected ECU's submissions in that regard.

684. For all these reasons I find that ECU has not established front running on Trade 25.

685. If however I were wrong on that, I accept Mr Moore's evidence (reflected in the Joint Report) that Trade 25 would have triggered the following day.

Trade 28 EUR/USD (6 January 2006)

686. This was a EUR/USD trade executed on 6 January 2006 for €167,313,926 at a trigger rate of 1.2176. Mr Gladwin identified a trigger time of 13:52:08 whilst Mr Moore took a trigger time of 13:52:07.

687. In his report (paragraphs 1302-1305) Mr Moore identified the key market movements for the relevant time on 6 January 2006:

"1302. At 13:30:00 there was then a period of extreme market volatility commencing with a sharp move higher to 1.2141 followed by an equally rapid move lower to 1.2088. ECU state that the Stop Loss order was placed at13:35:00 when EBS records the EUR/USD rate was around 1.2122.

1303. In the following 17 minutes there was a significant move higher to a high of 1.2185 at 13:52:12. It was this EUR/USD rate movement to 1.2185 which caused the ECU Stop Loss order at 1.2176 to be triggered.

1304.In my opinion, HBEU or HBUS trading activity related to the ECU Stop Loss order would not be responsible for or explain this movement, as I would not expect this level of market volatility to be caused by the HBEU and HBUS trading volumes discussed above. Economic data is often released at 1.30pm, and as further detailed later in my report, in my opinion this market movement was related to the release of important US non-farm payroll data. Further, ECU appear to have placed the order during a period of significant market volatility following this announcement.

1305.Having reached a high of 1.2185 as indicated in Figure 56, the EUR/USD rate moved lower and for the remainder of the London trading day, traded in a range between 1.2125 and 1.2168." [emphasis added]

688. I note that in Mr Moore's opinion the volatility was related to the release of the US non-farm payroll data at 13:30 and not by the trading activity related to the ECU Stop Loss Order (which was triggered according to Mr Moore at 13:52:07 and according to Mr Gladwin at 13:52:08).

689. Mr Moore was of the view that there was a pre-hedge of approximately EUR75m. However it was his opinion (paragraph 1331 of his report) that

"...considering the environment of a fast-moving market following the release of US non-farm payroll data, the pre-hedge purchase of EUR75m EUR/USD at 1.2167

was not responsible for the EUR/USD rate movement and triggering of the ECU Stop Loss order."

690. Mr Gladwin agreed (in the Joint Report) that the ECU order could only affect the EUR/USD market over a very short timescale. Mr Gladwin was of the view that Mr Scott was responsible for the last 5 pips of the move which is what triggered the Stop Loss Order. In his report Mr Gladwin stated that (based on a trigger time of 13:52:08):

"I believe Mr Scott deliberately drove the market higher with his buying from 13:52:03 and wrongfully triggered ECU's order, in order to make a profit from the triggering of the order." [emphasis added]

691. In the Joint Report it was stated that Mr Gladwin based his conclusion in part on the belief that an EBS market depth product was available to Mr Scott.

692. Mr Gladwin was cross examined about this aspect of his opinion in light of evidence from Mr Moore, a non-executive director of EBS in 2006, that the data product relied upon was not available to users of EBS at that time. Mr Gladwin accepted the evidence of Mr Moore. The key part of the exchange was as follows:

"*Q. So the basis for your belief that it was a deliberate attempt by Mr Scott to trigger the ECU order is in fact, you will accept now, based on information which was not available and visible to Mr Scott according to the Data Mine data. Correct?*

A. Well, it's not based entirely on that, because he also trades ahead of the trigger."

693. Mr Moore's evidence was that a spot dealer would not have had time in the seconds identified by Mr Gladwin to decide to move the market. His evidence in his report was as follows:

"*740. Mr Gladwin's position is that SS reviewed the depth of the market on EBS at 13:51:29 and decided that he could not trigger the order, but then roughly 30 seconds later at 13:52:03 or 13:52:07, he reviewed it again and decided that he could trigger the ECU order. In my opinion, SS would not have had visibility of market depth as described by Mr Gladwin.*

741. In my opinion, following the release of important economic data and during a sharp movement in the EUR/USD rate, I would not expect SS to be focussed on assessing the market depth. SS would have had his own position to manage, as well as other customer orders and price requests to manage. At this time, the ECU order would not be the exclusive focus of SS.

