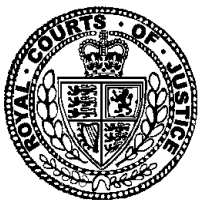

Neutral Citation Number: [2022] EWHC 1138 (Comm)

Claim No: CL-2017-000583
Claim No: CL-2019-000644

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Before: The Hon. Mr Justice Waksman
Draft Judgment circulated: 14 April 2022
Date handed down: 16 May 2022

Claim No: CL-2017-000583

BETWEEN:

EURASIAN NATURAL RESOURCES CORPORATION LIMITED

Claimant

-and-

(1) DECHERT LLP
(2) DAVID NEIL GERRARD

Defendants

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Third Party

("the 2017 Action")

Claim No: CL-2019-000644

AND BETWEEN:

EURASIAN NATURAL RESOURCES CORPORATION LIMITED

Claimant

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

-and-

DECHERT LLP
DAVID NEIL GERRARD

Third and Fourth Parties

("the 2019 Action")

JUDGMENT

Hearing dates:

24-27 May, 7-11, 14-17, 22-24, 28-30 June, 1-2, 5-9, 12-16, 19-22 and 26-30 July,

22-24 and 27-30 September 2021

Representation:

Clare Montgomery QC, Nathan Pillow QC, Anna Boase QC, Tim Akkouh, James MacDonald Jack Rivett, Alyssa Stansbury, Freddie Popplewell, Matthew Hoyle (instructed by Hogan Lovells International LLP, Solicitors) for the Claimants

Andrew Onslow QC, Michael Bools QC, Nicholas Purnell QC, Jonathan Barnard QC, Edward Harrison, Kyle Lawson, Rachel Kapila (instructed by Clyde & Co LLP, Solicitors) for the Defendants in the 2017 Action and the Third and Fourth Parties in the 2019 Action

Simon Colton QC, James Segan QC, Rachel Scott, Tom Richards, Joyce Arnold, George Molyneaux, Tom Lowenthal (instructed by Eversheds Sutherland (International) LLP, Solicitors) for the Third Party in the 2017 Action and the Defendants in the 2019 Action

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INTRODUCTION

1. This case consists of two actions brought by the Claimant, Eurasian Natural Resources Corporation Limited ("ENRC") which have been managed together for some considerable time, and which have now been tried together. In the first action ("the 2017 Action"), ENRC made claims against two Defendants (collectively "the Dechert Defendants"). The First Defendant, Dechert LLP ("Dechert"), is a well-known firm of solicitors. The Second Defendant, Neil Gerrard, is a solicitor now retired from practice. Between 23 April 2011 and 31 December 2020, he was a Partner in Dechert. Before that, he was a Partner in DLA Piper UK LLP ("DLA"), which he joined in 1995. As both Defendants are jointly represented, I shall refer to them collectively (in the singular) as "Dechert" unless the context otherwise requires.

2. In the second action ("the 2019 Action"), ENRC brought claims against the Director of the Serious Fraud Office ("the SFO"). The SFO was joined into the 2017 Action as third party by Dechert. Conversely, Dechert was joined into the 2019 Action as third and fourth parties by the SFO.

3. The events to which this case relates occurred principally between December 2010 and June 2013. Between 24 December 2010 and 22 April 2011, DLA was retained by ENRC, principally acting by Mr Gerrard. Between 23 April 2011 and 27 March 2013, Dechert was retained by ENRC, again, principally acting by Mr Gerrard.

4. At all material times, ENRC was and is an international mining conglomerate. Between 12 December 2007 and 25 November 2013 it was listed on the London Stock Exchange, and formed part of the FTSE 100 list of companies as from 12 March 2008. It ceased to be a Plc on 16 January 2014 and was then re-registered in its present name. It had substantial mining operations in Kazakhstan, including through its indirect subsidiary Sokolov-Sarbay Mining Production Association ("SSGPO"). By 2006, ENRC had annual revenues of more than US$3 billion and accounted for 4% of Kazakhstan's GDP.

5. Put very broadly, ENRC retained Mr Gerrard to advise on and assist it with various internal investigations into some of its operations in Kazakhstan and then also the Democratic Republic of the Congo ("DRC") in particular, where it was thought that they may have been tainted by bribery, corruption, and fraud. The immediate catalyst for Mr Gerrard's involvement was the sending to ENRC of an anonymous whistle-blower's letter on 20 December 2010 which made serious allegations about ENRC's operations in Kazakhstan

("WB1"). A particular concern for ENRC was whether the SFO might decide to intervene and launch a criminal investigation into its activities. As will be explained in more detail below, at the time when DLA was first instructed, it was possible for the SFO to bring charges against a company and/or its directors even where the relevant events occurred outside this jurisdiction provided that certain conditions were met. After the coming into force of the Bribery Act 2010 ("the Bribery Act") on 1 July 2011, it was easier for the SFO to exercise this "international reach" of its powers. A key objective for ENRC was to avoid any criminal investigation, and if it had to engage with the SFO, to do so in a way which would lead to a form of civil settlement (again put very broadly, but explained in more detail below) instead.

6. In the event, the SFO did become directly involved with ENRC on 10 August 2011 when it first wrote to it ("the SFO Letter"). The day before, *The Times* had published an article ("the August Article", as further defined at paragraph 86(1) below) which contained a number of serious allegations about ENRC and its failings, based to a large extent on ENRC's confidential information. In short, there had to have been a major leak from someone to facilitate the publication of this article ("the August Leak").

7. In the following 20 months or so, ENRC engaged with the SFO in various ways including at a number of meetings, while also seeking to progress its own internal investigations which themselves were of interest to the SFO. During that period, the SFO did not launch a criminal investigation - but neither was a civil settlement reached. On 25 March 2013, Dechert's retainer was abruptly terminated by ENRC. On 17 April 2013, the SFO decided in principle that it would now launch a criminal investigation into ENRC and this was confirmed on 19 April. Nine years later, that investigation is still ongoing and has yet to conclude with the bringing (or decisively not bringing) of any criminal charges. The fact of this ongoing investigation has given rise to one of the remarkable features of this case which is an effective "Chinese wall" within the SFO so that information about the criminal investigation does not itself seep into the evidence given by the numerous SFO witnesses who have testified before me.

8. Initial estimates for the work to be done for ENRC by Dechert, as at 29 March 2011, were around £400,000 although on any view, these were early days. But in the event, the total fees charged by Dechert up until 27 March 2013 were some £13 million, while work done by relevant third parties exceeded £11 million.

9. The claims made by ENRC against Dechert and the SFO are of the most serious kind. As against Dechert, it is said that Mr Gerrard acted in gross breach of his duties as a solicitor by, among other things, disclosing clearly confidential and/or privileged information to the SFO and expanding the scope of ENRC's investigations greatly, in order to generate massive amounts of legal fees. It also alleges that the instigator of the August Leak was none other than Mr Gerrard himself. ENRC also says that he facilitated two other leaks to newspapers and anonymously provided a number of privileged documents to the SFO in June 2013 ("the June 2013 Material", as further defined at paragraph 1446 below). Other allegations include the giving of wrong advice in numerous respects.

10. While, of course, the core claims against Mr Gerrard, whether in contract or tort, would require it to be shown that he was negligent, the claims here go beyond that. That is first, because, on the facts, ENRC alleges that Mr Gerrard had engaged in a deliberate (or at best reckless) course of conduct. Second, because of the existence of a limitation of liability clause in Dechert's contract of retainer with ENRC, it might be necessary for ENRC to show at least recklessness, as opposed to mere negligence.

11. As for the SFO, ENRC claims that certain of its officers (and through them, the present Director as a matter of vicarious liability) were not merely aware of many of Mr Gerrard's breaches of duty, they actively participated in them to the extent that they were liable for the tort of inducement to breach of contract and/or fiduciary duty, the latter breaches being on the part of Mr Gerrard. A further or alternative claim is that they were guilty of misfeasance in public office because of the way in which they conducted themselves in relation to Mr Gerrard and as against ENRC. Put bluntly, in respect of both such claims, it has to be shown that those officers were either dishonest or reckless or guilty of bad faith in the required sense. One of the allegations is that the former Director of the SFO, Richard Alderman, while in post, secretly met with Mr Gerrard prior to the publication of the August Article, and Mr Gerrard provided to Mr Alderman the gist of the leaked information or at least tipped him off about the article.

12. Again, in very broad terms, ENRC alleges that, but for such conduct on the part of Mr Gerrard and the SFO, the SFO would never have become seriously interested in ENRC at all, and ENRC would not have voluntarily engaged with it; alternatively ENRC could have reached a resolution with the SFO after a far more modest investigation and with far less legal or other work being required. And on any view, the SFO would never have launched the criminal investigation which it did. Almost all questions of causation and loss have been put

off, either for a further judgment (if required) although still based on this trial (Phase 1A) or for a further trial (Phase 2). This judgment deals with what have been called the Phase 1 issues.

13. The sums claimed by way of damages or other monetary relief, as against both Dechert and the SFO are as follows:

    (1) Unnecessary Dechert Fees: £11,515,236.04;

    (2) Unnecessary Third Party Fees: £11,163,214.20;

    (3) Lost management and Employee Time: £257,546.68.

14. In addition, exemplary damages are claimed against the SFO on the basis of its alleged oppressive, arbitrary and unconstitutional conduct. Further, declaratory relief is sought against the SFO to prevent it making any use of the confidential and privileged information disclosed to it in breach of Dechert's duties, as well as the removal from its criminal investigation team of any individuals who reviewed such material.

15. Save in one (important) respect, Dechert firmly deny all of the allegations against them. They also allege, if necessary, contributory fault on the part of ENRC as well as raising a limitation defence and a further defence based on the limitation of liability provision referred to above. However, Dechert have now admitted one reckless breach of duty on the part of Mr Gerrard in relation to what I shall refer to as "the Depel Interview". This admission was made following the end of witness evidence and as a result of evidence given by Mr Gerrard in cross-examination, itself following the late disclosure of a large number of text messages to and from Mr Gerrard.

16. As for the SFO, it equally robustly denies the allegations against it. If necessary, it also relies upon a limitation defence. In addition, and in respect of much of the claim based on its knowing or reckless receipt of ENRC's confidential information via Mr Gerrard, it relies on various findings made by Andrews J (as she then was) in earlier proceedings between ENRC and the SFO ("the Privilege Proceedings"). It contends that this Court is bound by those findings so as to acquit the SFO of much of its alleged wrongdoing. This has been referred to as the SFO's "Abuse of Process" argument.

17. Finally, there are contribution claims going both ways as between the Dechert Defendants and the SFO. These are made solely pursuant to s1(1) of the Civil Liability (Contribution) Act 1978 ("the 1978 Act").

KEY PARTIES AND INDIVIDUALS

ENRC

18. ENRC itself was formed in December 2006 to become the holding company for the ENRC natural resources group which had itself acquired most of its assets in the privatisation process undertaken in Kazakhstan in the mid-1990s. Its principal base of operations and location of assets was in Kazakhstan.

19. The three founding shareholders were Alexander Mashkevitch, Alijan Ibragimov, and Patokh Chodiev ("the Founders", sometimes referred to in this litigation as "the Trio" but I shall use the former expression). Following ENRC's admission to the LSE, each of them would hold 14.9% of the issued Ordinary Shares making 44.7% collectively. This was identified as a Risk Factor at p22 of the Prospectus for ENRC's IPO ("the IPO Prospectus"), because as a result of that shareholding,

> "the Founders… will be able to exercise significant influence over all matters requiring shareholder approval, including the election of directors and significant corporate transactions. In addition, each of the Founders has appointed a representative to the Board. Although the Company has entered into a relationship agreement with each of the Founders to enable the Group to carry on its business independently… there can be no assurance that the Founders will not continue to exert significant influence over the Group's operations and employees."

20. Other significant shareholders included the Republic of Kazakhstan with 19.7% and a subsidiary of Kazakhmys Plc, another Kazakh mining company, with 14.9%.

Relevant ENRC personnel

21. These were, at the material times, or are, as follows (in alphabetical order as with the further lists below):

    (1) Clint Adonis, Head of IT, ENRC Africa;

    (2) Gerhard Ammann, Chairman of ENRC's Audit Committee ("AC") until August 2012; he was also Chairman of ENRC's Investment Committee between August 2012 and October 2013;

    (3) Randal Barker, General Counsel until 21 June 2011;

    (4) Mounissa Chodieva, Head of Investor and Public Relations and daughter of Mr Chodiev;

    (5) Jim Cochrane, Chief Commercial Officer and Director from 13 August 2010 to 11 April 2013 and a Director of Camec (see below) from 10 November 2009 to 11 April 2013;

(6) Mehmet Dalman, a director of ENRC between 2007 and April 2013 and Chairman of the Board and a member of the SIC between 3 February 2012 and April 2013;

(7) Cary Depel, Group Global Head of Compliance from May 2010 to June 2012; he was at all material times a lawyer qualified in California since 1990 and an English solicitor since 1997;

(8) Anja Doncaster-Tatnall, General Counsel of ENRC Africa from December 2010;

(9) Beat Ehrensberger, a qualified Swiss lawyer and ENRC's General Counsel from 1 July 2011 to December 2014; he had also been an in-house lawyer from August 2003 to December 2007 after which he was General Counsel, and then Head of Mergers and Acquisitions between 2008 and 30 June 2011;

(10) Alex Gaft, ENRC's Head of Investigations from about April 2012 to March 2013;

(11) Victor Hanna, initially seconded to ENRC from International Mineral Resources BV, a Dutch company beneficially owned by the Founders until about October 2011, after which he was ENRC's Head of Strategy and CEO of ENRC Africa;

(12) Sir Paul Judge ("SPJ"), a non-executive Director until June 2013 and a member of the AC until then;

(13) Arek Kowalewski, Head of Internal Audit;

(14) Sir Ken Olisa, another non-executive Director until 8 June 2011;

(15) Victoria Penrice, ENRC's Company Secretary;

(16) Dr Johannes Sittard, Chairman of the Board until 3 February 2012, and a member of ENRC's SIC from January 2012 until then;

(17) Jason Spiteri, CFO ENRC Africa;

(18) Sir Richard Sykes, another non-executive Director who resigned in June 2011;

(19) Roderick Thomson, a Director until 25 October 2013 and a member of the AC until then;

(20) Felix Vulis, CEO of ENRC until 15 November 2014, and the present sole director of ENRC;

(21) Terence Wilkinson, another non-executive Director between 28 September 2011 and 25 October 2013;

(22) Zaure Zaurbekova, a director of SSGPO, and CFO of ENRC from 1 October 2009 to 31 August 2014;

(23) Simon Zinger, Deputy General Counsel between 6 June and 21 September 2012.

ENRC's AC

22. The AC was the ENRC body which formally instructed DLA and then Dechert. Its members consisted of Mr Ammann until August 2012, whoever was the chairman at the time (Dr Sittard, then Mr Dalman), Mr Thompson, SPJ and Sir Ken Olisa.

23. In a letter from DLA dated 29 March 2011 ("the DLA Letter") addressed to the AC and sent by email to Dr Sittard, Mr Ammann, SPJ and Sir Ken Olisa, DLA recommended that a new Investigation Committee (IC) be formed to provide DLA with instructions and assistance on the investigation and which would be empowered to do so by the AC for that purpose. DLA would then report to and take instructions from the IC while continuing to report monthly to the AC. DLA suggested that the members of the IC should be a member of the AC together with Mr Barker and Mr Depel. The DLA Letter is a significant document for other reasons as well as will be seen in due course.

24. The IC was duly set up with Mr Ammann as the Chairman but it did not include Mr Depel. He was vetoed by Mr Ammann and Mr Barker who, by now, were frustrated with his lack of professionalism. This was reflected in Dechert's Engagement Letter dated 27 April 2011 which was addressed to Mr Barker and Mr Ammann. It acknowledged ENRC's instructions to Dechert to advise the AC, with instructions being taken from Mr Ammann and/or Mr Barker for that purpose, and Dechert communicating with the AC and/or the IC as necessary. Mr Barker was replaced by Mr Ehrensberger on the IC following the former's resignation in July 2011.

25. In January 2012, a new committee called the Special Investigation Committee (SIC) was formed to oversee the investigations then underway and to be the instructing body for Dechert, as set out in Dechert's letter of 17 January 2012. Its initial members were Dr Sittard, Mr Ehrensberger and Mr Wilkinson. It therefore replaced the AC as the formal instructing body.

DLA/Dechert Personnel

26. Mr Gerrard has already been identified in paragraph 1 above. Other personnel involved were:

(1) Leann Adams, Personal Assistant to Mr Gerrard both at DLA and Dechert;

(2) Jonah Anderson, a solicitor at DLA who also transferred to Dechert in July 2011 working with Mr Gerrard for ENRC. He was an Associate at Dechert between July 2011 and May 2015;

(3) Caroline Black (formerly Lee) a solicitor at DLA who transferred to Dechert in July 2011, following Mr Gerrard and now Partner at Dechert, again working with Mr Gerrard for ENRC;

(4) Karen Coppens, a solicitor at DLA from August 2010 until November 2011 when she transferred to Dechert, working with Mr Gerrard for ENRC;

(5) Jonathan Pickworth, Partner at DLA from September 1999 to April 2011 and then Partner at Dechert from then until September 2015, working with Mr Gerrard for ENRC; and

(6) Duncan Wiggetts, Partner at DLA from May 2009 to January 2012 and then Partner at Dechert from February 2012 to December 2013, again working with Mr Gerrard for ENRC.

Addleshaw Goddard personnel

27. These included:

(1) Louisa Caswell, Managing Associate, seconded to ENRC's Office of Acting Deputy General Counsel along with Ms Coleman;

(2) Barry Coffey, Associate, assisting Ms Coleman and Ms Caswell;

(3) Clarissa Coleman, Partner, seconded to ENRC's Office of Acting Deputy General Counsel from September 2012 to April 2013; and

(4) Alasdair Simpson, Partner.

Other Parties associated with ENRC

28. These included:

(1) Forensic Risk Alliance ("FRA"), instructed to assist with the investigation - in particular a "book and records" review from May 2011; FRA carried out forensic accounting, financial investigations, risk management and related work;

(2) Herbert Smith LLP, as it was then known, now Herbert Smith Freehills LLP ("HS") who communicated (principally by Malcolm Lombers) with Dechert over previous due diligence work done on earlier ENRC transactions;

(3) Jones Day ("JD"), its corporate lawyers; the main contact there was Sion Richards, Partner; Harriet Territt was also involved in dealing with ENRC, as was Vica Irani; and

(4) PwC, its auditors since at least 2007.

SFO personnel

29. These were, or are, the following:

(1) Richard Alderman, Director of the SFO from 2008 until 20 April 2012;

(2) Sam Carlyle, PA to Mr McCarthy;

(3) Barry Collins, employed by the SFO from 26 July 2004 to 31 March 2017, and a Principal Investigator between 21 September 2009 and 25 November 2012;

(4) James Coussey who had been employed by the SFO as a senior prosecutor from 8 January 2013 to 4 May 2018;

(5) Hannah von Dadelszen, employed on a permanent basis by the SFO from 2007, and a Case Controller from around 2012; she was Head of Strategy and Policy Division from November 2019 to December 2020;

(6) John Gibson, a senior employee of the SFO from 3 March 2014 to 10 September 2018 and Case Controller on Project Quest ("QUT01"), being the SFO's project name for the criminal investigation of ENRC;

(7) Richard ("Dick") Gould, employed by the SFO from January 2008 to July 2015, Interim Head of Proceeds of Crime and Intelligence from late 2011 until September 2012, and Deputy Head of Operations and Investigations from September 2012 to 2015;

(8) (Now Sir) David Green QC, Director of the SFO between April 2012 and April 2018; at the time of the trial he was a consultant at Slaughter and May; for ease of reference I will refer to him throughout this judgment as "Sir David" including when referring to what he did or said in 2012 and 2013;

(9) Andrea Johnson, Senior Personal Secretary to Mr Alderman;

(10) Ian McCall, the SFO's Head of Technology, Proceeds of Crime and Intelligence between June 2011 and May 2012; he also was a contractor to the SFO between June 2008 and May 2010 and again between June 2010 and May 2011;

(11) Keith McCarthy, employed by the SFO between 2008 and December 2011 and its Chief Investigator from 2009 until he left;

(12) Alun Milford, General Counsel for the SFO between August 2012 and December 2018;

(13) John Peck, private secretary to Sir David from October 2012 to January 2017;

(14) Patrick Rappo, employed by the SFO from 1 September 2008 to 12 April 2013, and Joint Head of Bribery and Corruption Division between September 2012 and 12 April 2013;

(15) Mark Thompson, employed by the SFO from 2004 to July 2010, and then again from 1 August 2011 to 4 October 2019; he was a Case Manager in the Proceeds of Crime Unit (POCU) between August 2011 and September 2012; from then, he was Head of POCU and shortly after, Head of the new Proceeds of Crime Division (POCD) which POCU became; he was the SFO's Chief Financial Officer as from May 2015 and its Chief Operating Officer as from September to November 2019 when he left the SFO to join KPMG; he had also been the Interim Director of the SFO between April and August 2018.

THE EVIDENCE

Documents

30. As would be expected, there has been a mass of documentary evidence, principally in the form of emails, along with notes of meetings and telephone calls. Such notes vary both in form (i.e. manuscript or typed) and level of detail. Their accuracy, and indeed meaning, have been the subject of many disputes at trial. In addition, certain individuals never, or hardly ever, took notes, in particular Mr Gerrard himself. But this was also true (though over a shorter period) of Mr Alderman, the SFO's Director from November 2008 to 20 April 2012, and Mr Gould, who was employed by the SFO between January 2008 and January 2015. Indeed, one allegation made by ENRC is that some or all of these failures to take (or take proper) notes, were themselves deliberate.

31. There were also disclosed a number of telephone records which in particular showed calls made and taken by Mr Gerrard. The dates and times and length of the calls were provided but obviously not their content.

32. A major development in the disclosure in this case (presaged above) was the belated disclosure of more than 600 text messages to or from Mr Gerrard, back-up copies of which

had been retained. The existence of those copies was communicated by Clyde & Co, for Dechert, in the evening of 6 July, being Day 23 of the trial and Day 6 of Mr Gerrard's (continuing) cross-examination. This led to disclosure of further material in a rolling process, but which was undertaken as fast as possible for obvious reasons. I discuss this aspect of the case in more detail below. No party has suggested that this development in disclosure was not of considerable significance.

The Witnesses

33. For ENRC I heard from the following witnesses:

    (1) Mr Ehrensberger;

    (2) Mr Ammann;

    (3) Eric Joyce, an MP from 2000 to 2015 who had raised criticisms of ENRC's conduct in Parliament as well as writing to the SFO about it;

    (4) Cameron Findlay, a security consultant acting through a company called Bridge2 Ltd ("B2"); his company was retained by ENRC in connection with its internal investigations from January 2011 to July 2012;

    (5) Pierre-Richard Prosper, Partner in the law firm Arent Fox ("AF") who was also involved in ENRC's investigation over the period March 2011 to late 2012;

    (6) Robert Trevelyan, a computer forensics specialist and owner of a company called Cyntel; through Cyntel, he assisted B2 in relation to ENRC's internal investigation from January 2011 to July 2012;

    (7) Mr Dalman.

34. Mr Zinger did not give live evidence but his Witness Statement ("WS"), filed on behalf of ENRC, was permitted to be adduced as a hearsay statement. The same applies to Leann Adams, who was PA to Mr Gerrard from July 2008 to December 2019, moving firms with him.

35. For Dechert I heard from:

    (1) Mr Gerrard;

    (2) Ms Coppens; and

    (3) Ms Black.

36. For the SFO I heard from:

(1) Sir David;

(2) Mr Gibson;

(3) Ms von Dadelszen;

(4) Sasi-Kanth Mallela, employed by the SFO from 2006 to February 2014. From 2013 he was the SFO Case Controller for QUT01 until his departure;

(5) Mr Rappo;

(6) Richard Day, a member of the QUT01 case team between April and September 2014;

(7) Allister Dawes, another member of the QUT01 case team, since 2013;

(8) Mr Milford;

(9) Matthew Wagstaff, Joint Head of Bribery and Corruption division at the SFO and latterly Head of Fraud and Corruption Division A from 30 July 2012 until the present day;

(10) Jonathan Mack, who joined the SFO in 2015. He was the Principal Investigative Lawyer and the Disclosure Officer on the ENRC investigation from January 2018; he then became the Case Controller on QUT01 on 7 September 2018 until 24 September 2019; his role at the SFO is currently as a Principal Investigative Lawyer;

(11) Mr Gould;

(12) Raymond Emson, employed by the SFO since 2011 and as its Associate General Counsel since 2012; he is responsible within the SFO for the conduct of this litigation;

(13) Mr McCall;

(14) Mr Peck;

(15) Philip Hawkins, who joined the QUT01 case team in March 2014;

(16) Graham Marsh, employed by the SFO since June 2011 and now a Senior Infrastructure Engineer;

(17) Edward Mills, an employee in the SFO's Materials Management Team since 1999;

(18) Myles Robinson, a member of the QUT01 case team since November 2014;

(19) Mr Thompson; and

(20) Michael Magenis, permanently employed by the SFO since June 2005; at all material times up until November 2017, he worked in Materials Management; after that he became a Case Support Analyst.

37. In addition, the SFO served a WS from Mr Coussey on 10 December 2020. For good reason, as set out in a confidential WS, the SFO decided not to call him as a live witness; Mr Coussey's WS has however been adduced as a hearsay statement. In addition, there are WSs from the following SFO witnesses whom neither Dechert nor ENRC wished, in the end, to challenge: Susan Givens (the SFO's Head of Communications), Gillian Anderson, Ian Chapman, Terence Coleman, Jacqueline Connery, Janet Dias, Joy Hamilton, Narelle Morley, Christopher Lee Man Yan (all working in Materials Management), Mark Ashton, Ceri Davis, Jonathan Chung-to Chan, Michael Fenner-Evans, Benjamin Griffiths, Matthew Herdman, Ida Hoyer, Abigail McClements, Andrew Parratt, Lily Riza and Jamie Sharma (all working on the QUT01 case team).

38. All the above live witnesses are listed in order of their appearance at trial.

39. There were two witnesses who had been expected at an earlier stage to appear and give evidence but in the event they did not. The evidence of both would have been of considerable importance had it been given. For the reasons set out below, there is not a hearsay statement tendered in respect of either of them.

40. The first is Mr Alderman himself. The SFO was in touch with him since June 2019 and had indicated in its Case Management Information Sheet dated 28 April 2020 that it anticipated calling him (along with Keith McCarthy - see below) and others. However, it appears that the SFO did not tell Mr Alderman that they wished to call him until August 2020. In the event, he refused to provide a WS and said he had "personal and sensitive reasons" for not giving evidence which the SFO said were unexplained at the time. It did not issue a witness summons against him until 13 May 2021. This was shortly before the opening of the trial on 24 May and the commencement of the evidence on 7 June. On 17 June, being Day 13 of the trial, the SFO intimated that it was going to apply to set aside its witness summons, and it did so the following day. The evidence in support of that application included a confidential exhibit which I have seen. The result was that I agreed that for personal reasons entirely unconnected with this case, Mr Alderman was not then in a position to give evidence and the summons was set aside. ENRC asks the Court to draw an adverse inference (if required) from the ultimate non-appearance of Mr Alderman or indeed any evidence adduced on his behalf. I deal with that question below.

41. The second person is Keith McCarthy, employed by the SFO between 2008 and December 2011. He was its Chief Investigator from 2009 until he left. ENRC had obtained a WS from him in May 2018. At all material times, Mr McCarthy had his own separate legal representation. ENRC informed the SFO that Mr McCarthy had met with its solicitors but they had not been able to obtain a full account from him of relevant matters because of legal restrictions which his lawyers said were in place which would limit what he could say about his time at the SFO (see paragraph 49 of the first WS of Michael Roberts of Hogan Lovells dated 8 June 2018). Some time later, by a letter dated 13 January 2020, and in the context of a dispute about the provision of Further Information by ENRC, Eversheds, acting for the SFO, said that it would not release him from the confidential obligations which he continued to owe to the SFO, as a former employee. Subsequently, ENRC notified the other parties that it was not going to call Mr McCarthy. Indeed, in Hogan Lovells' letter of 6 February 2020 it suggested that since, in effect, the SFO had "gagged" Mr McCarthy, it was incumbent on the SFO to call him as its witness. The SFO did not do so. In fact it (and Dechert) ask the Court to draw an adverse inference, this time against ENRC, in respect of its failure to call Mr McCarthy.

42. There is then one further person who did not give evidence although ENRC did not intimate that he would be called. This is Mr Felix Vulis, CEO of ENRC between 20 August 2009 and 15 November 2014 and currently the sole director of ENRC. This is despite the fact that he has signed almost every statement of truth made on behalf of ENRC. The SFO invites the Court to draw an adverse inference against ENRC in respect of the absence of this potential witness as well.

Approach to the Evidence in this case

43. In this case, I do not propose at the beginning to set out in general terms my views of the key witnesses. Their credibility or otherwise will emerge in the course of the judgment as I deal with their evidence on particular matters and make general observations as necessary in that context.

44. Certain observations I made in the case of *PCP v Barclays Bank* [2021] EWHC 307 (Comm) are apposite here also. Thus,

    (1) I of course bear in mind the observations of Leggatt J (as he then was) in *Gestmin v Credit Suisse* [2013] EWHC 3560, as to the fallibility of human recollection especially where the events concerned happened long ago and where that recollection is then subject to the iterative processes of making witness statements and the effect

of preparing for trial. None of that means, of course, that some witnesses, for whatever reason, may not have better (or less fallible) recollections than others;

(2) As against the witness evidence, I have an extremely large body of contemporaneous documents, particularly emails and their attachments, and a large number of formal and informal reports, including of meetings, which have proved to be of very considerable assistance. However, there is on occasion a need for caution with the documents where the authors may have had reason to mis-state the true position, or at least not describe it fully;

(3) Moreover, all of this is in the context of claims of very serious wrongdoing going beyond mere negligence in the case of both Dechert and the SFO. In that regard, I bear in mind that while the standard of proof remains the civil standard, in general terms, the more serious the alleged wrongdoing the less likely it is that it took place, and accordingly the evidence required to demonstrate the wrongdoing will need to be more cogent than what is necessary to prove mere negligence; see *In Re B (Children)* [2009] 1 AC 11 at paras. 13-15 and *JSC BM Bank v Kekhman* [2018] EWHC 79 at paras. 51-53.

45. Despite the (largely) sequential approach I have taken to determine the numerous issues arising between ENRC and Dechert and the SFO, I have also undertaken the exercise of assessing the evidence cumulatively and holistically when considering in particular whether a witness's evidence on a particular point should be accepted or not.

46. Next, given the length of the trial, the number of witnesses, and written submissions, amounting to over 1,500 pages (over 1,180 being in closing) with many hundreds of footnotes, followed by two weeks of oral closings, it is simply not possible for me in a judgment of any manageable length to deal with every single point and every single piece of evidence relating to every point. I have, nonetheless, read and listened with care to all the submissions made and evidence given even if they are not all identified in this judgment and have dealt with all the key points.

47. Concomitant with that approach, not every matter which, strictly speaking, was required to be put to a particular witness was put. In most cases, that was justified, given time constraints and in some cases a point which was put was sufficient where there were other similar points. That said, there were, in my view, a number of significant matters which were not put to

witnesses and should have been. I deal with those instances, and whether the failure to put a matter made any difference, below.

48. Equally, it was agreed that all sides could refer in their closing submissions to documents which were not in fact read out or put in the course of the trial, albeit they were in the trial bundle. In the event, I have had to consider many such documents.

49. It has been necessary in this judgment to cite or quote from a very large number of contemporaneous documents. Where I do so, and in order to assist the reader, I have reformatted them, save where their particular format is relevant and so should be preserved.

50. Given the number of issues, many of them interlocking, it would be impossible to undertake a chronological survey of all the evidence and necessary findings of fact in one go, as it were. However, within the description and analysis of the 30 Disputed Contacts ("DCs", explained at paragraph 86(2) below), I have endeavoured to interpose or inject other relevant events, so that a sense of the overall chronology can be given. I have attempted to assist this by a relatively brief chronology which forms Appendix 1 to this judgment. I have also set out as Appendix 2, a *dramatis personae*, which essentially reproduces that contained in paragraphs 21, 26, 27 and 29 above, but which might be useful as a separate document when reading this judgment.

OTHER PROCEEDINGS

51. ENRC's engagement with the SFO and with Dechert has spawned a substantial amount of litigation, quite apart from the two claims before me. This includes the following claims brought by ENRC:

    (1) a claim made against SPJ on 6 June 2013 and settled on 13 March 2015 ("the SPJ Claim");

    (2) a claim against Dechert commenced on 22 October 2013, seeking an order for a detailed assessment of Dechert's fees in the preceding 12 months; this involved an appeal to the Court of Appeal, on the question of whether such proceedings should be held in private or not ("the Costs Proceedings");

    (3) a claim against Mr Findlay made on 29 January 2018 and settled on 22 February 2018 ("the Findlay Claim");

    (4) an application for pre-action disclosure against the SFO made on 8 June 2018 and which preceded the commencement of the 2019 Claim;

(5) an application for judicial review as against the SFO made on 27 November 2018, and which was later withdrawn;

(6) a claim against Mr Ake-Jean Qajgeldin made on 24 July 2019 ("the AJQ Claim"); and

(7) a further application for judicial review as against the SFO made on 1 August 2019, for which permission was refused;

(8) a claim against Mr Hollingsworth, commenced on 21 October 2019 ("the Hollingsworth Claim"); and

(9) a claim against the SFO and Mr Gibson made on 27 January 2021 ("the Gibson Claim").

52. In addition, on 2 February 2016, the SFO issued a Part 8 claim seeking a declaration, for the purposes of the criminal investigation, that ENRC was not entitled to refuse to disclose or produce certain documents subject to notices issued by the SFO under s.2 of the Criminal Justice Act 1987 (the "1987 Act") on grounds of legal professional privilege (the "Privilege Proceedings"). This was dealt with in a judgment of Andrews J (as she then was) on 12 May 2017. An appeal against her decision was allowed in part by the Court of Appeal on 5 September 2018.

SOME BACKGROUND MATTERS

Reports for ENRC

53. On 25 September 2007, HS produced a report for ENRC ("the HS Report"). It was concerned with possible irregular business practices in relation to end customers in Russia who had purchased ENRC products from companies referred to as the Russian Trading Structure ("RTS"). Although the relevant transactions ceased in 2006, there were possible further liabilities in relation to them and accordingly, the RTS issue was disclosed as a Risk Factor in the IPO Prospectus.

54. On 11 March 2010, Peters and Peters LLP produced a report for ENRC dealing with 3 areas of concern in relation to the operations of SSGPO in Kazakhstan ("the PP Report").

55. Matters discussed in the PP Report were then investigated internally by ENRC's Internal Audit team with conclusions set out in a report for the AC dated 5 August 2010 ("the 2010 IA Report").

ENRC's Africa Acquisitions

Camec

56. In November 2009, ENRC acquired the Central African Mining and Exploration Company Plc ("Camec"), an English mining company operating in Africa through subsidiaries (known internally as Project Crete). Due diligence was carried out by HS and PwC among others. AF advised in relation to the sanctions aspects of the acquisition.

57. Prior consent for the acquisition was given by the Serious Organised Crime Agency ("SOCA") on 16 September 2009 pursuant to a Suspicious Activity Report ("SAR") issued the previous day by HS on behalf of ENRC. This was about Camec's potential involvement in sanctions breaches and the potential interests of sanctioned individuals including Muller ("Billy") Rautenbach, a Zimbabwean businessman. He had been subject to financial sanctions in the EU and UK between January 2009 and 17 February 2012 and in the US between November 2008 and April 2014. Mr Rautenbach's interest in Camec was thought to be through a company called Harvestview Ltd which had a minority shareholding in it. That shareholding was "frozen" by ENRC after the acquisition so as to comply with EU and US sanction regimes.

Chambishi

58. In February 2010, ENRC acquired Chambishi Metals Plc ("Chambishi"), the owner of the Chambishi copper and cobalt mine in Zambia. Due diligence was carried out by JD and PwC, among others.

CCC

59. ENRC acquired Congo Cobalt Corporation ("CCC"), a company registered in the DRC in July 2010.

Camrose

60. On 20 August 2010 ENRC acquired a 50.5% shareholding in Camrose Resources Ltd ("Camrose"), a BVI company indirectly holding various mining interests in the DRC (known internally as Project Pine). This shareholding was acquired from a group of companies indirectly owned and controlled by Dan Gertler, an Israeli businessman. Legal due diligence was carried out for ENRC by HS and other advisers, including AF. The consideration paid by ENRC was a total of $175 million. ENRC also agreed to make a shareholder loan to the company totalling US$400 million ("the Camrose Loan"). $35 million of that was said to have been drawn down by a company called Metalkol and is referred to in more detail below.

61. At the same time, it was understood that Camrose would be acquiring 100% of the Highwind Group of companies thought to be beneficially owned by Mr Gertler. The Highwind Group in turn owned 70% of Metalkol. This company owned a valuable mining permit in relation to the Kolwezi mines in the DRC ("the Kolwezi Licence").

62. SOCA consent was obtained for this transaction pursuant to two SARs dated 12 July and 16 August 2010 dealing with the link between the Highwind Group and Mr Gertler, and various proposed financing arrangements.

63. Controversy surrounded Camrose. This is because First Quantum Minerals Ltd ("FQ"), the former owner of the Kolwezi Licence, alleged that this licence had been illegally revoked by the Congolese Government in 2009 and that Mr Gertler then unlawfully acquired it for US$20 million. FQ said that the licence was transferred to the Highwind companies and thereby to ENRC pursuant to the acquisition of those companies, for $175 million. It was said that the acquisition of the licence by Mr Gertler was corrupt and at an undervalue. In September 2010, FQ brought proceedings against the Highwind Group of companies, now owned by ENRC. In early 2012 the dispute was settled by ENRC agreeing to pay to FQ £1.25 billion.

64. By late 2012, ENRC had resolved to buy out Mr Gertler's minority 49.5% interest in Camrose, which was believed to have been held through a company called Cerida. ENRC obtained approval for the acquisition from SOCA on 7 December 2012 pursuant to a SAR filed on 30 November 2012. The acquisition, internally known as Project Moses, completed on 28 December 2012.

65. These corporate acquisitions are not merely relevant by way of background. Elements of them ultimately featured as part of Dechert's investigation.

WB1

66. On 20 December 2010 an email was sent anonymously to Kazakhstan's Committee for National Security and its Chief Prosecutor's Office as well as to the Almaty, Astana and London offices of ENRC. This was WB1. It read as follows:

> "I'm an engineer of the supply/purchasing department at the SSGPO JSC, Rudnyi, Kostanayski Region, and I'm writing to you on behalf of a group of 4 employees to report certain facts of corruption and financial wrongdoings, that have been happening at the enterprise in the last few years. The relatives of the director are constantly present at the Rudnyi headquarters, and are intentionally and out of self-interest limiting competition amongst those taking part in the tender processes/potential suppliers. Currently, 90% of those who work with the enterprise, are those who give kick backs to the director and his relatives. To facilitate this, various manipulations are happening at the tendering stage. Some of the acquired machinery is not at all included in the tenders organised on ENRC's goods and services purchasing website, and is instead bought directly at inflated prices. Moreover, the machinery is very often of low quality and doesn't comply with the stated requirements. The managers, and also their deputies, of all the subdivisions are forced to buy the machinery at inflated prices.