742.To illustrate this point, and assuming that the data existed as suggested by Mr Gladwin, at 13:52:06 there appeared to be an offer totalling EUR60m at 1.2175 which disappears 1 second later. If Mr Gladwin is correct and SS was monitoring the EBS representation of market depth closely, this would have been the catalyst for SS to purchase EUR/USD with the intention to trigger the ECU order. This implies that, within a second, SS decided he could push the rate up since there was suddenly no longer a large amount available at a lower rate. In my experience a spot dealer would not have the time to work like this in a fast-moving busy market, with multiple calls on their attention and his own risk to manage." [emphasis added]

694. Assuming there was trading ahead of the order, trading ahead is not of itself sufficient to establish front running. In his report it is clear that Mr Gladwin's conclusion as to Mr Scott's intention was reliant on the fact that the EBS depth analysis was available to him and that Mr Scott made such an analysis. Mr Gladwin said:

"I do not know how Mr Scott's trading systems were configured so I do not know exactly how much information Mr Scott could see about the amounts available at different offer prices. It should be noted however that the total amount offered at a price of less than or equal to 1.2177 (yellow column Table 1) drops to only EUR69m at the end of the 13:52:06 time-slice. This would have been a clear sign that the size of ECU's order would have been sufficient to move the market through the trigger level. Mr Scott starts a large purchase in the next time-slice. I believe that this is a deliberate attempt by Mr Scott to trigger the ECU order." [emphasis added]

695. In cross examination as referred to above it was established that the figures in the "*yellow column*" referred to in that paragraph were not figures which were visible to Mr Scott at the time.

696. Mr Gladwin placed reliance on the fact that Mr Scott carried out the triggering trade. In his report he described this as

"… a clear red flag, as a trader charged with handling a client stop loss order should never transact the trade triggering that stop loss order (unless for legitimate business for another client)"

697. However in his report Mr Moore stated that:

"In my experience, I have not heard of a bank executing the trade that triggered a customer Stop Loss order described as a "clear red flag". In my opinion, there are legitimate reasons that a trader may execute the "triggering trade". For example, the trader could be executing other customer business that triggered the order or observe sizeable activity in another related currency pair indicating that the trigger level was about to trade and act to limit order slippage…

Whilst it would be inappropriate to trade to trigger a Stop Loss order in circumstances where it would not otherwise be triggered, where it becomes obvious to a trader that the order level is about to trigger, acting promptly and conducting the trade that triggers the order can minimise customer order slippage."

698. Further I note that there is a difference of opinion between the experts on the trigger time of one second and that this would make a difference in this trade to the significance of the trading carried out by Mr Scott. I referred above to the uncertainty of determining the precise trigger time and the caution which in my view the court should exercise in making findings which are dependent on trigger times being correct to one second time slices.

699. ECU relies on the "*context*" and, whilst I do not entirely discount the fact of the subsequent wrongdoing by Scott admitted by HSBC in the Deferred Prosecution Agreement, for the reasons discussed above I accord it little weight in relation to a trade in January 2006.

700. ECU also seeks to rely on Mr Scott's conduct being "*in line with his methodology*" (paragraph 3.9 on p111 of Appendix 2.1) as set out in a transcript of a Bloomberg "chat" on 28 January 2010 with a Mr Mischenko in which he said he loved "*stops*" and that they were "*free money*" and that he "*jam[med]*" the market 4 pips.

701. I do not accept that this conversation is of any real weight in support of ECU's case on front running by Mr Scott in 2006:

701.1. Firstly this is a conversation in 2010 some 4 years after the trade in issue here.

701.2. Secondly it is unclear what kind of stops are being discussed-Mr Mischenko seems to contrast the stops with "other stops".

701.3. Thirdly there is no evidence as to what in fact were the circumstances which Mr Scott is referring to when he says he jammed the market 4 pips. Even if it was a reference to a bid at the trigger level 4 pips above the next best bid, in my view it provides no evidence of any substance as to what occurred on Trade 28.

702. ECU seeks to derive support from the fact that the rate went sharply above the stop loss level at the trigger time and then dropped immediately back down and did not go above the trigger level again that day. However the movement in the market after the trigger does not provide a link to Mr Scott given the evidence of Mr Moore that in his opinion you cannot make a link between the trading ahead of the trigger by Mr Scott and the movement in the market. In addition the evidence of Mr Moore on Trade 16 was that the fact that the market subsequently fell back is not necessarily significant.

703. ECU also relies on the context of other wrongdoing. I note that Mr Scott was involved in Trade 20 and Trade 24.

704. On Trade 20 it appears from Appendix 1 of the Claimant's Closing Submissions that it maintains its claim of trading ahead against Mr Scott but no longer alleges rate manipulation. However in Appendix 2.1 of its Closing Submissions ECU appears to maintain its claim of front running on the basis that Mr Moore said in cross examination that ECU's order had the potential to move the market around the trigger.

705. However the evidence of Mr Gladwin in relation to this trade is that although he found trading ahead of the trigger time by Mr Scott and other HBEU traders, in his opinion this trading ahead did not affect the triggering of ECU's order. Mr Gladwin noted that in this case the US economic data release was a "*market moving event*" and created a "*fast market*". He also noted that EUR/USD is the most actively traded foreign exchange rate and has great "*depth*" which he explained meant that significant amounts can usually be transacted without materially altering the price. He further noted that during a fast market the price movement can become more erratic as traders reassess the value in the currency pair at different rates. Having said that it is difficult to assess precisely the impact of the trading given the absence of data, Mr Gladwin then concluded that the trading by Mr Scott and others would have "*added weight*" to any move lower and accelerated the trigger.