> For example, deputy head of security Razmat, is not hiding and boasts about having monthly kickbacks worth $200,000 - 300,000. Farhad Ibragimov also doesn't hide that he receives $30,000 - 40,000 every month, protecting himself with his highly esteemed uncle's name. Former employee - Satyr Parhatovich Sadykov, has not been employed by SSGPO for a few years, but nevertheless freely accesses the central office and in having enormous influence and support from highly-placed relatives, is threatening procurement engineers with redundancies and is literally shoving equipment that, according to our factory workers, is poor quality and often second-hand from the Pervouralsk and Uralmash factories. The father of SSGPO's Director's wife, is not an employee of the SSGPO, however using his connections as a relative of the esteemed Mr Shodiev, is forcing the purchase, at hyper inflated prices, of Rudgormash factory's equipment for the SSGPO and for other company enterprises.
>
> It is also widely known that the director of the SSGPO has bought a state-owned farm in our region and it is known for a fact, that payment for the equipment, spare parts and running repairs is coming out of the SSGPO's budget.
>
> For obvious reasons we are unable to disclose our surnames, but we hope that you will conduct the necessary investigations and take the necessary measures."

67. By the time of WB1, questions had already been raised in the press about ENRC's approach to corporate governance. Its investments in the DRC had also attracted attention because of the DRC's low ranking in terms of perceived corruption. There was added focus to all of this because of the forthcoming Bribery Act.

68. It was also clear that, internally, ENRC was somewhat dysfunctional. It had recruited SPJ, Sir Ken Olisa and Sir Richard Sykes as eminent non-executive Directors at least in part to assuage concerns about its own governance. Once there, they objected to the roles of Mr Ammann and Mr Vulis, and they also stressed to the Founders the need for the Board to operate independently. In June 2011, as already noted, Sir Ken Olisa and Sir Richard Sykes were not reappointed as directors.

69. In the course of Dechert's investigation, it is fair to say that ENRC's directors and officers did not always speak with one voice. Indeed, Dechert's original case was that particular individuals positively acted to obstruct that investigation, although ultimately this point was not pursued with the relevant witnesses or in its submissions.

Mr Gerrard

70. Mr Gerrard had been an officer in the Metropolitan Police prior to qualifying as a solicitor in 1991. He became a Partner at Pannone in 1993, practising in corporate crime, and his clients included Ernest Saunders and Asil Nadir. He was headhunted by DLA in 1995 whereupon he became an equity Partner. He established its Regulatory and White-collar Crime department, became Head of White-collar Crime Europe in 1998 and Global Co-Head of Regulatory, and then Litigation and Regulatory, in 2005 and 2006 respectively. He had been ranked as a leading practitioner in fraud and corporate crime in the Chambers and Legal 500 directories since 2010.

71. Subsequent to the termination of Dechert's retainer on this case in March 2013, Mr Gerrard worked on other matters involving the SFO. In particular, his team at Dechert acted in

relation to a Deferred Prosecution Agreement ("DPA") negotiation on behalf of Airbus SE as approved by the Crown Court on 31 January 2020. The DPA involved a fine of €991 million and followed a global investigation covering 5 jurisdictions and lasting for years. He retired, from Dechert and practice, later in 2020.

72. It is therefore unsurprising that Mr Gerrard held himself out as a specialist in corporate crime and someone who was very familiar with the SFO and how it worked.

Jones Day

73. According to Mr Ehrensberger, JD had been one of ENRC's regular corporate advisers and he had worked with them extensively in his previous role as Head of M&A which was from March 2008 to July 2011. That period, of course, covered the Camec, Chambishi and Camrose acquisitions. However, HS were also corporate advisers for ENRC. They had acted in that capacity on the Camec and Camrose deals, whereas JD had so acted in relation to Chambishi.

74. It is said that JD also had a role in the Camrose acquisition. That is because the Camrose Due Diligence Report has a cover with the name only of JD on it. However, that is the only reference to JD in that document. The cover sheet "Legal Due Diligence" after the index bears the name of HS. If they had a role in connection with Camrose it is not clear what it was. It was HS which filed the two SARs in July and August 2010.

75. On the other hand, JD did act on the later buyout of Mr Gertler's shareholding in Camrose in late 2012 and it filed the single SAR in respect of that. It had also acted for ENRC on the IPO in 2007.

A SUMMARY OF THE INVESTIGATION

76. It is necessary to sketch out in the broadest terms the investigation work which DLA/Dechert was instructed to perform as there will be many references to its elements hereafter.

77. On Kazakhstan, the investigation was all about SSGPO. Two principal points were raised in WB1 (see paragraph 66 above):

    (1) The Farm Allegation: this was that SSGPO's director had bought a farm for himself, but SSGPO was paying for its equipment and repairs; and

    (2) The Procurement Allegation: this was that SSGPO was paying hyper-inflated prices for equipment and/or receiving low quality equipment, and the suppliers thereof were giving kickbacks to the director and others.

78. Then, in January 2011, Mr Depel raised an issue as to whether SSGPO had been selling materials to Iran in breach of sanctions. This was the Iran Allegation.

79. Then, in February 2011, ENRC's Internal Audit reported an allegation that the son of a local police chief in Kazakhstan had been given a scholarship by SSGPO to study at the University of Michigan. Scholarships were meant to be limited to children of employees and did not usually extend to universities abroad. This was the Education Allegation.

80. Finally, in December 2011, an allegation arose from a whistleblower that SSGPO was paying other companies to do the work of topsoil removal, known as "stripping", at various sites, which work was not done because SSGPO was doing it itself. This was the Stripping Allegation.

81. All of the above formed part of ENRC's engagement with the SFO which was commenced on 9 November 2011.

82. On Africa, following the engagement with the SFO, the investigation broadened to include various aspects of the Camrose, Camec and Chambishi acquisitions referred to above.

83. The only formal communication to the SFO in writing that transpired was the Kazakhstan report which arrived in draft on 30 January following the Rappo Letter of 23 January 2013 and then the final version on 28 February. The Africa investigation was still ongoing, with no report, when Dechert's retainer was terminated on 27 March, 2013.

THE ISSUES

Introduction

84. On the primary issues of liability, there is only a limited number of legal issues. Most of the issues I have to resolve are ones of fact.

85. I will set out below the key issues in the claims against Dechert and the SFO. Later in this judgment I will determine the nature and scope of the duties that each of Dechert and the SFO owed to ENRC. Further issues on liability will be discussed after I have set out my analysis of all the alleged breaches of duty.

Liability (1): Breaches of duty by Dechert

86. These are alleged, essentially, to be the following:

(1) Leaks to the press: ENRC alleges that Mr Gerrard leaked confidential information about ENRC which formed the basis for the following articles: by David Robertson in *The Times* on 9 August 2011 ("the August Article"), by Ben Laurence in *The Sunday*

Times on 11 December 2011 ("the December Article") and by Chris Thompson in *The Financial Times* on 14 March 2012 ("the March 2013 Article");

(2) Other unauthorised disclosures, comprising Mr Gerrard's repeated unauthorised contacts with the SFO (there are said to have been 30 in total). These were given the shorthand expression "Unauthorised Contacts" ("UCs") by ENRC while Dechert/the SFO preferred the more neutral "Disputed Contacts" ("DCs"). I shall use the latter expression. The meetings between the SFO and Dechert and usually representatives from ENRC, which are not alleged to have been unauthorised, I shall refer to as "Open Meetings" ("OMs");

(3) Failures to inform ENRC: Mr Gerrard failed to inform ENRC of Mr Depel's contacts with the SFO and the Depel Interview, despite knowing of them;

(4) Wrong advice: Mr Gerrard failed to give ENRC any, or any accurate, advice on: (i) the risk of criminal liability here in respect of events or suspected events concerned with ENRC's operations in Kazakhstan and Africa; (ii) the risks of a raid by the SFO; (iii) the risks of the self-report process in the sense in which ENRC decided to engage with the SFO; (iv) the potential penalties which might be applied to ENRC; and (v) the risks of bringing documents into England from abroad;

(5) Unnecessary expansion of the investigation: Mr Gerrard wrongly advised ENRC to expand the scope of the Kazakhstan and Africa investigations and/or to reopen closed matters, without regard to proportionality, and whilst wrongly claiming that the SFO 'expected' such steps to be undertaken;

(6) Failure to establish the scope of the SFO's concerns: Mr Gerrard failed to establish, or adequately attempt to establish, a clear and precise scope of the matters the SFO wanted investigated; instead he fed the SFO's suspicions during the unauthorised contacts and by referring e.g., to "red flags" and other prejudicial matters at open ENRC/SFO meetings;

(7) Failure to protect ENRC's information protected by legal professional privilege ("LPP"): Mr Gerrard failed to protect privileged information ENRC provided to the SFO (or properly advise ENRC about the risks of doing so); and

(8) Supply of privileged material to the SFO in June 2013 ("the June 2013 Material", as further defined at paragraph 1464 below) effected by Mr Gerrard.

87. I have dealt below with those allegations though not necessarily in that order or quite as formulated. I have been guided, ultimately, by how the allegations were framed in ENRC's written Closing.

88. Dechert deny the allegations recited above, essentially on the facts. Sometimes, they agree the facts but argue that no breach of duty resulted. But in addition, and as subsequent points,

(1) They rely upon a clause which limits liability, as noted above; and/or

(2) They contend that the claims are time-barred as against them; and/or

(3) They allege contributory fault as against ENRC.

Liability (2): The SFO's misconduct

89. The key factual allegations underlying the claims for inducement and misfeasance in public office are as follows, noting the particular SFO personnel said to be involved:

(1) The 30 contacts defined below as DCs, involving Mr Alderman and/or Mr Gould and/or Mr Thompson running over the period from about July 2011 to 28 March 2013; some of those DCs are said to involve deliberate failures to keep proper records and/or instructions to that effect and/or the destruction of relevant emails or notes; it should be noted that although others at the SFO (notably Mr McCarthy and Ms von Dadelszen, who was herself a witness) were involved in some of the DCs, the wrongdoing alleged against the SFO here (whether in inducement or in misfeasance) does not involve wrongdoing by them, only by Messrs Alderman and/or Gould and/or Thompson;

(2) The Depel Interview conducted by Mr Thompson;

(3) Sir David's failure to deal with an anonymous letter purporting to be from a whistleblower which he received in July 2012 ("WB2");

(4) The leak of the SFO's decision to launch a criminal investigation into ENRC;

(5) Mr Coussey's use of the June 2013 Material;

(6) The removal/ destruction of Mr McCarthy's Beige Notebook by persons unknown at the SFO;

(7) Mr Gibson's failure to amend the SFO Website which referred to the criminal investigation into ENRC.

90. The allegations of wrongdoing in sub-paragraph 89(3)-89(7) above is made in the context of a claim in misfeasance only.

91. It is then said that this conduct amounted to the tort of inducement to breach of contract or fiduciary duty and/or misfeasance in public office, broadly as follows:

(1) Inducement**:** The ways in which Dechert acted in breach of their duties to ENRC are explained above. Those breaches were so obvious that the experienced SFO officers involved either knew that Mr Gerrard was acting improperly or turned a blind eye to his conduct (which should have been reported back to ENRC). Worse, the SFO encouraged or assisted Mr Gerrard to act or continue to act improperly and helped him keep his conduct secret from ENRC. They held 30 DCs with him, in private (often mobile phone) discussions, in a hotel or pub etc. They willingly received the prejudicial and confidential (and often privileged) information he was providing to them. It was then used to inform the SFO's decisions (including to serve the SFO Letter and open the criminal investigation). On one occasion the SFO agreed at a DC a particular line later to be taken at an OM. By so doing, it is said that the SFO induced, procured or encouraged Mr Gerrard to act in (further) breach of his duties.

(2) Misfeasance in Public Office: In addition, the SFO breached its own duties and in particular its duty to be independent ("the Independence Duty"), to properly record evidence ("the Evidence Duty") and its duty to respect and not to make use of privileged information belonging to a company which was an actual or potential target ("the LPP Duty") (collectively "the SFO Duties"). It is said to have done so by the following conduct:

(a) By reason of the DCs, the SFO officers were in repeated breach of the Independence and/or LPP Duties; and

(b) The Evidence Duty was repeatedly broken by keeping material "off the books", the destruction or suppression of the Beige Notebook, and the double-deletion of improper email communications with Mr Gerrard (or evidence of them).

92. ENRC says that it was plain to the relevant SFO officers at the time that conduct of this nature - resulting in a very public and never-ending criminal investigation - would cause ENRC huge reputational, consequential and other losses (quite apart from the fact that ENRC was paying Dechert very large sums in fees during the course of the Retainer).

Causation and Loss

93. I have set out broadly, ENRC's case on causation and loss at paragraphs 12-14 above and the denials by Dechert and the SFO of the entirety of the claims against them in paragraphs 15-16 above.

94. In fact, the only matters for determination in this judgment on causation and loss concern ENRC's contention that, but for the SFO's wrongful conduct, (a) the SFO would not have sent the SFO Letter and (b) ENRC would not have agreed to enter the Review Process with the SFO on 9 November 2011. This is in turn denied by the SFO.

Statements of Case

95. The primary statements of case have undergone more than one amendment. Unless the context otherwise requires, I shall simply refer to each of them as "the Particulars of Claim", "the Defence", etc.

RELEVANT CRIMINAL OFFENCES

Introduction

96. For the purposes of dealing with a number of issues hereafter, it is necessary to sketch out the elements of a number of different criminal offences, principally (but not exclusively) concerned with bribery and corruption. I have taken those offences from lists provided to me by both ENRC and Dechert.

Public Bodies (Corrupt Practices) Act 1889 (as extended by s109(3)(c) of the Anti-terrorism, Crime and Security Act 2001) ("the 1889 Act")

97. Put broadly, s1(1) and (2) thereof make it an offence to take or give (respectively) a bribe. The person bribed must be a public officer. The relevant conduct must take place (a) in the UK or (b) anywhere else provided that it was committed by a British national or UK incorporated company. The 1889 Act applied until 1 July 2011. It applied to conduct wholly outside the UK as from 14 February 2002.

98. For a company to be convicted, the corrupt intention to induce or reward must be held by its "directing mind and will" ("DMW").

Prevention of Corruption Act 1906 (as extended by s109(3)(b) of the Anti-terrorism, Crime and Security Act 2001) ("the 1906 Act")

99. Offences similar to those set out in s1 of the 1889 Act are provided for in s1 of the 1906 Act, except that the person bribed is not limited to a public officer but may be any "agent". There

are certain other differences between the 1906 and 1889 Acts, but it is not necessary to examine them here.

100. The provisions concerning conduct outside the UK and the relevant *mens rea* are, however, the same as in the 1889 Act.

Bribery at Common-Law (as extended by s109(3)(a) of the Anti-terrorism, Crime and Security Act 2001)

101. It is at common law an offence to give or offer a bribe to a public official or for a public official to receive or solicit a bribe. Once more, the application of this to conduct outside the UK and the *mens rea* requirements are the same as for the 1889 Act.

Bribery Act 2010

102. This applies to conduct committed wholly after 1 July 2011. It replaces the bribery offences listed above from after that date.

103. Section 1 deals with bribing a person. It requires an intention on the part of the defendant to induce a person to perform improperly a relevant function or activity (themselves defined) among other things. In the case of a company, that intent must be held by its DMW.

104. As to jurisdiction, the UK Courts have jurisdiction if any act or omission forming part of the offence is committed within the UK. If not, they will still have jurisdiction if a person's acts or omissions outside the UK would form part of the offence if done in the UK and that person has a "close connection" with the UK. Such a person would include a British citizen and a UK-incorporated company. However, in a new development from previous law, it would also include a non-British national who is ordinarily resident in the UK.

105. Section 2 deals with the taking of bribes. This includes the case where a person accepts a financial advantage, intending that, in consequence, a relevant function or activity should be performed improperly. The jurisdictional position is the same, *pari passu*, as for s1.

106. Section 6 creates a separate free-standing offence of bribing a foreign public official. The jurisdictional scope is the same as for s1. However, the *mens rea* for the bribe is different and easier to establish. It is simply to influence the person bribed in his capacity as a public official with the intention of obtaining a business advantage.

107. Section 7 is the key and significant departure from previous law. This offence is entitled "Failure of commercial organisations to prevent bribery". A relevant commercial organisation ("C") commits an offence if a person associated with it bribes another, intending to obtain or retain business for C or obtain or retain an advantage in the course of business for

C. C must be a company or partnership which is either (a) established or formed in the UK and carries on business there or elsewhere or (b) incorporated or formed elsewhere but which carries on business or part of its business in the UK.

108. A person is "associated" with C if he performs services for or on behalf of C. Whether there is a relevant performance of services will be decided by considering all the relevant circumstances and is a question of fact. However, examples of who might be so associated are said to be employees, agents and subsidiaries. But there will be others as well and the Ministry of Justice Guidance on the Act gives a number of further examples.

109. It is clear from the above that the jurisdictional reach of this offence is considerably wider than under the previous law. In addition, the offence (subject to the defence provided) is effectively one of strict liability, since if the relevant acts by an associated person are shown, no particular *mens rea* on the part of C is required.

110. However, it is a defence for C to prove that it had in place "adequate procedures designed to prevent persons associated with C from undertaking such conduct" (i.e. bribery).

Other Offences

Fraud Act 2006

111. For present purposes, this covers, broadly, frauds where any act or omission forming part of the offence occurs in England and Wales.

Conspiracy to Defraud at Common Law

112. This covers cases where the intended fraud was to take place in England and Wales, or if intended to take place abroad, it would be an offence in that place and any party to the conspiracy (or his agent) (a) did something in England and Wales in relation to the agreement, before it was made, or (b) joined the conspiracy in England and Wales, or (c) acted or omitted to act in England and Wales in pursuance of the conspiracy.

Conspiracy to commit an offence overseas: s1A of the Criminal Law Act 1977

113. This offence covers conspiracy to commit any offence, not merely fraud, so it would include bribery. Its jurisdictional reach is similar to that under the common-law offence of conspiracy to defraud.

Serious Crime Act 2007

114. By ss44 and 45 thereof, a person commits an offence if he does an act capable of encouraging or assisting the commission of an offence and either (a) intending that encouragement or assistance or (b) believing the offence will be committed and that his act will encourage or

assist it. The underlying offence can be one which has been committed or is intended to be committed overseas, provided that (a) it would be triable in England and Wales or (b) it would be so triable if committed by a person who satisfies a nationality or residence condition.

115. In addition, the act of encouragement or assistance must be wholly or partly in England and Wales.

False Accounting under s17 of the Theft Act 1968

116. The offence of false accounting here has the same jurisdictional reach as the Fraud Act 2006.

Companies Act 1985

117. There are various false accounting offences under this Act where committed by an officer of the company.

Companies Act 2006

118. As from 6 April 2008, an officer of a company commits an offence if he fails to comply with the statutory duty under s386 to keep accounting records.

Financial Services and Markets Act 2000

119. This Act creates offences of making misleading, false or deceptive statements to the market.

Perverting the Course of Justice and s2(16) of the 1987 Act

120. On the assumption that there is the prospect of criminal offences justiciable under English law, then, being a party to steps taken to conceal or destroy evidence in relation to those offences (wherever the evidence may be located) can constitute the common-law offence of perverting the course of justice. Further, under s2(16) of the 1987 Act it is an offence for any person who knows or suspects that an investigation by the police or the SFO into serious or complex fraud is being or is likely to be carried out to falsify, conceal, destroy or dispose of documents which he knows or suspects would be relevant to such an investigation.

A further point

121. There is a broader question as to the general ability of the SFO to be able to prosecute ENRC either with, or without, the information supplied to it by Mr Gerrard and/or ENRC. Appendix 3 to Dechert's Closing deals not only with the relevant offences but also their implications. It is not necessary for me to assess the detailed points made therein. This is because in my judgment (a) they do not affect the limited respects in which I have found Mr Gerrard to have given wrong advice on criminality (see paragraphs 939-963 below) and (b) in my judgment the main issue that arose in the investigation which calls for comment is the notion that

matters would be and were, of less interest to the SFO where they essentially concerned a fraud committed not by the company (for example SSGPO) on some other party, but one which was a fraud on the company itself. This latter point needs further consideration.

122. First, such frauds were not on their face concerned with bribery and corruption which was the main focus of the SFO. Indeed, at least in some meetings, the SFO seems to have taken that on board. It is one reason why, as we shall see, the SFO was in truth much more interested in Africa than Kazakhstan.

123. However, Dechert has made the point that even where the fraud is on the company, there can still be criminal liability, at least in English law. Here, the case of *Moore v Bresler* [1944] 2 All ER 515 is relied upon. This was a case where the company was convicted of making false returns in respect of purchase tax with intent to deceive, contrary to the Finance (No. 2) Act 1972. Provided the relevant company officers making the returns were acting within the scope of their employment, the company would be liable. A point was taken that the relevant officers were not acting within the scope of their authority because they themselves were using the relevant sales to defraud the company i.e. their own employer. It was held by the Court of Appeal that this feature did not mean that they were not acting within the scope of their employment nor did it somehow absolve the company of guilt even though, in one sense, it was the victim of the fraudulent sales.

124. All of that is perfectly understandable. As is the reference to it in paragraph 19 of the 2009 SFO/CPS *Guidance on Corporate Prosecutions* where it was cited in the precise context of the corporate liability point which was its subject.

125. But the matters raised in respect of Kazakhstan were not on their face concerned with criminal offences committed there as against the external authorities as it were. So the way in which the fraud on the company was said to be irrelevant in *Moore* had no application there. Had there been such offences which, as a matter of English law, gave jurisdiction to the SFO here, then *Moore* might have been relevant but in reality it is not. Thus the difference between a fraud committed on rather than by the company remains important, in my view.

RELEVANT POWERS OF THE SFO

126. The SFO is itself a prosecuting authority. By s1(3) of the 1987 Act, the Director may investigate "any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud". By s1(5), the Director may then "institute and have the conduct of

any criminal proceedings which appear to him to relate to such fraud" or may "take over the conduct of any such proceedings at any stage".

127. Once a criminal investigation has begun, s2(2) and (3) empower the Director to require the person under investigation (or any other person whom he has reason to believe has relevant information) to answer questions or otherwise furnish information, or produce any specified documents or class of document, which appear to relate to any matter relevant to the investigation.

128. Further, and as from 1 July 2011, by s2A, the Director may also exercise the powers granted by s2 prior to the commencement of any criminal investigation for the purpose of enabling him to decide whether to start such an investigation. This is subject, among other things, to an exception where privileged documents are concerned (see s2(9) discussed below) and to the fact that if there is a reasonable excuse for non-compliance with the requirement from the SFO made under s2, that non-compliance will not constitute an offence – see s2(13).

129. Importantly, s2 also provides:

> "(4) Where, on information on oath laid by a member of the Serious Fraud Office, a justice of the peace is satisfied, in relation
> to any documents, that there are reasonable grounds for believing—
> (a) that—
> (i) a person has failed to comply with an obligation under this section to produce them;
> (ii) it is not practicable to serve a notice under subsection (3) above in relation to them; or
> (iii) the service of such a notice in relation to them might seriously prejudice the investigation; and
> (b) that they are on premises specified in the information,
> he may issue such a warrant as is mentioned in subsection (5) below.
> (5) The warrant referred to above is a warrant authorising any constable—
> (a) to enter (using such force as is reasonably necessary for the purpose) and search the premises, and
> (b) to take possession of any documents appearing to be documents of the description specified in the information or to take in relation to any documents so appearing any other steps which may appear to be necessary for preserving them and preventing interference with them."

130. It is the exercise of such a search warrant which has been colloquially described (by Mr Gerrard and others) as a "raid". It will be appreciated that it is not always necessary for there to have been issued a s2 notice which has not then been complied with, because of sub-paragraph 4 (a) (ii) and (iii). Moreover, a criminal investigation does not need to have commenced either, because by reason of s2A(3)(c), there can be an equivalent search warrant in respect of a s2A exercise.

131. Both ss2 and 2A have numerous other ancillary provisions but it is not necessary to examine them at this stage. The interviews and document production which occurred at the instance of the SFO in this case were pursuant to its s2 and 2A powers.

132. All of the above is in the context (and only in the context) of an actual or putative criminal investigation.

133. However, it is also necessary to refer here to the making of a Civil Recovery Order ("CRO"). This procedure was introduced by Part 5 of the Proceeds of Crime Act 2002 ("POCA"). The High Court may make a CRO against property if it is satisfied that such property was the proceeds of crime, strictly "unlawful conduct". The conduct may have been carried out anywhere in the world provided that it would have been criminal if carried out here. The "recoverable property" may itself be anywhere in the world provided that there is a connection between it and the relevant civil recovery proceedings brought here.

134. Proceedings claiming a CRO may be brought by a number of different authorities, including the SFO, which was entitled to bring such proceedings from 1 April 2008. The proceedings are civil in character and are "*in rem*" in the sense that they are brought against the property itself.

135. Since 1 April 2008, and by reason of an amendment to POCA inserted by the Serious Crime Act 2007, additional powers were granted to those authorities contemplating CRO proceedings. By s341(2) any "civil recovery investigation" is an investigation into whether property is recoverable property, who holds the property, or its extent or whereabouts but there is no such investigation once proceedings for a CRO have been commenced. One such power is that provided for by s357. Here, a judge may, on an application made to him by the relevant authority, make a disclosure order if satisfied that each of the requirements for the making of the order is fulfilled.

136. In 2009, a Guidance Note was produced by the Secretary of State pursuant to s2A of POCA. It stated in the Introduction that:

> "In any case where proceeds of crime have been identified but it is not feasible to secure a conviction, or a conviction has been secured but no confiscation order made, relevant authorities should consider using the non conviction-based powers available under the Act."

137. In the section dealing with civil recovery, the Guidance points out that civil recovery proceedings are often contested and may in certain circumstances involve protracted litigation. In other cases, however, an order can be obtained quickly and simply where the other party consents to it; but it is important to emphasise that there still needs to be property emanating from crime otherwise there could be no jurisdiction for making the order.

138. As will be seen below, the SFO's 2009 Guidance envisages the use of an agreed CRO to achieve a civil settlement between the relevant party and the SFO following engagement in

the SR process (as described at paragraph 141 below) where this is considered an appropriate alternative to a criminal investigation and prosecution.

THE SFO'S 2009 SELF-REPORTING GUIDANCE

139. On 21 July 2009 the SFO published a document entitled "Approach of the Serious Fraud Office to dealing with overseas corruption" ("the 2009 Guidance"). It was the potential and then actual operation of the self-reporting process explained in that document that lies at the heart of ENRC's engagement with the SFO in this case. For that reason, it is necessary to refer extensively to this document. I add at the outset that it was significantly changed by revised Guidance on Corporate Reporting on 9 October 2012 ("the 2012 Guidance").

140. There will be much reference to the 2009 Guidance below. However, and although there was criticism of the 2009 Guidance and there are issues as to how it was applied here, some points about what the Guidance intended are relatively clear.

141. First, it refers to a "self-referral" or "self-report" ("SR"). It envisages that the relevant company decides voluntarily to report to the SFO a "case of" or "a problem concerning" overseas corruption. This is likely to happen only when there has been advice and a degree of investigation by its professional advisers which reveals that there is a "real issue and remedial action is necessary." In other words, the company is likely to be reasonably sure that there has been criminal wrongdoing which could be the subject of prosecution here.

142. Next, following the SR and the acknowledgement of a problem, the SFO would need to be assured about a number of things. These are set out at paragraph 4 and include the SFO wanting to establish:

    (1) if the company's Board was genuinely committed to resolving the issue; and

    (2) that the company was prepared to work with the SFO on the scope and handling of any additional investigation thought necessary.

143. That further investigation is covered in paragraphs 11-13. They provide that if both sides were satisfied as to the answers to the questions raised in paragraph 4, they would then discuss the scope of any further investigation needed, if possible, to be done by the company's professional advisers. The SFO would want to be involved in regular update discussions concerning the progress of such further investigation. It is implicit in this that at some point the further investigation would come to a conclusion.

144. The whole point of the SR process from the company's point of view would be to secure a civil rather than a criminal outcome in respect of the wrongdoing reported, albeit that there could be no absolute guarantees.

145. The only pre-SR engagement with the SFO referred to is at paragraph 2 which says that there could be earlier engagement between the company's advisers and the SFO to obtain an initial indication, where appropriate, and after a detailed review of the facts, of what the SFO's approach might be. It seems to me that this is not indicative of some pre-report investigation but rather securing from the SFO (if it was prepared to give it) an indication as to whether it might or might not contemplate a civil settlement in the case concerned.

146. On the face of it, what the 2009 Guidance was not about was reporting to the SFO mere suspicions or initial thoughts or reports about matters which might possibly involve criminal offences after fuller investigation, or giving to the SFO a "running commentary" on how a particular investigation was doing or supplying the SFO with pieces of information along the way, in advance of the report itself.

147. This is why a self-report is such an important step for a company because it amounts to volunteering information which shows or is likely to show the commission of a criminal offence, where there is no complete guarantee that a criminal investigation will be avoided or that the SFO may not require a substantial further investigation before resolving the matter.

148. I shall refer to the process of engaging with the SFO pursuant to, or purportedly pursuant to, the 2009 Guidelines in this case as "the SR Process".

THE CLAIMS AGAINST DECHERT: THE LAW

Introduction

149. The causes of action pleaded against Dechert are the familiar ones where the professional liability of solicitors is concerned, that is to say breach of contract and/or negligence and/or breach of fiduciary duty. The law of such claims does not need to be rehearsed at this stage. The question which does arise, because it is not entirely common ground, is the nature and scope of Dechert's particular duties *qua* solicitors here. Hence the title of this section. I am not dealing here with any legal questions arising out of Dechert's limitation defence or limitation of liability defence. They will be considered below, to the extent necessary, once my primary findings on the question of breach of duty have been set out.

Common Ground

150. It is common ground that it was an implied term of the Dechert Retainer that it would act with the care and skill to be expected of a firm of solicitors with relevant expertise ("the Core Duty"). In this particular case, I consider that the relevant expertise is that of solicitors who (among other things) specialise in white-collar crime work and internal corporate investigations. There is, on the statements of case, a narrow dispute as to the particular content of that expertise (see footnote 16 to the Amended List of Issues and Common Ground in the 2017 claim). In the event, nothing turns on it.

151. It is also accepted that Dechert would act in accordance with, and not contrary to, its client's instructions ("the Instructions Duty") and that it would not disclose to any third parties confidential information belonging to ENRC without the latter's consent ("the Non-Disclosure Duty").

152. Dechert also accept that both Dechert as a firm, and Mr Gerrard personally, owed fiduciary duties to ENRC. These included a duty of confidence and a duty to act in what they in good faith considered to be the best interests of ENRC, and not to allow their own interests to conflict with that duty.

Areas of Dispute

153. On the face of it, and not least because Mr Gerrard was hired specifically because of his expertise in and experience of white collar crime cases and investigations, and of dealing with the SFO, he owed a personal duty of care in tort to ENRC as well. While Dechert have denied this, the only possible argument is that somehow this duty did not arise because of the limitation of liability clause. For the reasons given below when I deal with that clause, I reject that suggestion and I find that Mr Gerrard did owe a personal duty of care as well.

154. ENRC alleges that Dechert had an implied duty to disclose any material information in their possession which related to their retainer and in particular to ENRC's engagement with the SFO and which was within their knowledge. ENRC relies on paragraph 9-149 of *Clerk & Lindsell on Torts* 23rd Edition. Dechert initially denied this duty but then accepted it in principle in its Opening Submissions. In evidence, Mr Gerrard admitted that ENRC was entitled to be made aware of all information which was material to his retainer and that he should tell ENRC of any wrongdoing by him. He also agreed that he should disclose his actual or suspected involvement in any leak even if inadvertent, and whether current or former employees had been interviewed or were going to be interviewed by the SFO especially if they had privileged information. He also had a duty to tell ENRC if the SFO was

considering confiscation proceedings against senior ENRC officers or employees, due to alleged wrongdoing in the course of their employment. In my judgment, Mr Gerrard was right to admit all of this. It is self-evident in my view (altogether, the "Disclosure Duty").

The Standard of Care

155. Dechert made a number of points in its Opening Submissions which might be thought to lessen the standard of care actually owed. Given the nature and seriousness of the allegations here, any such nuanced disagreement is hardly likely to make any difference. But in any event, I agree with ENRC that the standard is the objective one of the reasonable solicitor and the application of that standard to particular facts or situations can vary depending on whether one is instructing a generalist solicitor to deal with highly specialised situations or whether (as here) a specialist solicitor with avowed experience in the field is chosen. Indeed, it is difficult to see how Mr Gerrard could purport to be any closer to the SFO and its operations, given how he described himself on his firm's website as a candidate for the Directorship, albeit that this claim was untrue. More pertinently, he had personal experience of the SR regime through the cases of MW Kellogg and Mabey & Johnson. And most telling of all, in his evidence, he never suggested he was unaware of some features of the SFO's processes or the SR scheme. On the contrary, he spoke with complete confidence that whatever course he took with the SFO was clearly the right one. He hardly suggested he was feeling his way. Accordingly, the relevant standard is that pertaining to the reasonable solicitor in Mr Gerrard's position, i.e. as an expert specialist in the field.

Authority

156. At this point, it is appropriate to say something about the application of the concept of authority in relation to Mr Gerrard's alleged breaches of duty. In a number of instances it is said on behalf of Mr Gerrard that even if he did not have ENRC's express authority to do or say something, he had its implied authority. In principle, he could act pursuant to an implied authority which is, after all, just another form of actual authority. Whether he had such implied authority is a matter to be decided on the evidence and objectively, as with any other implication.

Actual knowledge and recklessness

157. As noted above, both because it is its case on the facts and because of the possible effect of the limitation of liability clause, ENRC alleges that in fact, Mr Gerrard's breaches of duty were at least reckless. Hereafter, where I refer to a question of knowing breach, that should be taken to include a reckless breach.

THE CLAIMS AGAINST THE SFO: THE LAW

Introduction

158. Here, it is necessary to say rather more about the relevant causes of action than in the case of the claims against Dechert. As to the question of limitation again, that matter will be dealt with later in this judgment.

Inducement to breach of contract and/or breach of fiduciary duty

Generally

159. There is no real dispute between ENRC and the SFO on the elements of this tort, save whether it extends to breaches of fiduciary duty, which ENRC says it does, while the SFO says it does not. I deal with that dispute below although, as I shall explain, it is academic on the facts of this case. I therefore turn to the elements of the inducement tort.

160. I can take the various elements of the tort from the judgment of Lord Hodge in the Outer House in *Global Resources* v *Mackay* [2008] CSOH 148. It is not suggested that Scottish and English law differ in this regard, and it was for example cited with approval by the Court of Appeal in the recent case of *Kawasaki v Kembell* [2021] EWCA Civ 33. At paragraphs 11-14 of his judgment, Lord Hodge referred to the following necessary elements:

(1) A breach of contract by B, the party to the contract with C, the claimant;

(2) The defendant, A, must know that by his acts (whatever they are) their effect will be to put B in breach of contract, in other words, he must have knowledge of the contract and the relevant terms. Where knowledge is required, this encompasses reckless indifference as well as actual knowledge. In other words, the defendant has a suspicion that certain factors exist and then makes a conscious decision not to take any step to confirm their existence. See the judgment of Lord Hoffmann in the leading case of *OBG v Allan* [2008] 1 AC 1 at paras. 40-41;

(3) A must have induced B to break the contract by persuading encouraging or assisting him to do so ("the Inducement Requirement");

(4) A must intend to procure the breach of contract either as an end in itself or as the means by which he achieves some further end ("the Intention Requirement"); this is drawn from the judgment of Lord Hoffmann in *OBG* to which I shall refer below.

161. Lord Hodge also stated that lawful justification may be a defence. That does not arise here.

162. Equally, loss must have been caused to C as a result of the inducement. However, I am not concerned with that question in this judgment.

The Inducement Requirement

163. Something more needs to be said here, first, about the Inducement Requirement. There is no doubt that the paradigm examples of the tort concern active persuasion or encouragement by A to B to do that which puts him in breach of contract with C, as A knows. But, as reflected in modern descriptions of the tort as one of accessory liability, knowingly assisting B to break the contract may be sufficient. That is especially so if, without A's assistance, the breach of contract itself cannot be committed.

164. Thus, in *Lictor v Mir Steel* [2011] EWHC 3310, the assets and business of a company in administration, Alphasteel, were sold in a hive-down to a company formed by the administrators called Mir Steel, the first defendant. Mir Steel was then to sell them on to a company called Libala, the second defendant. The claimant, Lictor had supplied substantial equipment to Alphasteel for use in the production of steel but it remained the property of Lictor and in any event Alphasteel covenanted not to sell it. It was common ground that Alphasteel, by selling it down to Mir Steel was in breach of that covenant. Moreover, since the administrators controlled Mir Steel, they knew of the breach of covenant. Lictor alleged that Mir Steel had induced the breach of contract on the part of Alphasteel.

165. However, Mir Steel sought to dismiss the claim made against it on the basis that it had not induced or persuaded Alphasteel to sell the equipment to it. David Richards J (as he then was) rejected that argument and said this at paragraph 48:

> "…in circumstances where the defendant's involvement or co-operation is necessary to the breach intended by the contract breaker, then the defendant who participates in this way with the relevant knowledge is liable. He submitted that the necessary element of causative participation was satisfied if the defendant does an act which enables the contract breaker to breach his contract and without which no breach would occur. In such circumstances the defendant is sufficiently instrumental in causing the breach to be liable. Active persuasion by the defendant is not required."

166. Then, applying this to the facts of the case David Richards J said as follows:

> "[51] In the course of his judgment…Roxburgh J, commenting on the use by Lord Macnaghten of the word 'interference' in Quinn v Leathem…considered that mere passivity would not be sufficient to give rise to liability. An example of mere passivity is found in the decision of the Court of Appeal in Batts Combe Quarry Ltd v Ford…In that case a father who had sold his quarry business with a covenant not to be engaged or concerned in the business of a quarry within 75 miles for a period of ten years, provided funds to his sons to purchase and operate a quarry in the immediate neighbourhood of the quarry which he had sold. The funds were provided gratuitously to his sons. He was held liable for breach of contract but the claim for inducing his breach of contract against the sons was dismissed at first instance, a decision which was affirmed by the Court of Appeal. Dealing with this Lord Greene MR said…: 'First of all it was said that the sons, by accepting their father's bounty amounting to something over £7,000, did procure him to break his covenant—that is assuming, of course, that the finding of the money by the father was a breach of covenant. Assuming that, it was said that that was a procuring of a breach of contract. In my opinion, that argument is completely misconceived. The tort of procuring a breach of contract requires something much more than that. Mere acceptance of a proffered bounty given in breach of covenant cannot, it seems to me, be said to be in any sense a procuring of a breach of contract.'

> [52] The terms of the hive-down agreement are readily distinguishable from the mere acceptance of proffered bounty. Not only did Mir Steel agree to purchase the equipment as part of the assets of the business for a very substantial price which it paid with funds advanced to it by Libala, it also undertook significant and continuing obligations. These included, for example, the obligation contained in cl 9.5 that it would be responsible for settling any claim made against it by the claimant in respect of the hot strip mill. The agreement by Mir Steel to purchase the equipment and other assets on the terms of the hive-down agreement is in my judgment, consistently with the authorities on which Mr Boyle relied, at least arguably sufficient to constitute acts required for liability in tort for inducing a breach of contract."

167. Accordingly, assisting the breach can be enough at least where the breach could not be committed without it. This was recognised by Popplewell LJ in *Kawasaki*. At paragraph 23 having referred to the fact that liability for inducement is an accessory liability, he said:

> " A commits a tort and attracts liability to C because he does something which joins in with the conduct of B in a way which makes him an accessory to the breaking of the contract by B."

The Intention Requirement.

168. Here, I turn first to the well-known judgment of Lord Hoffmann in *OBG*. Among other things, he said this:

> "39 To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so. This proposition is most strikingly illustrated by the decision of this House in British Industrial Plastics Ltd v Ferguson in which the plaintiffs former employee offered the defendant information about one of the plaintiffs secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal …MacKinnon LJ observed tartly that in accepting this evidence the judge had vindicated his honesty . . . at the expense of his intelligence but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract…
>
> 42 The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract. But that did not matter. Again, people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves. As I said earlier, the Dunlop employees who took off the tyres in GWK Ltd v Dunlop Rubber Co Ltd…intended to advance the interests of the Dunlop company.
>
> 43 On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been "targeted" or "aimed at" In my opinion the majority of the Court of Appeal was wrong to have allowed the action in Millar v Bassey [1994] EMLR 44 to proceed. Miss Bassey had broken her contract to perform for the recording company and it was a foreseeable consequence that the recording company would have to break its contracts with the accompanying musicians, but those breaches of contract were neither an end desired by Miss Bassey nor a means of achieving that end."