706. Further although Mr Moore accepted that it was a large order and it might have an effect in the period immediately around the trigger Mr Moore's evidence was that Mr

Scott's trading could not influence where the euro/dollar market was and he did not accept the premise of the question that Mr Scott traded in sufficient quantities to move the trigger. He said:

"*So Trade 20 is a day when, looking on EBS only, considering high paid/low given 43.6 billion traded, in the hour around the market place, around the trigger time high paid/low given 13.2 billion traded. So more than 13.2 billion euros traded on EBS. The euro was trading in multiple other venues bilaterally between banks and banks, bilaterally between banks and their customers, on FXAll or any other bank system such as Currenex in futures format. Therefore the proposition that Mr Scott sold 70 million euros or whatever the number is, is not an opinion that I agree with. His trading in my judgment could not influence where the euro/dollar market was."*

707. Taking Mr Gladwin's evidence at face value he does not appear to conclude that Mr Scott had deliberately triggered i.e. front run the ECU stop loss order. To the extent that he thought Mr Scott's trading had an influence on the order being triggered, it is difficult to see how he arrives at that conclusion given the acknowledged absence of data and the "*fast market*". For reasons already discussed to the extent there is a conflict in the evidence of the experts, I prefer the evidence of Mr Moore.

708. In my view therefore there is no basis on the evidence relating to that Trade to conclude that Mr Scott deliberately triggered Trade 20.

709. On Trade 24 ECU appears from Appendix 2.1 of its Closing Submissions to have dropped its front running claim.

710. It would appear therefore that although Mr Scott was involved in both Trades 20 and 24 ECU has not shown that he front ran these trades and thus there can be no indirect support inferred from his conduct on these Trades. (ECU also makes other allegations about Mr Scott but these do not relate to front running of trades and as set out above, I have accepted Mr Moore's evidence that the fact that there is collateral inappropriate or illegitimate collateral trading and trading ahead does not inform as to the motive for any trading ahead.)

711. In my view for the reasons discussed above ECU has not established that Trade 28 was front run.

712. If I were wrong on that, I accept Mr Moore's evidence that the trade would have triggered in any event that day given the amount traded by Mr Scott relative to the size of the relevant market.

Trade 29 CAD/JPY 31 January 2006

713. This was a CAD/JPY trade executed on 31 January 2006 in an amount of CAD 242,350,919 at a trigger rate of 103.07. Mr Gladwin identified a trigger time of 19:49:28 whilst Mr Moore adopted the pleaded trigger time of 19:49:59.

714. The experts are agreed that there was trading ahead and that this impacted the market rate although they differ as to the impact of the trading by HBUS. Mr Moore is of the view that the trading ahead was related to the ECU order. It was in a less liquid time zone.

715. The key features of this trade are as follows:

715.1. The Stop Loss order was placed at 17:04:00, with instructions for the order to be "Valid only from 19:45 GMT 31/01/2006" and was executed at 19:49:28/19:49:59 on 31 January 2006.

715.2. The order was placed and executed after the end of the London trading day and likely handled by HBUS (Moore report paragraph 1349).

715.3. HBUS is likely to execute a CAD/JPY order via USD/JPY and USD/CAD and this would involve selling USD/CAD and purchasing USD/JPY.

715.4. On the day of the order, 31 January 2006, the US Federal Reserve Interest Rate decision was expected during the New York trading day, and the FX markets reacted to this economic announcement (Moore report 1361).

715.5. From 17:15:00, to the point the order was executed, the CAD/JPY rate traded consistently upwards and reached a high of 103.20 shortly before 20:00:00. The CAD/JPY move higher was steeper from 19:15:00 to the point that the order was executed (Moore report 1354).

715.6. After 20:00:00, the CAD/JPY rate declined to below the ECU Stop Loss order level and spent the majority of the remainder of the New York trading day below 103.00 (Moore report 1354).

715.7. The move higher in CAD/JPY on 31 January 2006, causing the execution of the ECU Stop Loss order, was the beginning of a sustained move higher. The CAD/JPY rate traded above the order level on each of the 8 trading days following the execution of the ECU Stop Loss order (Moore report 1359).

716. According to Mr Moore, both currency pairs would be traded and moving constantly and in his opinion, there is a degree of "*false precision*" to the suggestion that at precisely 19:49:59 the CAD/JPY rate traded at the ECU Stop Loss order trigger level.

717. In the opinion of Mr Moore (report paragraph 1373):

"… it is possible that the HBUS USD/CAD pre-hedge sale of US$154m contributed to the decline in USD/CAD (from 1.1426 to 1.1389) in the period 19:29:29 to 19:49:58, proceeding the Stop Loss order trigger. However, it is unlikely that a sale of US$154m USD/CAD, conducted over a 20 minute and 30 second period, would be exclusively responsible for the 37-point decline in the USD/CAD rate. As described in paragraphs 1360 and also evident in Figure 58 above, the CAD currency was independently strengthening in the period leading up to the order." [emphasis added]

718. Mr Moore reviewed contemporaneous press articles from the Financial Times and Wall Street Journal from 31 January 2006 to 2 February 2006 and notes market commentary in these newspapers. Mr Gladwin did not consider such materials but in my view, there is no reason why Mr Moore's opinion should not be formed having regard to the context provided by these well-established journalistic sources.

719. In particular I note that on 1 February 2006 the Financial Times refers to the rally by the dollar after the Federal Reserve announcement and an observation as to the rationale for gains by the Canadian dollar which Mr Moore notes is a reference to the strength of the Canadian dollar which he says is clearly visible in the market at the relevant time.

720. Mr Moore reviewed HBUS trading from 19:29:29. His evidence was that:

"*Based on an assumption that HBUS coordinated the sale of USD/CAD and the purchase of USD/JPY, US$154m of the US$306m USD/JPY purchase identified would be related to the ECU order. On this basis, HBUS bought CAD176m CAD/JPY at 102.87 in the period leading to the order trigger (19:29:29 to 19:49:58). In my view, this can be considered a pre-hedge of the ECU Stop Loss order*."

721. He then considered whether the pre-hedge which he identified had an impact on the CAD/JPY rate. His conclusion was that:

"…, *it is likely that the HBUS pre-hedge contributed to the CAD/JPY rate movement upwards, and the ECU Stop Loss order being triggered. It is also my opinion that this pre-hedge could not be solely responsible for the decline in the USD/CAD rate which caused the CAD/JPY order to be triggered…*" [emphasis added]

722. Mr Moore's calculation of the pre-hedge was based on TREATS data which was shown to be incorrect. In his supplemental report Mr Moore considered the timestamp adjustments but although it moves the times of certain trades and increased the pre-hedge to CAD 225m, he stated that it did not alter his conclusion that the pre-hedge may have altered the precise time the order was triggered but it would have been triggered, if not on 31 January, then the next trading day.

723. In cross examination Mr Moore was asked:

"Q. ...Do you agree Mr Gladwin is correct when he says the 78 million of [$/CAD] trading in 41 seconds caused the 22 pip move?

Mr Moore responded:

A. *One hundred per cent of it? Probably not. A significant contributor? I would say yes*."

724. Mr Gladwin in his report (para 159) said:

"I believe that both Mr Mehani in USD/CAD and Mr Babich in USD/JPY trade ahead of the trigger working together with the intention to trigger the order and I believe they cause the trigger with their trading as they intended. As the price of CAD/JPY depends on the levels of both USD/JPY and USD/CAD, it is likely that they coordinated their actions. Clearly, this is wrong for the type of order left by ECU and contrary to ECU's instructions."

725. In cross examination the evidence of Mr Moore was:

"*Okay, the first sentence that Mr Mehani traded ahead of the trigger, I agree with. Working together, I don't get necessarily to the intention to trigger the order. There*

was a pre-hedge there, that could be, I am not saying that it is wrong, I just don't reach that final conclusion."

"... I think the other factors that I refer to at the time, the Canada was strengthening, the impact was in dollar/Canada rather than dollar/yen, the size of dollar/yen movement at the time was -- the volume of dollar/yen was significant around that time, so it wasn't just the ECU order. So I can't rule out what Mr Gladwin says but I think it is not certain"

"*He is correct that that trading moved the market in the direction of the order and contributed to the order being triggered. In that he is correct. It could be that the motivation he ascribes to that trading is also correct. I would accept that*."

726. There is nothing to support Mr Gladwin's assertion that Mr Mehani and Mr Babich worked together intending to trigger the stop loss order. ECU submitted (Appendix 2.1 of Closing Submissions p120) that the court should draw an adverse inference from the fact that they were not called as witnesses. I have set out above why I do not draw such an adverse inference.

727. ECU also submitted that the court should take into account illegitimate proprietary trading by Mr Mehani on another trade (Trade 30) and by Mr O'Sullivan on this Trade. I have set out above why I do not accept that illegitimate proprietary trading provides support for allegations of front running. I note that on this trade Mr O'Sullivan is not the trader who is alleged to have been carrying out the trading ahead which led to the order being triggered and on Trade 30 Mr Mehani was not the trader (the order being executed by HBEU in London and not in New York).

728. Finally it was submitted for ECU (Appendix 2.1 of Closing Submissions p119) that Mr Moore "*could not say that Mr Gladwin was wrong*" and the only other intention would be pre-hedging to benefit the customer.

729. For reasons set out at the outset I prefer the evidence of Mr Moore where there is a conflict of views between the experts. Mr Moore accepted in cross examination that it "*could be*" the case that HBUS traded ahead with the intention of triggering the market but the test which the court applies is that of balance of probabilities. The burden is on ECU to establish its case and not for Mr Moore to establish that Mr Gladwin is wrong. As discussed above, the fact that ECU asserts that it gave instructions not to prehedge does not establish that the traders were not in fact acting to minimise slippage by pre-hedging.