169. For present purposes, the key passages are paragraphs 42 and 43 but I cite paragraph 39 to emphasise the point that knowledge by the defendant that what he is procuring is a breach of contract, dealt with in that paragraph, is a separate requirement to intention. The distinction is

important because it would be possible to have the former without the latter. What has to be shown for intention is either that the breach by B is itself the end in question i.e. the aim of A, or that breach is a means to some other end. As Lord Hoffmann points out, cases where the breach is an end in itself are rare. So one is looking at the means to the end. It is therefore vital to discern what was A's end or aim. In many cases, this is obvious. So, for example, in *Lumley v Gye* (1853) 118 ER 749, Mr Gye's aim was to obtain the services of Ms Wagner which could not be done without putting her in breach of her contract with the theatre who presently had the use of her services. The aim of securing her as a performer was the end in question but the means to it was her breach of contract.

170. Lord Hoffmann distinguished such a means from a case where the breach was merely a foreseeable consequence. He referred to the case of *Millar v Bassey* [1994] EMLR 44 which had been cited in argument. Here, the well-known singer Shirley Bassey decided not to make a particular record with her existing record company, which put her in breach of her recording contract with that company. As she knew, a producer and musicians had been hired by the record company for the purpose of making the album. She knew that the consequence of her breach of contract would be that the record company would not now be able to use the services of the producer and musicians which it had already contracted for. While knowledge and inducement were alleged, there was no separate allegation of intention to cause the breach on the part of the record company. At first instance, the Judge struck out the case on that basis. In the Court of Appeal, the majority considered that in an evolving and complex area of the law the case should be allowed to proceed to trial. Peter Gibson LJ, dissenting, said that the Intention Requirement was clearly established on the authorities and the failure to plead it was fatal to the claim. Because of the majority decision the case was allowed to proceed to trial although it is not clear if it ever did.

171. As can be seen from paragraph 43 of his judgment, Lord Hoffmann said that the majority of the Court of Appeal was wrong. This was not simply on the basis that an essential requirement had not been pleaded. As a matter of substance, Lord Hoffmann was saying that Ms Bassey did not have the relevant intention anyway, because the breach of contract on the part of the record company with the producers and musicians was neither an end nor a means to an end so far as she was concerned. I think what is meant here is that the breach of the contract with the musicians was not why she broke her contract, although the further breach committed by the record company was a necessary consequence. The means to the end here was no more than her leaving her present record company in breach of contract. Using

somewhat different language, the breach of contract with the producer and musicians was simply a by-product of her course of action.

172. By way of contrast, in order for Mr Gye to obtain the services of Ms Wagner, she had to break her contract with the theatre. That was not his end or aim but it was the means, indeed the only means, to achieve it.

173. It is perhaps unfortunate that the Intention Requirement is expressed by the very word "intention" although one understands its ancestry from the case-law on economic torts and the importance of ensuring that they have clear limits. But really, it is almost a question of analysis as to the role played by the breach of contract in the defendant's putative aim or scheme. This is reflected in the fact that it was thought necessary by Lord Hoffmann to say that it is not open to a defendant to say that he did not intend the breach (i.e. the Intention Requirement is not made out) if the breach was an essential part of what he wanted to achieve, as in *Lumley*. That seems to me to be close to saying that the defendant is deemed to intend the breach because it was bound to occur.

174. The reason why the Intention Requirement is often easy to satisfy, once there is the relevant inducement and knowledge, is because the defendant usually takes the initiative or is at least jointly active with B in terms of causing the relevant breach of contract. Where the aim for A (and usually B) is some economic benefit derived from the breach of contract, it is not difficult to find the Intention Requirement proved.

175. In *Lictor*, it was also argued that there was no relevant intention on the part of Mir Steel. As to that David Richards J said as follows:

> "[46] Mr Downes submitted on the basis of these paragraphs that the breach of the April 2000 agreement involved in the sale of the equipment was no more than a foreseeable consequence of the hive-down agreement. It was not therefore a result which could be said for the purposes of this tort to have been intended by Mir Steel. I am unable to accept this submission. It seems to me to be the case, or at any rate to be reasonably arguable, that the breach of the April 2000 agreement was the means by which the aim of transferring the equipment as part of the hive-down agreement was achieved. If the transfer of the equipment constituted a breach of the April 2000 agreement, then a breach of that agreement was necessarily involved in the transfer. In other words, without the breach the transfer could not be achieved. The breach of the April 2000 agreement was not the end in the sense used by Lord Hoffmann. Just as Mr Gye would very likely have preferred to have been able to obtain Miss Wagner's services without having to break her existing contract, so no doubt Mir Steel would have preferred to have taken a transfer of the equipment without any breach of the April 2000 agreement. But, as Lord Hoffmann observed, that does not matter. The breach of the April 2000 agreement was integral to the transfer and not, as in the case of the breach by the recording company of its contract with backing musicians resulting from Shirley Bassey's breach of her recording contract, a mere consequence."

Application to Breach of Fiduciary Duty

176. So far as breach of fiduciary duty is concerned, there is no case which clearly establishes that the tort can extend this far. In *First Subsea v Baltec* [2014] EWHC 860, Norris J said that it did not, at paras. 351-353. The editors of *Clerk and Lindsell on Torts* 23rd Edition at paragraph 23-23 agree. Possibly, where there are identical contractual and fiduciary duties, the tort could encompass the latter but if so, it is difficult to know what inclusion of the latter adds. The same is true in this case. In the present context, a situation where the SFO knowingly induced a breach of fiduciary duty but not a breach of contract does not realistically arise. Nor is there some limitation point which the SFO could invoke as against ENRC which turns on whether breach of fiduciary duty is encompassed or not. That is hardly surprising since, for the SFO, the cause of action is the commission of a tort, not the commission of a breach of contract as opposed to a breach of fiduciary duty. I therefore proceed on the basis that the tort is here limited to breaches of contract.

The Context of this Case

177. In the context of this case, the relevant contract is, of course, the Dechert Retainer. The breach thereof is by Mr Gerrard. As for the SFO's knowledge of the retainer, it is not suggested that at any material time, the relevant officers did not know that Mr Gerrard was acting for ENRC and hence there was a retainer between ENRC and his firm. Equally, it is not suggested (nor could it be) that the relevant SFO individuals did not know that under the retainer, Mr Gerrard owed a contractual duty not to act without his client's authority and only to act in its best interests.

178. So far as the Knowledge Requirement is concerned, if Dechert, through Mr Gerrard, was in breach of contract because he had no authority to meet and/or to give confidential information to the relevant SFO officer on the relevant occasion in the way that he did, the question is whether the officer was at least recklessly indifferent as to that lack of authority or not. Equally, if Mr Gerrard was acting otherwise than in the best interests of ENRC, was the officer at least recklessly indifferent to that fact?

179. The Inducement and Intention Requirements are important elements here and cannot be simply assumed. That is because the DCs were almost always initiated by Mr Gerrard, not the SFO and in some cases the relevant meetings or calls were themselves authorised by ENRC, if not their actual content. Furthermore, it is not (now) suggested that a motive for inducement by the SFO was to assist Mr Gerrard in furthering his goal of raising the stakes and expanding the investigation so as to earn more fees (see paragraph 211 below).

180. In reality, when the SFO witnesses were cross-examined about the DCs and when the latter were addressed individually by ENRC in its written and oral Closings, the key point was that the relevant SFO officer must have known and did know (or was reckless as to the fact) that Mr Gerrard was plainly acting without authority and against the interests of his client. These are the matters on which I shall focus, too. In relation to any given DC, I shall make reference to whether Mr Gerrard and/or the relevant SFO officer were in knowing or reckless breach of duty. The duties on the part of the SFO officers relate to the claim in misfeasance (see below) but any breach of duty on their part found by me is equivalent to a finding that they knew that (or were reckless as to whether) Mr Gerrard was acting without authority and/or not in the best interests of his client and was thereby in breach of contract, which is then relevant for the inducement claim.

181. As to whether, in any case where there was such knowledge or recklessness, the SFO officer can then be said to have knowingly and intentionally induced Mr Gerrard's breach of duty, I will address that point generally, after considering the individual DCs.

Misfeasance in public office

Generally

182. There are two forms of this tort. The first arises where the defendant specifically intends to injure the claimant i.e. "targeted malice". ENRC does not allege this of the SFO, here. Instead, it relies on the second form. This is where the relevant officer has acted unlawfully and knows that he has done so and that it will probably injure the claimant – or that he is recklessly indifferent to those facts. In the discussion which follows, where I refer to knowledge, this includes recklessness.

183. In addition, the defendant must be a public officer engaged in carrying out public functions. There can be no serious suggestion that this is not the case here. Messrs Alderman, Gould, Thompson, and the other SFO "actors" alleged to have committed the alleged misfeasance were clearly public officers and their dealings with ENRC were plainly undertaken as part of their public function.

184. The claimant must also have a sufficient interest to bring the claim, which ENRC plainly does.

185. Again, the misfeasance must of course cause loss, but, again, apart from one aspect of causation, loss itself is outside the scope of this judgment.

186. Something further needs to be said about the requirement that there be knowledge of probable injury to the claimant. I have taken that requirement from the well-known judgment of Lord Steyn at p191E in the leading case of *Three Rivers DC v Bank of England* [2003] 2 AC 1. At p192C, he said that the basis of the action lay in the defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is likely to cause damage to an individual. Mere foreseeability of loss is therefore insufficient. I shall refer to this requirement of any misfeasance claim as the "knowledge of loss" requirement.

187. In *Three Rivers* itself, the losses claimed were the deposits placed in BCCI by very many depositors as a result of its fraudulent operations, and which were subsequently lost. The depositors' case was that had the Bank of England not been in breach of duty in granting a banking licence to BCCI in the first place, or at least not withdrawing it subsequently, those deposits would never have been made and/or would have been able to be reclaimed. The knowledge of loss requirement here was therefore that the relevant officials knew that by continuing to allow BCCI to operate this would probably cause loss to the depositors in the form of their lost deposits.

188. Turning to the misfeasance case against the SFO here, as with the losses actually claimed (and summarised at paragraphs 13 and 14 above) there is in the Particulars of Claim a generic plea of knowledge of loss in respect of all the different misfeasances alleged, as follows:

> "51. The SFO (and in particular Messrs Alderman, Gould, Thompson, Green and Coussey) knew, as a result of information in the public domain as well as their involvement with ENRC, that:
> 51.1 ENRC was a large publicly traded mining company with the characteristics described in paragraph 1 above;
> 51.2 ENRC was going to, and did in fact, incur substantial legal and other professional fees in connection with the Retainer, the Initial Contact, the Review Process and the SFO's subsequent investigation into its conduct. The said professional fees included (without limitation) those incurred by ENRC in respect of computer, data processing and hosting specialists, translators, accountants, forensic consultants, and solicitors, counsel and other legal advisers.
> 52. In the premises, the SFO took each of the unlawful acts set out above with knowledge of, or with recklessness as to, the serious risk of loss to ENRC."

189. In response to that, paragraph 172 (1) of the Defence takes the point that the knowledge of particular individuals cannot be aggregated for these purposes. This was common ground at trial, so that the elements of the tort of misfeasance must be made out with respect to each individual accused of it, including the knowledge requirement.

190. Paragraph 172 (2) of the Defence stated that the knowledge of loss plea in paragraph 52 of the Particulars of Claim was unsupported by the matters pleaded in paragraph 51.

191. As already noted at paragraph 92 above, ENRC alleges that it was plain to the relevant SFO officers that their misconduct would cause "huge" losses to ENRC including with regard to

the cost of defending a lengthy criminal investigation and the fees incurred while Dechert were retained. Thus, at least in broad terms, the loss of which it is said the relevant SFO officers had knowledge is aligned to the losses actually alleged.

192. I mention this to emphasise that the knowledge of loss requirement is not satisfied by showing knowledge of the probability of some loss or damage to ENRC regardless of what it is. To be fair to ENRC, it has not suggested otherwise. But one needs to take particular care when analysing, for example, the DCs where knowledge of breach of duty is said to be made out where the relevant officer knew that the information being given to them by Mr Gerrard was clearly against the interests of his client and unauthorised. The fact (if it be established) that the officer knew that what he was being told was damaging to ENRC says nothing about whether the knowledge of loss requirement is also made out.

193. A further point arises in relation to knowledge of loss. So far as the 6 non-DC allegations of misfeasance are concerned, as made against Mr Thompson (the Depel Interview), Sir David (WB2), Mr Coussey (June 2013 Material), Mr Gibson (website) and persons unknown (Beige Notebook and leak of the decision to launch the criminal investigation), knowledge of loss must be established in each case against each relevant individual.

194. However, the approach to establishing knowledge of loss in relation to each of the 30 individual DCs is less straightforward. Nine involve Mr Alderman, ten involve Mr Thompson and eleven involve Mr Gould (two involve Mr Rappo but no cause of action is alleged against him). It seems to me to be artificial to consider whether the knowledge of loss requirement is established in respect of each separate DC, in a vacuum as it were. And indeed, for almost all of the DCs, there was no attempt to put the knowledge of loss case to the relevant individual where they gave evidence for every occasion when there was a DC. The only sensible way to consider knowledge of loss here is to examine this issue after all the DCs have been considered individually. To the extent that any individual was in knowing breach of duty in one or more of the relevant DCs, one can then ask the further question as to whether there was knowledge of loss either individually or cumulatively.

The Relevant SFO Duties

195. There is more between the parties as to what the potential breaches of duty could be here, than in the case of the tort of inducement.

196. ENRC alleges that the SFO had duties (which it goes on to say were knowingly or recklessly broken):

(1) to act strictly in accordance with its powers (the Powers Duty);

(2) to act independently, objectively, and in good faith (the Independence Duty);

(3) to protect the LPP and confidentiality of any affected third-party (the LPP Duty); and

(4) to preserve documents, evidence, information and intelligence produce received by it in relation to the carrying out of its functions (the Evidence Duty).

197. The SFO accepts that it had the first two duties and by the end of the trial appeared to accept much of the third. However, here, some further discussion is necessary. First, the duty to protect the LPP and confidentiality of a third party, of course, only arises when confidential information (including LPP information) was disclosed without the consent of the party who owned it. Obviously, if there was such consent, the SFO could not be in breach of the LPP Duty. As with the claim in inducement, what this means in practice is that if, in any given instance, there was no consent, the question has to be asked whether the relevant officer knew this or was recklessly indifferent to that fact.

198. Second, there is a distinction between privileged information and "merely" confidential information. Section 2(9) of the 1987 Act provides that no person shall be obliged to provide to the SFO, exercising its investigatory powers, any information which he would be entitled to withhold on the grounds of LPP in High Court proceedings, save that a lawyer may be obliged to provide the name and address of his client. Accordingly, absent consent from the owner of the LPP information (i.e. a waiver of the privilege), there is an absolute ban on the use of privileged information by the SFO, unless a statute permits it or a common-law exception applies, for example, illegality. None of those matters arise here in terms of what the SFO did.

199. Confidential information can be used if statute provides for it. Section 2 of the 1987 Act does provide for it within the general investigatory powers of the SFO, if exercised, save for a specific provision in relation to cases where a bank's duty confidence to its customers arises. Such information can also be used if the common law permits it. The existence of such permission can lead to a balancing exercise between the interests in preserving confidential information on the one hand, and competing public interests on the other.

200. I would accept that there are these limitations on the SFO's LPP Duty. In practice, however, when one turns to the particular allegations made against the SFO here, and its answers to them, these points hardly ever arise.

201. However, there is a very real dispute between the parties over the existence or otherwise of the Evidence Duty. The SFO's position is straightforward. It has to be shown that there is some legal duty to preserve documents and information as such. Guidance or best practice to that effect will not do, because they would be insufficient to found the relevant duty for the purposes of the tort of misfeasance. It contends that the only legal duty that could be relevant is that imposed by the first part of the Criminal Procedure and Investigations Act 1996 ("the CPIA"). Section 1 (4) says that this part applies where a person has been charged with an offence. It also defines a "criminal investigation" as one whereby police officers or other persons have a duty to conduct an investigation with a view to it being ascertained whether a person should be charged with an offence, or is guilty of it, having been so charged. It is common ground that the effect of sections 1(3) and 3 of the CPIA is to impose a duty on the prosecution to disclose to the accused any prosecution material not previously disclosed, and which might reasonably be considered capable of undermining the prosecution case or assisting the accused's case, and which was obtained during the relevant criminal investigation. That is reflected in the CPIA Code of Practice.

202. The SFO's investigatory powers under s2 of the 1987 Act only apply once it has commenced a criminal investigation which is itself defined in s1(3). This states that the Director may investigate any suspected offence which appears on reasonable grounds to involve serious or complex fraud. So far as the SFO is concerned, therefore, there is a power but not a duty to commence a criminal investigation. Nonetheless, the SFO's practice is to consider itself bound by sections 1, 3 and 7 of the CPIA in terms of the retention and disclosure of unused material, once it has commenced a criminal investigation. The key point here, of course, is that the criminal investigation of ENRC did not commence until 19 April 2013. That date is after all of the torts alleged against ENRC took place, save those in relation to the June 2013 Material and the website, but those matters do not concern any alleged breach of the Evidence Duty anyway.

203. I can see no good reason to interpret the phrase "criminal investigation" in s1(3) of the 1987 Act in any way differently from that as defined in the CPIA. On that footing, the CPIA is the only governing statute and it does not support the existence of the Evidence Duty on the SFO at any time prior to the commencement of any criminal investigation. I do not see that the CPIA Code makes any difference.

204. Of course, it is true that the SFO may (and did here) conduct some investigatory work in the SR process in respect of which ENRC agreed to engage by its letter dated 9 November 2011.

But I do not see that process as a "criminal investigation" for the purposes of the CPIA. Nor do I see any investigatory work carried out in anticipation of a possible criminal investigation, not itself yet started, as sufficient.

205. There is one wrinkle here. Since the introduction of section 2A into the 1987 Act, the SFO has had the coercive power to obtain information etc prior to the start of any criminal investigation. While, in my judgment, the CPIA duty still does not apply here, there may well be an implied duty to preserve and record the information obtained. That would be a necessary consequence of these powers because, otherwise, there would be no need to record the process of the interview or of obtaining other information pursuant to the exercise of the powers which would be relevant as to whether they were exercised properly or not. However, this point is not in fact relevant here, since although the SFO did exercise s2A powers in relation to, for example, SPJ and Mr Depel, notes were taken and ENRC's allegations against the SFO in these respects do not involve a breach of the Evidence Duty.

206. All of that said, I doubt whether the debate over the Evidence Duty makes any real difference here. In closing, Mr Colton QC accepted that a deliberate destruction of notes or a bad faith failure to take any notes, for example, to hide some illicit activity between the SFO and Mr Gerrard, would be a breach of the Independence Duty anyway. It is hard to see that this would not be the case in every or almost every instance where ENRC alleges misfeasance by reason of a breach of the Evidence Duty. That is because ENRC is not alleging some innocent breach of the Evidence Duty, but rather a breach committed in bad faith, with an ulterior motive. And an innocent or negligent breach of the Evidence Duty would not be enough for the tort of misfeasance anyway.

207. In the end, Mr Colton QC's real point here seems to be that ENRC stuck its colours firmly to the mast of the Evidence Duty and did not cross-examine the SFO's witnesses on the basis of the lack of any notes as part of a wider exercise of bad faith. I do not think that there is anything in this. The *gravamen* of the allegation was sufficiently put, in my view. Whether the evidence showed the commission of misfeasance on any of the occasions on which it was alleged, is, of course, another matter.