730. As set out by Mr Moore, the move higher in CAD/JPY began almost 2 hours prior to any relevant HBUS trading. The market was moving upwards for a number of economic reasons as identified by Mr Moore and although not determinative of whether the order would have triggered on 31 January 2006, the fact the upward trend continued supports an inference that the market was moving upwards rather than being driven through the stop loss trigger by HSBC.

731. Although Mr Moore considers it likely that the trading ahead by HBUS "*contributed*" to the order being triggered he cannot be more definitive in light of the limitations in the data available to him and the lapse of time.

732. Further although Mr Moore is of the view that the trade "*could*" have been front run he puts it no higher. The level of the rate provided to ECU (and the extent of the mark-up charged on the trade) are not sufficiently cogent reasons in my view to conclude in the circumstances that HSBC front ran the trade: as noted elsewhere the fact that front running a trade could generate a profit to the bank does not establish that the traders carried out an activity which could result in disciplinary action or even their dismissal.

733. In my view the court has insufficient evidence to find that it is likely that HBUS traders intended by their trading to trigger the Stop Loss Order. On the balance of probabilities for the reasons discussed above, I find that ECU have not established that Trade 29 was front run.

734. If I were wrong on that I accept the evidence of Mr Moore that the trade would have triggered on the following trading day.

Confidence Claims and the Margin Claims (including the Market Orders).

735. In light of my conclusion on limitation in relation to the Confidence Claims and Margin Claims including the Market Orders, it is not necessary for me to make findings on the allegations in relation to the Confidence Claims and the Margin Claims (including the Market Orders).

736. Given the findings on limitation and, as discussed above, the failure to properly plead the Confidence Claims I do not propose to consider the substantive allegations (either in the pleadings or in Mr Gladwin's report) said to comprise the Confidence Claims.

737. However I propose to address the Margin Claims briefly as ECU relies to a large extent throughout its submissions on the "*extent*" of the alleged misconduct by HSBC of which the Margin Claims by HBPB and HBEU/HBUS are said to comprise two of the five categories of misconduct (Closing Submissions paragraph 244).

738. As stated above, the "Margin Claims" are whether HBPB (by its own actions or the acts of HBUS and/or HBEU) breached any duties it owed to (i) ECU and/or (ii) the Assignors where HBEU, HBPB or HBUS charged undisclosed fees and/or mark-ups and/or 'dealing spreads' in addition to the agreed fee of £125 per currency switch per account. The Margin Claims extend to both the Stop Loss Orders and the Market Orders.

Margin added by HBPB

739. HBPB has accepted in its Defence that by virtue of Special Condition 2 it was not entitled to apply a margin to trades. It admitted (paragraph 105(4) of the Amended Defence) in relation to Trade 28 that it had acted in breach of contract with the Loan Customer:

> *"... (a) It is admitted that HBPB reported that the EUR/USD Order had been booked with the HBPB Loan Customers' account at a price of 1.2179 and did not inform ECU that HBEU had booked the EUR/USD Order with HBPB at a price of 1.2178; and (b) In consequence of the aforesaid facts and matters, and only to the extent of such facts and matters, it is admitted that HBPB breached special condition 2 of the HBPB Multi-Currency Facility."*

740. Subject to limitation, HSBC also admitted breaches in relation to other Stop Loss Orders before trial making a total of 19 trades (excluding Trade 1 which was abandoned by ECU in its Further Information) where breach of contract is admitted in this regard.

741. It is submitted for ECU (paragraph 27.4) that this suggests an "*endemic practice of client theft*" and raises a "*wider issue as to probity*" within HSBC. ECU submitted that the one remaining factual question concerns the intention behind HBPB's now admitted '*pip thefts*' – ECU submitted that these thefts were "*clearly and unambiguously dishonest*". However in my view ECU has not established "*dishonesty*" on the evidence: ECU makes specific allegations of dishonesty in its submissions concerning the reporting of fills by individuals at HBPB (individuals who were named it would seem only in the submissions and not in the pleadings) who did not give evidence and by reference to statements in contemporaneous documents for which there could be explanations which are consistent with an honest belief.

742. Whilst noting the number of trades for which HBPB has admitted a breach of contract, I do not accept that the admitted breach of contract by HBPB in adding pips to the execution price is sufficient to support the wide-reaching submissions advanced by ECU.

743. In relation to the Market Orders these were not addressed in the expert evidence. In the light of the conclusion on limitation, it is not necessary to address the substantive claims and I do not propose to do so.

Margin added by HBEU/HBUS

744. In relation to the addition of "*margin*" by HBEU and HBUS this turns on a number of factors:

744.1. the relationship between the Loan Customers and HBPB;

744.2. the relationship between HBPB and HBEU/HBUS;

744.3. the "rate" at which HBPB was required to effect the switch (irrespective of any additional margin)

744.4. the "rate" at which HBEU/HBUS was required/entitled to fill the order.

745. ECU submitted that HBPB acted as the agent of the Loan Customers in effecting the switch. ECU submitted that although HBPB did not meet the test for an "agent" of having authority to affect relations with third parties, HBPB was nevertheless an agent on the basis that (Closing Submissions paragraph 267) it owed a "*fiduciary duty of loyalty*". It was submitted that the executing bank "*acts loyally on behalf of its principal*".

746. As discussed above, in my view the relationship between HBPB and the Loan Customers was one of lender and borrower and this was a principal-to-principal relationship.

747. It was not a fiduciary relationship where the Loan Customer could be said to be entitled to repose trust and confidence in HBPB such that a fiduciary relationship was created.

I note the following observations of Leggatt LJ in *Al Nehayan v Kent* [2018] 1 CLC 216 at [163]-[164]:

"163. *Counsel for Mr Kent placed heavy emphasis on the close personal relationship between Mr Kent and Sheikh Tahnoon and on the evidence that, for most of the period at least of their business association, they reposed a high degree of trust and confidence in each other. But the existence of trust and confidence is not sufficient by itself to give rise to fiduciary obligations. In the first place, the question whether one party did in fact subjectively place trust in the other is not the test. As Dawson J said in the Hospital Products case (1984) 156 CLR 41 at 71: 'A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one. A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong assessment of character or reliability.' The inquiry, in other words, is an objective one involving the normative question whether the nature of the relationship is such that one party is entitled to repose trust and confidence in the other.*

164. It is also necessary to identify more precisely the nature of the trust and confidence which is a feature of a fiduciary relationship. There plainly are many situations in which a party to a commercial transaction may legitimately repose trust and confidence in another without the other party owing any fiduciary duties. Thus, in Re Goldcorp Exchange Ltd (In Receivership) [1994] CLC 591; [1995] 1 AC 74, the Privy Council rejected an argument that a company was a fiduciary because it had agreed to keep gold bullion in safe custody for customers in circumstances where the customers were totally dependent on the company and trusted the company to do what it had promised without in practice there being any means of verification. Lord Mustill said (at 605; 98): 'Many commercial relationships involve just such a reliance by one party on the other, and to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to their Lordships) have adverse consequences ... It is possible without misuse of language to say that the customers put faith in the company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies.' [emphasis added]

748. The Loan Customers relied on ECU to manage the currency exposure and to use its expertise to switch currencies where ECU considered it would provide the greatest benefit to the client. Whilst the Loan Customers may have had confidence in HBPB, it was as part of a normal commercial relationship which did not warrant the imposition of fiduciary duties.

749. In support of its submissions that HBPB was an agent, ECU submitted that HBPB was acting as a "*riskless principal*" in filling the orders. In his report (paragraph 193) Mr Moore explained this as follows:

"*As an agent, the bank will purchase GBP30m GBP/USD in the market and provide the customer with the rate achieved. The term "riskless principal" is sometimes used*

to describe this, i.e., where the bank executes the order in the market and does not assume market risk."

Mr Moore contrasted this with the position of a principal:

"*As a principal, the bank may elect to purchase GBP30m GBP/USD in the market but also has the option to sell the customer GBP30m GBP/USD from its own inventory i.e., the bank does not purchase GBP30m GBP/USD contemporaneously in the market*."

750. Although it was the evidence that HBPB was not taking any market risk in executing the orders, it is the position of HBEU and HBUS which is the issue.

751. The evidence of Mr Moore was in effect that an arrangement whereby HBEU was acting as an agent/ riskless principal would be surprising and uncommercial.

752. Mr Moore's evidence in cross examination on this issue was as follows:

"Q. *If the private bank role in this case was as pleaded [that HBPB was to handle and execute (or procure the execution of) ECU's FX trading orders as agent, upon a best execution basis and not as "market maker" or "principal at risk"] ... and if HBEU was executing those trades for the private bank, would you regard that as constituting an example of a riskless principal arrangement?*

...

A. [HBEU] would be a principal to HBPB.

Q. Why do you say that?

A. That is how I would imagine it would work, unless it had been varied between the parties. I can't imagine -- I mean HBPB gave an order to -- well somebody gave, HBPB is just providing an order to HBEU or another bank."

753. It was put to Mr Moore that ECU's case was that the order passed on to HBEU was on the basis that it would not expose HBEU to any market risk.

754. Mr Moore's response was:

"If HBPB constructed an arrangement with HBEU that HBEU were to execute the orders taking no market risk on the same basis, then that would be true. But I think that would be a surprising arrangement.

...