208. One further aspect of this debate is the significance or otherwise of the belief or opinion of an individual SFO officer as to whether they had the Evidence Duty. Even if they thought that they did, this cannot change the position if, as a matter of objective law, they did not. And if there was the Evidence (or any other) Duty, the fact that they thought they had no such duty

is equally irrelevant. It may, of course, be relevant to their mental state for the purpose of the tort.

209. A further point made by the SFO is that the tort of misfeasance only operates where there is no other available cause of action against the officers concerned. So, for example, if, on the same facts, the tort of inducement was made out, there will not be the tort of misfeasance as well. See the judgment of Lord Hobhouse at page 229G of *Three Rivers*. I accept that but this analysis can only be performed at the end of the day, when the question of loss is determined as well. It is no obstacle to me making relevant findings on liability (subject to causation and loss) on both torts at this stage.

Motive

210. A particular motive is not, of course, a separate element of either tort. Nor is it necessary to plead a particular motive. But its presence (or absence) may have evidential significance.

211. ENRC had originally pleaded, in respect of Mr Gould and Mr Thompson on the inducement claim, that they had agreed with Mr Gerrard to deliver certain pre-agreed "messages" to ENRC "to further Mr Gerrard's agenda of seeking to expand the scope of the Retainer" with particular regard to DC14 and DC15. This objective was relied upon in the context of both the inducement and misfeasance claims. It was not, however, put to either Mr Thompson or Mr Gould and there is no basis for it. It can thus be disregarded.

212. A second motive is pleaded against the SFO in the context of the inducement claim. This is that the SFO acted as it did "because it wanted to achieve the end of a substantial civil settlement from, and/or a criminal conviction against" ENRC. It was also pleaded that one of the reasons why Mr Alderman did not explain at OM1 that he had obtained, and would obtain, from Mr Gerrard, acting without authority, confidential information which was against the interests of ENRC, is because Mr Alderman wanted to use it in order to negotiate a high value civil settlement.

213. A more generalised motive for both the inducement and misfeasance wrongdoing on the part of the SFO was that in acting as they did, the SFO officers were so keen to get some sort of result as against ENRC that they were prepared to act unlawfully i.e. "the end justifies the means". This is effectively what was put to Mr Thompson at the end of his cross-examination although he denied it. ENRC also made the point that in reality, without Mr Gerrard's (illicit) assistance, the SFO would have no real chance of obtaining a high-value settlement or a conviction, as they well knew at the time.

214. I will consider those matters further, below.

Vicarious Liability

215. In the end, in my judgment, this is how any liability of individual SFO officers in inducement or misfeasance is attributed to the (office of) Director of the SFO who is in fact the Defendant in this case. That liability will only arise where the conduct constituting the tort is:

> "… So closely connected with acts [the employee] was authorised to do that, for the purposes of the liability of his employers to third parties, his [tortious conduct] may fairly and properly be regarded as done by him while acting in the ordinary course of his employment."

See para. 32 of the judgment of the Supreme Court in *Various Claimants v Wm Morrison* [2020] AC 989.

216. The SFO says that any suppression or destruction of relevant documents would be so contrary to the acts which SFO officers were authorised to do that it would fall outside the bounds of vicarious liability in terms of what could be attributed to the employer i.e., to use an older phrase, this was truly a "frolic of their own". However, it is hard to see how that works in practice, since the SFO does not take a similar point with arguably more serious breaches of duty like receipt and use of clearly privileged information. In fact, as will be seen, this point is academic.

217. I should add here that in its letter dated 11 July 2021, Hogan Lovells confirmed on behalf of ENRC that "it makes no positive case of wrongdoing against Mr McCarthy in these proceedings". So where there is a meeting between Mr Gerrard and the SFO, for example, where Mr McCarthy was present, even if a case could be made against him for breach of duty for which the SFO is vicariously liable (see above) no such case is made. That is so even if there was another person from the SFO present who was in a similar position (for example, Mr Alderman) where such an allegation is made. This is certainly a curious position for a claimant to adopt and we are not really told why it adopted it. In closing Mr Pillow QC simply said that just as one should not join individuals as parties to misfeasance cases unless absolutely necessary, so one should not plead allegations against individuals in misfeasance cases unless necessary. However, I do not follow this. The first is about joining individuals to a case. The second is simply about identifying relevant individuals for the purpose of establishing (for example) corporate liability. Here, of course, Mr McCarthy was central to the SFO's dealings with ENRC until he left. He was not a bit-part player. The approach taken by ENRC leads, on occasion, to a breach of duty being not alleged against Mr McCarthy as the person having the relevant conversation with Mr Gerrard, but rather, Mr Alderman who was not there but who heard about it afterwards.

218. Nonetheless, as a matter of law, if a breach of duty is made out against one SFO officer, the fact that ENRC does not allege the same against another (i.e. Mr McCarthy) cannot affect the liability of the first, if established.

Declaratory Relief

219. ENRC seeks the following declarations in the 2019 Claim:

(1) The SFO is not entitled to publish, disclose, divulge or otherwise make use of any confidential and privileged material which was disclosed to the SFO by Dechert and/or Mr Gerrard in breach of duty, including but not limited to the June 2013 Material; and

(2) Members of the SFO's staff who reviewed the said material should be removed from the team investigating ENRC.

220. This judgment is concerned with whether it is possible or appropriate to grant such declaratory relief. I will consider this once I have decided the primary questions of liability (in the sense of the elements of the claims other than causation and loss) and the two causation issues to be determined now.

THE DEPEL INTERVIEW EVIDENCE AND ITS EFFECT

221. A number of issues in this case can be dealt with chronologically. That is particularly true of the DCs where it is (generally) alleged that both Mr Gerrard and the SFO were in breach of duty. Other discrete claims against Dechert can be inserted into this chronology.

222. There are other, more "thematic" issues, which involve alleged breaches of duty committed over a period of time, in particular with regard to Mr Gerrard, such as the giving of wrong advice or the unnecessary expansion of the work to be done on the investigation. It makes sense to deal with such issues after considering the more discrete chronological issues, for example the DCs.

223. However, the chronological analysis of issues has in one sense been disturbed by the outcome of Mr Gerrard's evidence on the Depel Interview for this reason: ENRC has always alleged, on the basis of what it said was a strong inferential case, that Mr Gerrard (a) knew that Mr Depel was going to be and/or had been interviewed by the SFO, but (b) never informed his client of such a material fact. Indeed, ENRC goes further and suggests that Mr Gerrard actively encouraged Mr Depel to engage with the SFO, but that refinement does not matter for present purposes. For his part, Mr Gerrard accepted that he never informed his client, but that was for the simple reason that he did not know at the time that Mr Depel

would be or had been interviewed. Indeed, he said that he only learnt of this fact in the context of the present proceedings. He accepted that had he known, he was bound to tell his client - it would be a "huge" issue if he did not. Mr Depel was in fact interviewed on 16 May 2012.

224. As a result of one of the late disclosed texts from Mr Depel to Mr Gerrard dated 21 May 2012, which read "*only u and 2 know about s2*", Mr Gerrard then accepted that he must have known about the Depel Interview at the time but had effectively forgotten about it. In evidence he said he had absolutely no recollection of the text when put to him, although he accepted it had been received and was genuine. I will deal with the detail of this episode later, but the point is that it was this which led to the admission, referred to in paragraph 15 above, of a reckless breach of duty on the part of Mr Gerrard in not informing ENRC of what he knew.

225. ENRC contends that the effect of the Depel Interview evidence is not merely that it constitutes a serious and now-admitted breach. It is that, first, Mr Gerrard has been caught out in a lie (the denial of any knowledge of the Depel Interview at the time) told in the course of these proceedings, both prior to, and at, the trial itself. The fact that he could lie about such a matter heavily affects his general credibility as a witness and in particular in relation to his evidence about the August Leak. In short, it increases the likelihood that he was indeed the instigator. Secondly, it is said that it shows that Mr Gerrard had a propensity, when it suited him, to act in gross breach of duty towards his client, a propensity which would also support ENRC's case on the August Leak and other alleged wrongdoing. This is why, perhaps unsurprisingly, ENRC dealt at the outset of its closing submissions with the Depel Interview evidence. Perhaps equally unsurprisingly, it is why it came at the very end of the Dechert submissions.

226. On the face of it, ENRC's points here are at least plausible although Dechert rejects them. However, in order for me to assess them, I must deal in detail with the Depel Interview evidence at the outset (even though it relates to matters occurring in May/June 2012) before then considering its impact (if any) on the issue of the August Leak which comes at the very start of the chronological breaches levelled against Mr Gerrard.

227. Of course, where there are numerous factual issues, it is always possible that a court may take into account the damage to a witness's credibility caused by a lie or some other adverse evidential point relating to a later matter, when considering that witness's account of some earlier matter. A cumulative picture as to the credibility of witnesses may, after all, emerge.

There are many respects in which that is a feature of this case. However, the invocation by ENRC of the later evidence in relation to the earlier issue is here particularly dramatic and stark. In my judgment the only sensible way to deal with it is to set out my relevant findings on the former, out of sequence, before considering in detail the latter. I therefore intend to deal first with the question of Mr Gerrard's knowledge of the Depel Interview, and what can or cannot be drawn from it, and then return to the chronology. Other aspects of the Depel Interview (in particular the SFO's conduct relating to it) can be left until later.

MR GERRARD'S KNOWLEDGE OF THE DEPEL INTERVIEW

Procedural chronology

228. Mr Depel was, on any view, something of a loose cannon within ENRC by early 2012, if not before. He finally left in June 2012 but there was concern within ENRC before his departure that he might turn "Queen's evidence", as it were. As already noted, he was in fact interviewed by the SFO on 16 May 2012, although ENRC only discovered this from the SFO's disclosure in this case given on 30 October 2020.

229. As can be seen from ENRC's written opening and indeed Ms Montgomery QC's cross-examination of Mr Gerrard, it claimed that Mr Gerrard did indeed know about the interview but withheld such information from his client. It relied at that point on an increasing friendship between Mr Gerrard and Mr Depel despite the latter's erratic behaviour.

230. ENRC also relied on the making of a number of telephone calls between (a) Mr Gerrard and Mr Gould on 12 and 13 April 2012 and then a call with Mr Depel on 17 April, (b) a call between Mr Gerrard and Mr Gould on 17 May 2012 i.e. the day after the interview and then (c) a 44 minute call between Mr Gerrard and Mr Depel on Sunday 20 May. No notes were taken by Mr Gerrard, Mr Gould or Mr Depel that have been disclosed. ENRC says that there is an obvious inference that these calls were all about the Depel Interview.

231. As already noted, in evidence, Mr Gerrard emphatically denied that he knew about the interview and stated what a serious breach of duty it would have been if he did, since he never reported that fact to his client.

232. On Day 22, Ms Montgomery QC was asking Mr Gerrard questions about a note of an internal meeting where he referred to having received a text message from Mr McCarthy. This was against a background where Dechert's Electronic Disclosure Questionnaire ("EDQ") of 23 November 2018 had said that it had not retained any mobile phones used during its retainer

but that in any event, text messages were extremely limited and trivial. It also said that Mr Gerrard had at least one device (i.e. a BlackBerry or mobile phone) replaced.

233. When asked about whether he had retained the mobile phone that received the text in question, Mr Gerrard said that he had no idea what happened to it, but that Dechert's IT department would have information about the phone and any replacement. This led to further correspondence and then a letter from Clyde & Co dated 6 July 2021, which revealed that Dechert did indeed have backups of some of Mr Gerrard's phone data. It stated that mobile devices issued to Mr Gerrard between April 2011 and December 2013 had been replaced on at least 10 occasions and at least three phones used by Mr Gerrard had been damaged. It appeared from that letter that, contrary to the EDQ, data such as text messages could be recovered. Further, Mr Gerrard did receive at least some significant texts from relevant parties, including SPJ, Mr Depel and Mr Gould. ENRC say that some of the text messages are highly relevant. One of them is the message referred to in paragraph 224 above: "*only u and 2 know about s2*". This development was reported to me before the resumption of Mr Gerrard's cross-examination on 7 July 2021, Day 24. Pending a full discussion, Mr Gerrard's cross-examination continued for a short time to deal with some other matters, and then was suspended for the rest of the day to give ENRC time to consider the new material. For the rest of Day 24, Mr Gerrard stayed out of court and was not told of the exchanges between counsel and the court on these matters. It was decided that Mr Gerrard's cross-examination would resume the following day and obviously the text referred to (among others) would be put to him. I was asked whether Mr Gerrard could be given all the new material to review (at least 600 texts) on the basis that although he was still in the middle of his cross-examination and could not therefore speak to his solicitors, he was a party to the action. I did not see that this made any difference and refused that request. I did, however, say that if, when being shown the texts, Mr Gerrard wanted some time to consider and reflect on what he had seen, I would permit it. Equally, because of the seriousness of the position (since, on the face of it, it could be suggested that he had deliberately lied in court about his knowledge of the Depel Interview) I was asked to give and gave the usual reminder about the privilege against self-incrimination when his cross-examination was continued at 2pm on Day 25.

234. When that cross-examination recommenced Ms Montgomery QC put two texts to Mr Gerrard. Both were from Mr Depel. The first was sent on 5 April 2012 at 7:24am and read "*I would like to meet Dick early next week, can you arrange?*" It is common ground that "Dick" refers to Mr Gould. She then put to him the text already quoted, sent on 21 May. Mr Gerrard

did not ask for time before dealing with these texts, but said that he had "absolutely no recollection" of either of them. He said he was suffering from Long Covid and his memory was poor, but he had no recollection of talking to Mr Gould about this issue. He said he did not believe that Mr Depel did tell him about the interview and had no memory of it. It was then put to him that Mr Depel texted him on 17 April, saying "*need you to call me ASAP and check your messages*" which was followed later by a 24 minute phone call between the two of them. Mr Gerrard said that he did not believe that the conversation was about an interview but could not remember what was discussed. He also said that he had no memory of actually making any enquiries to the SFO on behalf of Mr Depel about a potential job there. He then said that by the texts shown to him, he must have known that Mr Depel was going to see the SFO. When it was put to him that he had previously said that he did not know that Mr Depel was "rushing off to the SFO" and this did not occur to him, he said this was not a deliberate untruth but it was his honest recollection. When it was put to him that his original answer was inaccurate and knowingly untruthful, Mr Gerrard said that it was not knowingly untrue. He had no recollection of Mr Depel telling him that he was going to see the SFO at all. He agreed that paragraph 257B (3) of his then Defence, which stated that he was unaware of the Depel Interview at the time, was not accurate. Equally, paragraph 21 of his second WS to the same effect was not accurate. Although he said he had no memory of this, he agreed that if he was doing his duty as a solicitor he would have to have told ENRC about the interview and Mr Depel's text, but he did not. He agreed that he failed in that duty. ENRC was not on notice of the interview and so it could not react. He went on to say that, assuming he received the text, he did not think that he would have asked Mr Depel whether he had already been interviewed or was about to be interviewed, and that the text would not have provoked any questions from him. But he agreed that, as he had said previously, an SFO interview with the then Head of Global Compliance at ENRC would have been "huge" and it would not have been possible for him to keep quiet about it. It was then put to him that on the basis of the text, there was a deliberate decision by Mr Gerrard to avoid ENRC coming to know about the interview. He denied this, but agreed that he should have reported the fact of the interview. He could not remember why he did not. He also agreed he should have raised it when, according to him, he had advised ENRC to have an exit interview with Mr Depel because the worry was that someone like him leaves and then "pops up" as a whistleblower, or is interviewed under section 2 by the SFO. When put to him that an honest and competent solicitor would then have said that Mr Depel had given such an interview, Mr Gerrard responded that he should have raised it.

235. When Mr Gerrard came back into court following the mid-afternoon break, he said that he wanted to tell the court that during the break his wife had reminded him that he had suffered bouts of "global amnesia" in the past. As to that, first, of course, he should not have been discussing his evidence with his wife during the break, even if she initiated the discussion and second, there was no reference to any such amnesia in his WS nor any medical evidence about it. While Mr Gerrard's cross-examination finished early on Day 26, I could not release him because the disclosure of new material was continuing and ENRC understandably wanted to reserve its right to recall Mr Gerrard for further questions if necessary. In the event, he was not later recalled and he was released on Day 36. I should add that although it had been intimated (prior to the disclosure of the texts) that there would be at least one and a half days of re-examination of Mr Gerrard, in the event, there was none at all.

236. Although there were some subsequent references to a possible application to adduce medical evidence in relation to Mr Gerrard's ability to recollect matters (whether through global amnesia or otherwise) no such application was ever made. The only medical matter which had been pursued (without objection) was at the outset of the trial where it was said that Mr Gerrard was suffering from Long Covid and this might cause him to tire more easily or need more breaks. As it so happened, Mr Gerrard coped well with his lengthy cross-examination without any obvious difficulty, including on Days 25 and 26.

What can be drawn from Mr Gerrard's evidence

237. In its Re-Re-Amended Particulars of Claim dated 4 February 2021 ENRC had already alleged in paragraph 158A that Mr Gerrard had failed to inform ENRC of Mr Depel's meeting with the SFO in April 2012, that the SFO was intending to serve a notice under s2A of the 1987 Act on Mr Depel or that the Depel Interview had taken place along with other matters. ENRC pleaded that it was to be inferred that Mr Gerrard was aware that ENRC did not know of Mr Depel's meeting with the SFO in April 2012 or the SFO's intention to serve a s2A notice on him or of the Depel Interview; and further that Mr Gerrard was aware that Mr Depel may disclose or may have disclosed to the SFO material which was privileged to ENRC and prejudicial to its interests. A plea of a consequent breach of duty followed. This was denied in Dechert's Re-Amended Defence dated 19 February 2021.

238. Then, by an amendment made to the Re-Re-Amended Particulars of claim, on 27 July 2021, ENRC alleged that:

> "158AA. Mr Gerrard has admitted that he must have known that Mr Depel was going to go to see the SFO, that he was on notice of the fact that Mr Depel had been served with a s2A notice and that he failed in his duty to ENRC by failing to inform it of these matters."

239. By paragraph 413A(A) (1) of its Re-Re-Amended Defence dated 6 August 2021, and in a reversal of its previous denial, Dechert admitted that Mr Gerrard did not inform ENRC of Mr Depel's meeting with the SFO in April 2012, that the SFO was intending to serve a notice under s2A or that the Depel Interview had taken place with a consequent breach of duty. Dechert went further in paragraph 428 (1) where it admitted that Mr Gerrard (and through him Dechert) had acted recklessly in committing the breaches of duty previously admitted in paragraph 413A(A) (1) (it also took points on causation and loss but they are not material to the present issue). Both iterations of the Defence referred to above were accompanied by a statement of truth signed by Mr Gerrard.

240. These admissions show that what had begun as ENRC's inferential case against Mr Gerrard (prior to the disclosure of the texts) was true. The admission of recklessness means that Mr Gerrard admits that his subjective state of mind at the time was that, in knowing the facts about the Depel Interview and not telling his client, he simply did not care whether there was a breach of duty or not. However, as a matter of analysis, and given Mr Gerrard's evidence about the obviously serious nature of any breach of duty which would follow non-disclosure of his knowledge of the Depel Interview, it is very hard to see why the admitted breach was not in fact deliberate as opposed to "merely" reckless even though the legal consequences are the same. Mr Gerrard must have known at the time (and not merely suspected) that he would be in breach of duty by not informing his client and in refraining from doing so, he acted deliberately. Indeed, the postulated (but entirely speculative and unsubstantiated) reasons why Mr Gerrard might have committed such a serious breach (see paragraphs 554-556 of Dechert's Closing Submissions) - which was somehow to protect Mr Depel - actually assume that the breach <u>was</u> intentional. As it happens, there has been no evidence from Mr Gerrard as to why he committed this breach. That is partly because he always denied it but partly because he was not asked about his motive in re-examination, since there was none.

241. In one sense, the question of motive is less important here than in other areas. That is because the breach has been admitted and so motive is not required in order to show, as it sometimes does, that the commission of the breach, though denied, is more likely than not. But in another sense, it is important as a contextual matter for ENRC's case against him as a whole.