A. Surprising because I have never seen it in at Citigroup or more recently at Lloyds. At Citi we would be too busy and -- to mandate a trader that says if this one customer comes in and wants to buy 100 you drop everything else you are doing, you forget your position and you go and buy 100 and hand it over, it would simply be impractical in a busy dealing room. Not impossible but impractical and I never saw it." [emphasis added]

755. ECU attempted to negate the significance of this evidence by submitting (Closing Submissions paragraphs 271-272) that it was nevertheless an option that was available and these were "*exceptional*" orders such that a "*bespoke arrangement*" was agreed.

756. However it seems to me that the contemporaneous evidence is also against a conclusion that the relationship with HBEU/HBUS was one of "*riskless principal*". In the file note made by ECU of a conversation between Mr Rumsey and Mr Petley on 21 June 2005 it records Mr Rumsey saying that there was an issue:

"*Execution of order, if not executed in the same amount, i.e. absorbed into position, it may not be possible to ID each trade that make up the client order*."

757. This is consistent with the evidence of Mr Moore set out above and no objection was noted on the part of Mr Petley to the statement of Mr Rumsey that indicated that orders may not be executed in the amount of the order but filled by a trader's own position.

758. It is also relevant in considering the relationship between HBPB and HBEU/HBUS that HBPB did not have to effect the switches through HBEU/HBUS but could and did effect them through other banks. This supports the conclusion that the banks executing the trades were not acting as an agent of HBPB with the duties that would be imposed on them if such a relationship had in fact existed.

759. ECU relied on the statement in the letter of 7 September 2005 in which Mr Whiting wrote:

"We, and/or our agent will at all times work to safeguard the best interests of the client"

760. It was submitted for ECU that whatever the legal status of the letter of 7 September, it is "*powerfully consistent*" with the relationship of agency.

761. In my view this reference, even if intended to refer to HBEU/HBUS, cannot create an agency relationship where there was none.

762. ECU submitted (Closing Submissions paragraph 242) that ECU was "*required*" to place its orders with HBPB and ECU was assured that the investment bank would be subject to the same "*best execution*" obligation as HBPB and it would pass on the currency acquired in the market without a mark-up.

763. As discussed above, having chosen to enter into a multicurrency facility with HBPB, the Loan Customer could only switch its debt through the lender. To that extent it was "*required*" to switch through HBPB but that does not make the Loan Customer (or ECU) "*vulnerable*". The Loan Customer had freely entered into the loans and agreed the terms on which loan balances could be switched.

764. It was submitted for ECU that the agreement on fees was recorded in the letter of 7 September and was the only way HBPB could discharge its contractual duty of "*best execution"*. It was submitted for ECU (Closing Submissions paragraph 242.5) that HBPB was under an obligation to ensure that HBEU/HBUS was executing at the "*best possible price*".

765. These submissions go to the rate at which HBPB was required to fill the orders as well as the rate which HBEU/HBUS was required/entitled to fill the orders. There are a number of problems with accepting ECU's submissions as follows.

766. Firstly, the evidence is that there was no recognised duty of "*best execution*" at that time in the FX market and no such duty could properly apply to a market where no single market rate could be identified.

767. It was put to Mr Moore that the bank in the circumstances should always "*strive for best execution"* (a reference to the 2001 *"Good Practice Guidelines" for foreign exchange trading* referred to above). Mr Moore's evidence was that:

> *"the term "best execution", is used in other markets routinely, less so in foreign exchange spot*".

768. He said:

> "*In spot foreign exchange, which has multiple prevailing rates in any one time second, it wasn't a term that I was familiar with. Certainly in the UK the regulation talked about treating customers fairly and managing conflicts. It didn't as frequently, at least in my memory today, refer to the concept of best execution."* [emphasis added]

769. Secondly, ECU seek to put a gloss on the term "*best execution*": in cross examination it was put to Mr Moore that a stop loss order would be an order on a "*best execution basis*" which it was put to him meant that:

> "*the ultimate rate provided to the customer will be the rate the bank achieves in the market, with the possible addition of an agreed customer margin or transaction fee*". [emphasis added]

770. Mr Moore's evidence was that it would not necessarily be a rate achieved in the market as it could be filled from the bank's own inventory. He said:

> "*I don't think that is quite right…Even in those circumstances a bank may still fill the order from within its own inventory at or around the rate it could otherwise have achieved in the market. So there may not -- as we don't see throughout, we don't see an order for 100 matched with a purchase of 100, because inevitably some combination of other orders and the bank inventory is filling the orders in this instance*."

771. Thirdly, it is admitted by the Defendants that ECU was authorised by the Power of Attorney to change the currency exposure on the HBPB Loan Customers' facilities at HBPB's "*prevailing foreign exchange rate.*" However if and so far as ECU asserted that this rate was the spot FX "*inter-bank rate*" the evidence of Mr McEvoy was that there was no such thing as an "*inter-bank rate*" in the sense of a published rate. Further given that there is no single market or place where spot FX trades are transacted or reported, the "*prevailing foreign exchange rate*" is difficult to identify with precision and the Power of Attorney expressly referred to "*the Lender's*" prevailing exchange rate and not any other source.