242. I think the truth is that when one looks at the other evidence concerning the Depel Interview the overwhelming inference is that if Mr Gerrard did not actually instigate it, he certainly facilitated it. That may have been partly because he knew through his friendship with Mr Depel that the latter wanted to be a whistleblower to the SFO. It may also have been in part

because it suited him at the time to keep the SFO's interest alive at least for the purpose of obtaining a civil settlement. I also think it was probably another attempt for him to curry favour with the SFO. Having acted in this way, the last thing Mr Gerrard would then have wanted was to let his clients know about it.

243. It is convenient here just to say a little more about the friendship between Mr Gerrard and Mr Depel. That friendship was already, i.e. prior to the disclosure of the texts, (and is) well-demonstrated by the contemporaneous documents. These have now been collated in detail at Appendix 8A to ENRC's Closing. They show the contacts between Mr Gerrard and Mr Depel before, at the time of and after the Depel Interview. Mr Depel was in fact the person responsible for instructing Mr Gerrard in the first place. Later on, they show that to an extent they treated each other as confidantes. Mr Depel was supportive of Mr Gerrard's approach to the investigation and Mr Gerrard supported Mr Depel up to and beyond the termination of Dechert's retainer. For example, he commented on a letter sent by Mr Depel to Mr Dalman on 27 February, 2013 which made serious allegations against ENRC, his own client. He later commented upon the draft of a letter which was ultimately sent by Mr Depel to Sir David Green on 15 April, again making serious allegations about ENRC. If one compares the draft sent to Mr Gerrard on 5 April with the version as sent, the only amendment appears to be the removal of the explicit reference to Mr Gerrard himself. While, in the event, it was not necessary to engage to any great extent in the friendship between Mr Depel and Mr Gerrard, given that the key allegation, being Mr Gerrard's knowledge of the Depel Interview, was admitted, that friendship is significant background. Further, since Appendix 8A is simply a collection of documents with references to what they say, it cannot seriously be doubted. The texts then provided more material. An example of that is the text sent to Mr Gerrard by Mr Depel on 23 April 2012 as follows:

> "Cary here. The ceo of the sfo resigned last week. Is that a job worth having? Could you make some enquiries for me. Thx."

244. The main contextual point here is that it demonstrates that Mr Gerrard was prepared, when it suited him, to act in a way which was completely contrary to his client's interests. All Dechert has said in response to this is in effect that if he had told ENRC it would not have been likely to make any difference. That does not necessarily follow and the issue of causation here is not for this judgment but in any event, I do not see how this affects the nature of the breach.

245. Although Mr Thompson took the view that the results of the Depel Interview justified opening a criminal investigation there and then (which did not happen) this does not mean

that Mr Gerrard intended that particular outcome at that time, not least because that would represent a failure on his part and would almost certainly have precipitated the termination of Dechert's retainer. That, however, does not mean that he did not have the more generalised motive referred to above.

246. The other consequence of the Depel Interview concerns its impact on Mr Gerrard's credibility. Here, it is necessary first to determine whether Mr Gerrard was telling the truth when he said on Day 25 that he had absolutely no recollection of the text referred to in paragraph 224 above. If this was correct it would not affect the underlying (and now admitted as reckless) breach of duty but it would mean that he had not been lying about it previously. But if in truth he did recollect the text, to say in evidence that he had not, could not have been a mistake. It must itself have been a lie since he is taken to know the state of his own mind.

247. In my judgment, Mr Gerrard cannot possibly have forgotten the text, having accepted that he did get it at the time. The allegation about not informing ENRC about the Depel Interview had been made for some time and it was not about a trivial breach of duty. If he had forgotten about the text, he had been forgetting about it for some time, including during the period when his WS was being written. In my judgment, that is wholly implausible. I consider that he did recall it when asked about it, but pretended he had not. He therefore lied in that respect and more generally, in saying that he had not committed the breach of duty when he knew that he had.

248. It needs also to be remembered that Mr Gerrard himself contributed to the (original) non-disclosure of the back-up texts. This is because it must have been on his instructions that Dechert's EDQ filed on 23 November 2018 stated (a) that he had to replace at least one device when in truth it seems there were some 19 devices in the course of the retainer (11 of which were lost or destroyed after a document preservation notice had been issued in 2013) and (b) that his use of text messages was "extremely limited and trivial". The first tranche of texts disclosed showed 364 texts sent in less than two years to 14 relevant persons. In isolation that is still a very small number; nonetheless, it was inaccurate for the issue of texts and their retention to have been described as they had been.

249. It is also worth noting that Mr Onslow QC for Dechert submitted in closing (Day 45/13) that Dechert did not in fact need to rely on Mr Gerrard's written or oral evidence where it was not corroborated by contemporaneous documents. That was said to be because there was a very full documentary record which would show that ENRC's case was clearly wrong in relevant

respects. But whether that latter conclusion is correct for any given incident, I will discuss below.

250. Accordingly, when considering other alleged breaches of duty on the part of Mr Gerrard (notably, but not exclusively, the August Leak), I am entitled to take into account those contextual consequences of his evidence on the Depel Interview to the extent I consider it appropriate. I will deal with other aspects of the Depel Interview below.

251. Indeed, quite apart from the issue of the Depel Interview and its implications for Mr Gerrard's credibility just discussed, I very much regret to say that in general I found him to be a highly unreliable and at times dishonest witness. His evidence was often inconsistent with the documents or implausible, and on more than one occasion, he was plainly lying. All of this will be seen, in context, below.

252. For now, I can return to address the issues as they arise chronologically.

MR GERRARD'S FINANCIAL MOTIVATION

253. There is nothing wrong with a solicitor wanting to build up business for his firm and thereby bring financial and reputational benefits for the firm and himself. The fact that a solicitor has sought and managed to lead a large case cannot itself be a point of criticism; indeed it is likely to be praised, assuming it is work which the firm can competently and timeously undertake.

254. However, the points made against Mr Gerrard's approach to getting work for ENRC in this case go well beyond what might be regarded as the norm. They are that he was so obsessed with making money from his work that he lost any real sense of objectivity, proportion or indeed loyalty to his client. And that in order to support his own reputation - and, in my view, his ego - he would make extravagant claims. Indeed, in answer to a question from me, he accepted that he was probably prone to exaggeration sometimes. I think that is something of an understatement.

255. To give but one example at this stage, Mr Gerrard told a number of people (Mr Findlay, Mr Trevelyan, Mr Prosper and Mr Gould) that he had been approached to be Director of the SFO previously but turned it down, or words to that effect. Mr Findlay recounted that he said this was because there was not enough money in it. There was in fact no evidence that Mr Gerrard had ever been approached for this job and indeed in evidence he did not suggest there had been. Yet his biographical entry on the Dechert website (at least up to 6 February 2016) stated "*Mr Gerrard has in the past been shortlisted to be Director of the SFO".* As to

that entry, he said that actually he did not know if he had ever been shortlisted, in which case it is impossible to understand how this entry was responsibly put onto the website, especially as he agreed he had approved it. Had he been shortlisted, he would have known about it (which is the premise underlying this particular entry). At best, this was a considerable exaggeration of the reputation which he claimed he had at the SFO; at worst it is simply untrue. Either way, it was a misleading statement by a professional to potential clients.

256. As to earnings, in December 2009, having had a meeting with Dechert, he told the recruitment agent that a minimum of £20 million or possibly up to £30 million in fees would leave with him if he left DLA. He later said in January 2010 that another firm had recently offered him a guaranteed salary of £2 million per year for two years, which he turned down because of his international profile. In an email from Steve Feirson, a Dechert US Partner who was involved in the possible recruitment of Mr Gerrard and his team, he noted that they would be expected to generate about $21-22.5 million in the first 12 months. He noted that they had said that $15 million was *"already in the door and is being worked on. The remainder would come in from work in the pipeline or to be pitched"*.

257. Later on, as discussions continued, on 3 February 2011, Mr Feirson emailed Mr Levander, another US Partner, to say that Mr Gerrard needed to be assured that if he produced a £12 million practice, he could easily reach £2 million by way of remuneration from the firm (there being a base amount of £1.75 million).

258. However, in cross-examination, Mr Gerrard denied that there was an expectation that if he was hired, he would deliver a £12 million practice. He said that *"at no stage in any of the discussions I had with Dechert did I indicate how much I would bill or generate."* In the light of the emails just quoted, that cannot have been true. The point is not so much that there is necessarily anything wrong with giving a predicted earnings figure; it is that Mr Gerrard saw fit to deny that he had done so.

259. It is worth noting that on 26 October 2010, Mr Defries, one of Dechert's London partners wrote to Mr Feirson as follows:

> "Just a short note on Neil Gerrard with whom I understand we are in an advanced stage of discussions. I came across him when I worked on the ...European restructuring in the wake of the Chapter 11 filing. Weil Gotshal were the debtors counsel in the bankruptcy and because of the implications for the wider group, Weil's London office was asked to assist the European subsidiaries of which there were about 120. Neil and his team were brought in by the directors I am not sure how.. The DLA team was made up of Neil… The DLA team did not come across as an elite group in the many meetings I spent on the opposite side of the table to them. Neil was heavily involved at the beginning, and he did I think gain the confidence of the UK directors of. . . who seemed to place a lot of importance on what he said (but …and not the directors were paying DLA's fees). If you had asked me or AlixPartners at the time whether the advice Neil's team was giving was unduly negative and to an extent scaremongering in

> order to increase DLA's fees the answer would have been a resounding yes. The overall impression I formed of them is that they made a little go a long way, by which I mean that they were advising the UK directors (plus the European directors) on their potential liability under the various insolvency regimes applicable in the jurisdictions in which… had subsidiaries, without perhaps recognising that it was not in anyone's interest for these local entities many of which held telecoms licences to be allowed to become insolvent. As a result I think Neil spent a lot of time charming the European CEO of… who then abruptly resigned once some emails emerged which cast doubt on her judgment as regards prior accounting practices… at in Europe. In summary, I think the technical legal advice they gave was ok, but it was straightforward issues they were advising on. ..They did not make themselves particularly popular with either… Weil or AlixPartners and came across as something of an irritant. Neil as I recall was capable of a lot of charm, but I did not see a great deal of substance from him in the meetings. I got the impression he used others to do the work."

260. In many ways, those remarks will be seen to have been prescient.

261. Some of the observations made about Mr Gerrard (most of which were complimentary) by those Dechert lawyers who interviewed him (see the composite document of 24 February 2011) are also revealing. They refer to his ego, a lack of clarity on details of profits for the work he did, his ability to turn a small job into a large one and a strategy of "hero marketing" around him. These are not, by themselves, fatal criticisms. But they do give a clue to his *modus operandi*.

262. I have little doubt that Mr Gerrard had a large ego and a belief that he is always right and expected others to follow him implicitly.

263. I agree with ENRC that in the first part of 2011, and indeed prior to the SFO Letter, Mr Gerrard must have been under some significant pressure. He clearly needed, first, to bring over the ENRC case to Dechert and was worried at the prospect that DLA might put him on garden leave, although in the event it did not.

264. Notwithstanding Mr Gerrard's assurances about fee income in the event that he moved, the only client that came to Dechert through him was ENRC, prior to April 2013, with some very small exceptions. Almost all of his income from April 2011-April 2013 was drawn from the profits from the £13 million billed to ENRC.

265. However, at the start of his retainer with ENRC, that amount of work was far from being guaranteed and was a long way from the original £400,000 estimate. Here, context is important. In some kinds of legal work, for example acting for the purchaser of a company or for a party in a piece of litigation, there is, in a real sense, a finite object, to acquire the company on suitable terms or to win the case or settle on suitable terms. Of course, the precise amount of work done and fees charged will vary, depending on the number and seniority (and hourly rates) of the fee earners involved and the extent of the work judged appropriate in order to further those objects. In addition, sometimes unexpected

developments will increase (or decrease) the costs. But the kind of exercise which Mr Gerrard and the Dechert team were hired to undertake was much less structured and was, or became, more vulnerable to expansion in my view. First, the initial work was that of investigation where it was possible for the number or size of the investigations to expand (or not). Second, at least at the outset, there was no counterparty in place. Nor would there be until and unless the SFO took an active interest, as it did by the SFO Letter. Before then, it was a putative counterparty only, albeit an important one. It has also to be recalled that it was open to ENRC to self-report under the 2009 Guidelines and in fact take the initiative without any prior engagement of the SFO.

266. It therefore stands to reason that the more trouble ENRC perceived itself to be in, with regard to matters that might be of interest to the SFO, or indeed simply to itself as a matter of good governance, the more work would be generated for Mr Gerrard and Dechert, among others.

267. That is why, in my view, Mr Gerrard was able to email Mr Feirson while in Kazakhstan on 2 June 2011, to say that "we have found great incriminating evidence - so good". One would have thought that if they found nothing untoward in the Kazakhstan operations, that would be a good result. And later the same day he emailed "*it's been utterly unbelievable. Could be a great case if it goes the way it should."* The "should" can only be some form of expansion because more trouble had been found. In cross-examination Mr Gerrard said that he thought that the evidence found about the "false office" in Rudny, Kazakhstan (see below) was in fact "great" because he wanted to be successful in getting to the bottom of the problem. Later, he said that it was good for ENRC to have been able to get so far in its investigations. The mere fact that it could mount an investigation and get to the bottom of it was great for a company. I regard all of that as disingenuous. It ignores the fact that if the investigation in Kazakhstan had disclosed no real problem, this would have been the best outcome for the company. Mr Gerrard's email comments were obviously about the prospect of further, perhaps substantial further, work which he would now be instructed to do.

268. That same lack of frankness can be seen when Mr Gerrard was asked about his email to Mr Pickworth dated 8 November 2011: *"... The company has agreed to self-report and... Dechert will be the lead law firm. Hooray."* The "hooray" was obviously that Dechert had got the job as lead law firm. Mr Gerrard could just have accepted that interpretation, and said it was innocuous. Instead he said that it meant he was "pleased that we had clarity and were moving forward" (on the self-report). That, again, is simply to ignore the obvious sense of his own remarks.

269. In my judgment, all of the above means that Mr Gerrard did indeed have a motive and inclination to "kick-start" more substantial work for ENRC by increasing the prospect that the SFO would become involved, not so as to provoke a criminal investigation; but rather to cause a large amount of work to be done which would lead to a self-report and some form of civil settlement which would avoid a criminal investigation. That does not mean that every solicitor who found himself in the position of Mr Gerrard would take action to bring that about in the way alleged here. The question at issue is whether Mr Gerrard would have, and did.

MR GERRARD'S DEALINGS WITH SIR PAUL JUDGE ("SPJ")

270. SPJ, along with Sir Ken Olisa, had expressed serious concerns about ENRC's governance and its operations. SPJ was a keen supporter of the investigation. He clearly considered that it was in the ultimate best interests of ENRC to expose and deal with all aspects of any improper dealings and corruption which might be found. He also had real concerns about the continued influence of the Founders, and was very resistant to any of them becoming Chairman, once Dr Sittard's term of office expired.

271. All of those sentiments Mr Gerrard probably agreed with, but at all material times, it remains the case that SPJ was not the "client" for the purpose of giving instructions or providing or receiving information. That was the AC and then the SIC. The distinction between the "client" for these purposes, and other individuals at ENRC was particularly important to maintain here because, as Mr Gerrard knew, ENRC was itself riven by splits and factions.

272. Mr Findlay says that he was told by Mr Trevelyan on or around 30 June 2011 that the leaker in respect of an article about ENRC in *The Times* on 8 June was SPJ, and (according to Mr Trevelyan's journalist contact) Mr Robertson said in particular that SPJ had been "singing like a canary". Mr Trevelyan, for his part, agreed that Mr Hollingsworth had told him that the leaker was SPJ and he told Mr Findlay immediately. Mr Findlay says that in turn, he told Mr Gerrard right away. If Mr Findlay had indeed found this out at this stage, there is no reason why he would not immediately tell Mr Gerrard.

273. However, there is no evidence that this important information was communicated to ENRC prior to 24 August. That is when, according to Mr Ehrensberger's email to Mr Vulis dated 25 August, he and Mr Gerrard had a meeting with Mr Findlay, who produced a five-page summary of his findings about the leaker which suggested it was SPJ. Mr Ehrensberger thought that Mr Gerrard was only told this for the first time at that stage, but on the dates that

cannot be right since, on this point, there is no reason to doubt Mr Findlay and Mr Trevelyan's evidence as to when Mr Gerrard was first told. On this basis, it is inexplicable why Mr Gerrard did not inform ENRC immediately that he knew.

274. Furthermore, on 1 July 2011, the day after Mr Findlay says he found out that SPJ was the leaker, he emailed SPJ at 1:29pm to suggest a meeting with Mr Gerrard and himself. For his part, Mr Gerrard emailed SPJ at 5:06pm to say it "might be better" if they met up for coffee and asked if Mr Findlay should join.

275. The upshot was that Mr Gerrard met SPJ at the latter's flat on Monday 4 July and he made a call during or shortly after that meeting to Mr Findlay. SPJ later agreed to meet Mr Findlay on 6 July. According to Mr Findlay, SPJ asked whether he would be prepared to investigate the Founders, but he declined. Mr Findlay called Mr Gerrard later that day. Mr Gerrard then met SPJ again, on Thursday 7 July, and Mr Findlay later texted Mr Gerrard to ask "what happened with Paul". These meetings were not documented and Mr Gerrard's diary shows them as "padlocked" i.e. private.

276. On Monday 11 July, Mr Findlay emailed SPJ to say they had had a "minor breakthrough" and "Neil has been briefed" and he texted Mr Gerrard asking to speak to him. On Sunday 17 July, SPJ texted Mr Gerrard to call him about "some interesting information". Later on, SPJ emailed him a "private" copy of the Good Corporation report into ENRC and for his part, Mr Gerrard asked if SPJ had a copy of the FRA report. On Monday 25 July, Mr Gerrard said at an FRA meeting that SPJ wanted to use "sunlight as disinfectant of corruption". The following day, he and Mr Findlay had dinner with SPJ. On Friday 29 July, SPJ did obtain a copy of the FRA report from Mr Ehrensberger, presumably as a result of the suggestion made by Mr Gerrard the previous week. There was yet another undocumented meeting over lunch between Mr Findlay, Mr Gerrard and SPJ on 3 August.

277. An exchange of emails between Mr Gerrard and SPJ on 4 August shows SPJ telling Mr Gerrard that he had persuaded Mr Ammann to keep the forthcoming AC meeting on 10 August, the following week, restricted to AC members only plus Mr Gerrard. He said that when Mr Gerrard communicated with Mr Ammann, he should say the same thing.

278. Pausing there, all of these communications were, in my judgment, highly irregular so far as Mr Gerrard was concerned. He knew at this stage that *The Times'* journalist had said that the leaker was SPJ and even if he did not know that, this was the commonly held suspicion at ENRC. It is not clear what this flurry of activity with SPJ was really about. And there was a

desire to stage-manage the AC meeting with Mr Ammann. Whether Mr Gerrard was doing all of this because he felt that ultimately it was best for ENRC is beside the point. He simply should not have been talking to SPJ at this stage especially as Mr Ammann, from whom he was to take instructions, was clearly unaware of it.

279. For the meeting on 10 August, Dechert was to produce a Progress Report on the investigation. On 8 August, Mr Gerrard (through Mr Anderson) sent a copy of the then draft of the report to SPJ. This version noted at paragraph 4.6 that there was widespread corruption in procurement at SSGPO, with profits being deposited in Swiss and Latvian banks. In addition, in an interview he gave to the journalist John Helmer on 1 October, SPJ said that he had been told by Mr Gerrard that there was a new "smoking gun" in an FRA report about ENRC's operations in Africa, although the report had not yet been delivered to the AC or him. He said that Mr Gerrard had told him that there was new evidence of corruption on the part of Victor Hanna in Africa. In fact, the final version of the Progress Report omitted any reference to the Swiss and Latvian bank accounts; however SPJ clearly made use of that information because he communicated it to the SFO in an email dated 20 September 2011. For Mr Gerrard to pass such information to SPJ in this way was extraordinary, given what Mr Gerrard knew (or on his case must at least have suspected) of SPJ.