772. Fourthly whilst HBPB had contractually agreed only to charge £125 per switch, the evidence is that the rate charged by a bank would include a margin. The evidence of Mr Moore was that the addition of a margin to customer orders was standard. In his report (paragraphs 107-108 and 110) Mr Moore stated:

107.To operate an FX business, incurring the costs and risks detailed above, a bank must generate sufficient revenues to remain viable. The revenues for an FX business are generally derived from one of three sources:

107.1. The addition of a margin to customer orders to reflect the costs and risk associated with dealing with a customer

107.2. The retention of the bid-offer spread from customer and other FX flows. This occurs as the bank will have customers dealing on the bid and offer side of the rate and will wherever possible retain the difference; and

107.3.A return from the proprietary risk taken by the FX spot or other dealer. In my experience, in the period 2004 to 2006, it was a routine business practice in the FX market that a margin was added to customer business and that the FX spot dealers were asked to generate revenue from a combination of managing client flows and taking risk with the bank's capital.

...

110.It would not be economic for a bank to provide a full-scale FX service, assuming all the attendant costs and risks, without generating revenue from the addition of a margin to customer flows, retention of bid-offer spread and a return from the bank's proprietary risk positions." [emphasis added]

773. In cross examination Mr Moore was asked about the basis on which the margin would be determined. His evidence was that:

"*There wasn't science to that on a per deal basis*"

774. His evidence was that the discretion tended to reside with an individual salesperson. He said that there might be some direction from the relationship management and credit function and a tight fill would add more opportunity:

"Q. I don't mean this in a pejorative sense but would it be fair to say that the trader can add within some parameter really whatever he thinks he can get away with in a given circumstance?

A. That is not how I would phrase it but I don't take issue with how you put it."

775. As submitted for the Defendants, this does not mean that HSBC had an unfettered discretion either in fact or in law to charge a margin. HSBC accept that they were obliged to act in pursuit of legitimate commercial aims and there were commercial consequences which in practice constrained the amount which could be charged. In Mr Moore's evidence he set out a table showing the rates charged and these showed that the HBPB rates varied within the range charged by the various lending banks.

776. It was submitted for ECU that whatever the meaning of the terms used in the facility documentation they were superseded by the subsequent agreement between ECU and HBPB. In its letter of 7 September 2005 Mr Whiting of HBPB wrote:

> *"The Bank will charge each client a fee of £125 for every switch transaction undertaken. There will not be any mark up to the rate of the FX transactions undertaken*." [emphasis added]

777. In my view this letter even if binding on HBPB did not state and (contrary to ECU's submissions) did not amount to an agreement that HBPB "*would procure an inter-bank rate without any mark up by the investment bank*". It left the "*rate*" to be determined and for the reasons set out by Mr Moore that rate would include a margin or mark up by HBEU/HBUS.

778. It was submitted for ECU that it was not unreasonable for HBEU and HBUS to give the "*market rate*" where the order was referred "*in house*".

779. If the test were what was "*reasonable*" then the evidence is that:

> "*It would not be economic for a bank to provide a full-scale FX service, assuming all the attendant costs and risks, without generating revenue from the addition of a margin to customer flows, retention of bid-offer spread and a return from the bank's proprietary risk positions*."

780. Further the evidence was that there would be a credit risk in dealing with HBPB which had to be reflected in the rate even though it was "*in house*". However in any event the test is not whether it was "*reasonable*" for HBEU/HBUS to charge a margin but whether the addition of a margin put HBEU/HBUS or HBPB in breach of a duty owed to ECU or the Loan Customers.

781. In my view:

781.1. there was no duty of "*best execution*" on HBPB which obliged HBPB to ensure that HBEU/HBUS was executing the orders at the "*best possible price*" or any obligation or agreement that the "*ultimate rate provided to the customer will be the rate the bank achieves in the market*".

781.2. HBEU and HBUS were acting as principals and not as agent of HBPB and were entitled to add a margin for legitimate commercial reasons.

782. If the Margin Claims had not failed by reason of limitation, I would have found that, for the reasons discussed above, the Margin Claims in respect of the margin or mark-up by HBEU and HBUS fall to be dismissed.

Summary of conclusions

783. In summary I have found for the reasons set out above, that the claims brought by ECU in these proceedings are time barred.

784. In particular on the evidence, ECU has failed to show:

784.1. that it had not discovered in 2006 the Trading Ahead Claims and the Front Running Claims in respect of the January 2006 Orders and the Further Orders;

784.2. that it had not discovered in 2006 the Confidence Claims and the claims for unlawful means conspiracy; or (if I were wrong on that) that it could not with reasonable diligence have discovered the Confidence Claims and the claims for unlawful means conspiracy;

784.3. that it could not with reasonable diligence have discovered the Margin Claims (including the claims in respect of the Market Orders);

all as more particularly described above.

785. I have found that the claims based on false representations are time barred for the reasons set out above in relation to the Trading Ahead Claims, Front Running Claims and Margin Claims respectively.