280. Following the AC meeting and on 15 August, Mr Gerrard asked SPJ to return the draft report he had earlier received, or delete it. This was said to be on the basis that the eventual report itself was not actually circulated at the AC meeting at all (although an Executive Summary was, but then collected at the end). In cross-examination, however, Mr Gerrard said that the draft report sent to SPJ on 8 August was itself sent in error. He said that the Progress Report was intended to be kept from the AC, SPJ must have asked for it and in error Mr Gerrard agreed to give it to him. That explanation makes no sense and is inconsistent with the deliberate nature of Mr Anderson's email of 8 August to SPJ. It also conflicts with the email of 15 August which does not suggest that the report had originally been sent in error to SPJ at all. Then Mr Gerrard said that the error was that he had forgotten that SPJ had been sent the report in the first place - i.e. a different error. He said this then explained why SPJ's name did not appear on a list produced by Dechert subsequently of the names of all those who had received particular documents. Mr Gerrard agreed that he should have told ENRC that he had sent a copy of the report to SPJ but that was a mistake.

281. None of these explanations is plausible. The only realistic inference is that Mr Gerrard was improperly providing SPJ with information which he knew or at least suspected might be

leaked. It was plainly against ENRC's interests. It is no answer, as Mr Gerrard ventured at one point, to say that SPJ was entitled to be given "updates" because he was a member of the AC and a non-executive director. He was those things, but he was not entitled to that information in circumstances where he might well use it against ENRC.

282. Equally, SPJ seems to have been keeping Mr Gerrard abreast of what he was doing, for example having a lunch meeting with Glyn Barker of PwC, ENRC's auditors, when they agreed that any whistleblower investigations should be done independently of the company, and by lawyers who were skilled in these matters (i.e, obviously, Mr Gerrard) and when Mr Barker apparently agreed that if certain people became Chairman (i.e. one of the Founders) PwC would resign as auditors. The email of 28 July conveying this information was blind-copied to Mr Gerrard. Mr Barker did subsequently contact the SFO to arrange a meeting, at the beginning of September. Also, on 21 July, SPJ had emailed a copy of the Good Corporation report, although Mr Gerrard in fact already had it. This is when Mr Gerrard had asked SPJ if he had the FRA report, SPJ said that he did not and they then arranged to meet the following week. SPJ later forwarded to Mr Gerrard an email from Nick Parry of Inception Partners, about acquiring leaked documents. As to this, Mr Gerrard said that SPJ would have wanted an update and Mr Gerrard had no instructions not to talk to him. But that is no answer when these were private meetings, unknown to ENRC, and taking place when SPJ, whatever his motives, was at least a suspected leaker.

283. A final example of Mr Gerrard's improper conduct occurred when Mr Ammann emailed Mr Gerrard expressly to say that because of the continued leaks, Board minutes should not now be sent to other AC members and that Mr Gerrard should not have any further meetings with SPJ. Despite this, Mr Gerrard went ahead with a meeting with SPJ at the latter's apartment the next day. This was to give him a briefing about deals in Kazakhstan for which a detailed speaking note was being prepared. Mr Gerrard eventually accepted in cross-examination that on the basis of the Board's instruction which itself was the basis for Mr Ammann's email, it was an error on his part to have met with SPJ. He had previously said that he thought he could still see SPJ because, after all, Mr Ammann was only the Chairman of the AC and he thought that Mr Ehrensberger had agreed that SPJ should be kept in the loop. There was in fact no evidence of that at this particular time. In my judgment, Mr Gerrard knew he should not have been meeting SPJ, but went ahead anyway.

284. In the light of all of that evidence:

(1) Mr Gerrard was plainly in breach of duty in communicating with SPJ as he did, and knowingly so;

(2) I am quite satisfied that he was because even if he thought it was appropriate in some way, it was clearly against his client's interest and he had no instructions for doing it;

(3) The fact that he may have thought (along with SPJ) that leaking information might ultimately be to the benefit of ENRC in forcing it to confront its conduct in Kazakhstan and/or Africa, or elsewhere, is beside the point;

(4) The dealings with SPJ show that at the very least, Mr Gerrard was clearly prepared to pass information where there was a real risk that it might be leaked;

(5) All of this adds to the other evidence showing that Mr Gerrard would not have regarded it as an extraordinary step to instigate a leak himself.

THE SFO REGIME UNDER MR ALDERMAN AND HIS CONDUCT AS DIRECTOR

Introduction

285. As with Mr Gerrard, the allegations against the SFO which involve Mr Alderman are very serious, since they concern not merely the torts of inducement to breach of contract and/or misfeasance in public office but ones where the officer concerned was himself the head of a state organisation whose very function is to investigate and, where appropriate, prosecute or otherwise resolve instances of serious wrongdoing.

286. In particular, Mr Alderman is the officer or one of the officers involved in Disputed Contacts 1-8 and 11, and within that context, the subject of allegations of deliberate failures to record material events and information.

287. It is therefore relevant to consider what factors, if any, there may have been which would have disposed Mr Alderman to commit all or any of the breaches alleged which concern him. I consider the following matters:

(1) Mr Alderman's conduct as Director;

(2) The SFO's reputation under his Directorship;

(3) His approach to dealing with cases; and

(4) The existence or otherwise of any relevant pressure on Mr Alderman.

288. In this regard it is worth noting that Sir David (a witness for the SFO) provided what in my view were valuable insights into Mr Alderman and how he was perceived. Whilst Sir David

was obviously not there while Mr Alderman was Director, he did have to deal with much of the fallout from Mr Alderman's regime.

Mr Alderman's conduct as Director

289. It cannot be seriously doubted that in the course of his Directorship, a number of events occurred which were at best ill-considered or naïve so far as he was concerned, and at worst plainly unlawful. As the underlying facts are generally not in dispute, I propose to summarise the relevant matters.

Settlement of Cases

290. The settlement agreement made with BAE Systems Plc on 5 February 2010 included a guilty plea to an offence under section 221 of the Companies Act 1985. On 21 December 2010 Bean J (as he then was) refused to sentence on the basis advanced by the SFO. He observed that the settlement agreement was:

> "loosely and perhaps hastily drafted… The heart of the matter is paragraph 8, whereby the SFO agreed there would be no further investigation or prosecutions of any member of the BAE Group for any conduct preceding 5.2.10… surprised to find a prosecutor granting a blanket indemnity for all offences committed in the past, whether disclosed or otherwise. The US Department for Justice did not do so in this case…"

291. He was also "astonished" to discover that the SFO did not invite the Court to proceed on the basis that part of a sum of $12.4 million paid to companies controlled by a third-party "marketing adviser" was used for corrupt purposes.

292. The settlement with Innospec in March 2010 was criticised by Thomas LJ (as he then was) as follows in paragraphs 40, 42, 43, 45 and 50:

> "…a fine of US$12.7 million would have been wholly inadequate as a fine to reflect the criminality displayed by Innospec Ltd. This was corruption involving the payment of very substantial amounts to the most senior officials of the government of Indonesia over a long period of time. …this court was placed in a position where it had little alternative but to agree to the limit of US$12.7 million, if it was to avoid injustice. It must, however, be appreciated that the circumstances of this case are unique. There will be no reason for any such limitation in any other case... …As it…is for the court ultimately to determine the sanction to be imposed for the criminal conduct, an agreement between prosecutors as to the division, even if it had been within the power of the Director of the SFO (which as I have explained it was not) cannot be in accordance with basic constitutional principles.…Nor in my view was the division agreed one which on the facts of the case accorded with principle. The gravamen of the criminality was centred in the UK…My provisional view is that the amount should have been divided 50-50 [between the US and UK authorities, rather than 68 (US) - 32 (UK)] … I have concluded that the Director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again.… There was at some stage a suggestion that a press notice in a form approved could be issued by Innospec. This is not a practice which should be adopted in England and Wales…It would be inconceivable for a prosecutor to approve a press statement to be made by a person convicted of burglary or rape; companies who are guilty of corruption should be treated no differently to others who commit serious crimes."

293. It is perfectly true that Thomas LJ did commend Mr Alderman at paragraph 22 and the first part of paragraph 45 for his vigorous policy of investigating corruption while also

encouraging cooperation. Nonetheless, I agree with ENRC that it is not possible to dismiss the significance of these remarks in relation to Mr Alderman's approach by saying that what this was about was no more than a legal error.

Tchenguiz

294. On 7 March 2011, the SFO applied for and was granted search warrants for the homes of Robert and Vincent Tchenguiz and the offices of two associated companies under s2(4) of the 1987 Act (see paragraphs 129 and 130 above). They were executed at a dawn raid which had been notified in advance to the press. The legality of the warrants and Mr Alderman's conduct was challenged in Judicial Review proceedings leading to a decision of the Divisional Court on 31 July 2012 in *R (Tchenguiz) v SFO* [2012] EWHC 2254. The Court was highly critical of the way in which the case for the warrants had been presented to the judge hearing the application, saying that there was a failure by the SFO to set out material facts and that the account given to the judge was inadequate and unfair. It also criticised the seizure pursuant to the warrants of privileged material. In the respect of a "here and now" notice issued by Mr Alderman to retain possession of the material improperly seized, the Court said that there was no doubt that he had acted unlawfully. In relation to costs, the Court said this:

> "Our starting point is that the conduct of the former Director has to be considered against the background of the duty that there was imposed on him. That duty was the heavy and critically important duty of ensuring that the information presented before Judge Worsley QC in support of the application for the warrants contained accurate and comprehensive material which itself was the product of a very careful and well-balanced investigation. All these matters must have been apparent to the former Director. In this case, for the reasons explained in our judgment, the former Director wholly failed to discharge this duty in circumstances in which the claimants' reputations were bound to be seriously damaged by the issue and the execution of the warrants, given the very public manner in which this was done.."

295. While the Court added a postscript, at paragraph 293, which stated that the SFO had clearly not been properly resourced for this case which had a number of consequences, I do not see how that affects the underlying gravity of the comments referred to above.

296. The SFO was later sued by the Tchenguiz brothers for misfeasance by its officers including Mr Alderman. Sir David settled those proceedings in 2014 for £4.5 million in damages and £3 million in costs, and his view, in reaching that settlement, was that the SFO had done "quite well". He issued a public apology and said that the SFO had "changed a great deal" since March 2011.

297. In its closing submissions, the SFO submitted that this whole incident was essentially irrelevant as to how Mr Alderman may have acted in this case. It was, at the end of the day,

simply a question of unlawfulness in JR proceedings. I disagree. It was a case betraying a serious lack of propriety on the part of Mr Alderman.

Redundancy and Severance arrangements with Ms Williamson and Mr Bailes

298. Between September 2011 and April 2012, Mr Alderman arranged severance payments for three senior SFO executives who had worked closely with him, Ms Williamson, the SFO's then CEO (£464,905), Mr Bailes, then the SFO's COO (£473,167) and Mr McCall, then Head of Technical and Specialist services (£49,885).

299. Sir David thought that these payments were improper and ordered an investigation and report which was undertaken by Tim Hurdle, a Finance Director at the Treasury Solicitor's department. This report which was delivered on 31 July 2012 concluded that the payments were irregular due to a lack of the required approval and there was an apparent desire for secrecy surrounding these arrangements. At that point Mr Alderman had not provided an explanation for the arrangements made. But following a further request made by Mr Hurdle on 6 September, Mr Alderman did provide an explanation on 28 September. He said that Ms Williamson and Mr Bailes had been looking for other roles since the previous summer as they had been told by the Attorney General's office and the Treasury Solicitor that they would be expected to leave their desks within a month or two of Mr Alderman's own departure, and Sir David made it clear that he saw no need for their roles. Mr Hurdle sought the comments of Mr Fish of the Attorney General's office and Sir Paul Jenkins of the Treasury Solicitor's office who made it clear that they did not accept the truth of his assertions. Further, in cross-examination, Sir David said that it was "quite untrue" that he had decided any such redundancies at that stage. He did go on to say that he thought Mr Alderman had believed what he was saying, but that it was incorrect. I suspect Sir David was being diplomatic here. It is difficult to see how Mr Alderman could simply have been mistaken given the rebuttals from the offices of the Treasury Solicitor and the Attorney-General. Further, while Mr Alderman claimed that he had records of communications in this regard with the Treasury Solicitor, none was ever produced or found and Sir David thought they did not exist.

300. Sir David also agreed that a separate internal investigation revealed that information that had been supplied to Sir Alex Allan who also produced a report on these matters, to the effect that Ms Williamson's promotion was regular when it was not, had misled him. He said that Mr Alderman was responsible for this if he supplied the information, and it is not suggested that it came from someone else. Sir David was, again, not prepared to go further and say that this

was a deliberate untruth on the part of Mr Alderman. Rather, he had "convinced himself that what he was doing was right".

301. Finally, Sir David said that he would not characterise Mr Alderman's way of working as involving a "lack of integrity"; rather it was an odd way of doing things that he somehow justified to himself. He then said that he was not qualified to say whether this amounted to a lack of integrity or not.

Consultancy Fees

302. In addition, in 2010, the SFO spent a total of over £1 million on consultancy fees when all new consultancy contracts over £20,000 required departmental approval. The invoices here were all split up into individual amounts of less than £20,000. In 2014 the Civil Service Code Standards Committee concluded that there had been an abuse of the Civil Service Code. Sir David said in evidence that this spending, overseen by Mr Alderman, was "crude and improper and in breach of the rules".

Brochure

303. Further, and somewhat remarkably, another report commissioned by Sir David referred to the printing of a colour brochure entitled "*Transforming the SFO 2008 to 2012*". Copies of the brochure were delivered on Ms Williamson's last day in office and had been written and printed outside the office at a cost of £17,700 plus VAT. The author of the report said that it had been "Written by ghostwriters… They glorified Richard Alderman and Philippa Williamson. It has become clear that this was symbolic of the state of the SFO at that time". The report went on to say that following an unfavourable reaction in the press, these leaflets were pulped. Their contents were a "mirage created by management consultants…".

The SFO's Reputation under Mr Alderman's leadership

304. In cross-examination, Sir David said that under Mr Alderman's watch, the SFO had lost its way and was known colloquially as "Nightmare on Elm Street" and the "Serious Farce Office". He said that Mr Alderman had left the SFO in quite a bad way, although Mr Alderman would not say that. From June 2011, the then coalition government kept under review the question as to whether the SFO should now be incorporated into the National Crime Agency following earlier suggestions that it should be disbanded. This remained the position whilst Sir David was there. While that review was no doubt unsettling for both Directors, it was not the same as an imminent threat of disbandment.

305. In 2010, Mr Alderman asked HM Chief Inspector, Michael Fuller, to inspect and then produce a report on the SFO to assist the Attorney General and this was produced in November 2012 ("the CPS Report"). Its Executive Summary stated that:

> "At present, the SFO carries out some of its casework to a high standard, but there is clear room for improvement. This is borne out not only through our inspection findings, but also in the views of the many stakeholders we have consulted…Therefore, much needs to be addressed if the SFO is to become a respected crime fighting organisation which is the envy of the world. The new Director recognises this and is fully committed to driving improvement. With this in mind he has invited me to re-inspect within the next two years, and to assess progress against the recommendations made in this report, which should be viewed as a staging-post on the road to success."

306. It later stated that:

> "The SFO has some very capable operational staff, but the quality of casework handling, and the capability of the SFO to assure itself of this is significantly undermined by weakness in systems and processes. Its casework handling processes are weak, and need urgent streamlining, including the standardisation of forms and record keeping. Case management compliance levels are currently insufficient, and new processes need to be mandated through effective performance management. Quality assurance is essential, and the new Director recognises this…..It should be noted that the timing of the inspection means that findings relate almost exclusively to casework quality levels and systems under the previous Director."

307. Sir David also said that when he arrived, staff morale was very low. He agreed that Ms Williamson had been promoted by Mr Alderman without a proper process and given an "exotic" working arrangement. He accepted that Mr Alderman's practices included "jobs for the boys and girls". In another case, he had to issue a "profound apology" on behalf of the SFO for Mr Alderman's mistreatment of an employee. Mr McCall, for his part, said it was a very challenging environment in which to work and Mr Gould said that the conduct of some in the SFO hierarchy had a very negative effect on other members of staff. He thought the behaviour of some senior management amounted to bullying and others felt the same way as him. Mr Thompson thought Mr Alderman and his senior managers were prone to selecting people who were their favourites.

308. At this stage it is worth saying something about the relationship between Mr Gould and Mr Gerrard. The former did not attend any OM until OM3 on 20 December 2011, and the first DC to involve him was DC13 on 9 May, although he was also party to a (non-DC) call with Mr Thompson, Mr Pickworth and Mr Gerrard on 20 February.

309. However, he had already discussed non-ENRC matters with Mr Gerrard earlier than that. This is illustrated by the much-debated cryptic email sent by Mr Gould to Mr Pickworth, for Mr Gerrard's attention which said this:

> "I'm sending this to you as I'm not certain of Neil's e-mail address.
>
> Can I ask you to raise with Neil the comment he made over coffee about having a face to face discussion with certain parties about the lay of the land.

> I have had a long think about this, and before you say anything yes it did hurt, and decided that I not only should but arguably must if there is a possibility of moving the entire topic forward.
>
> As such could you mention that I would, if the certain party wishes to, like to do this sooner rather than later (nothing sinister but I have some personal issues in the near/mid future which may impact on my ability to fit in with diaries at a later date).
>
> Apologies for using you as a conduit."

310. Although in evidence, Mr Gould thought that his reference to "hurt" was probably about his treatment at the SFO, I rather suspect that, read in a common-sense way, Mr Gould was joking, saying that it hurt his brain because he had to have a long think. There was an attempt in re-examination to suggest this to him which he did not take up but nonetheless I think this is the natural reading of the email.

311. Nonetheless, Mr Gould clearly felt confident enough to mention these matters to Mr Gerrard (and he is careful how he described them here to Mr Pickworth) in circumstances where they were on different sides, as it were, so far as ENRC was concerned. Mr Gould suggested in evidence that this was the sort of matter he might have raised with any lawyer but I think this was downplaying his relationship with Mr Gerrard.

312. There is further evidence on this point. Mr Gould himself accepted in evidence that he would trust Mr Gerrard not to "spill the beans" on him back to the SFO. Further, at least according to Mr Gould, the lunch at Shaw's Booksellers on 12 October 2012 which formed DC19 (see paragraphs 778-780 below) was "social". Mr Gould's later text to Mr Gerrard on 20 November shows that he was prepared to disclose the SFO's thinking which must have been confidential. I deal with this at paragraphs 781 and 783 below.

313. Another text of 7 February 2013 shows Mr Gould telling Mr Gerrard about a job application and how he wanted to "grab hold of the case and get it concluded properly". There were also many telephone calls between the two.

314. Finally, at least according to Mr Findlay, Mr Gerrard told him that he and Mr Gould went back a long way and that he could get Mr Gould a "big fuck off job" at Dechert one day. I have to say that I think this is the sort of remark which Mr Gerrard might very well have made. (For his part, in his WS, Mr Gould said that Mr Gerrard had never said to him that he could be sure of a "big fuck off job" at Dechert, which was not challenged. However, that is not to the point in this context.)

315. I think Mr Gould and Mr Gerrard were closer than both were prepared to admit, and this is reflected in some of the later DCs.

Mr Alderman's approach to dealing with cases

316. I have already referred to the settlements in certain cases which were the subject of criticism (see paragraphs 290-293 above). But Mr Alderman's general approach to dealing with existing or potential cases is highly pertinent here, in particular his apparent preference for dealing with matters in a highly informal way.

317. Sir David agreed that Mr Alderman was known to like informal "fireside chats" with company representatives or their lawyers who might be or were already the subject of the SFO's attentions and which Sir David said was "dangerous". When he took over, he in fact requested a list of cases which "might be affected by discussions with Mr Alderman". He accepted as true that Mr Alderman's own records were "inconsistent, incomplete and poorly kept such that it was extremely challenging to find information".

318. Mr Mallela, another witness called by the SFO, said that "amongst the legal community there was a sense that if you couldn't get what you wanted from the case team you would then open a parallel channel of communication to Mr Alderman", and that he had not been consulted on the BAE settlement when he was working on that case. Mr Milford, for his part, said that Mr Alderman conducted himself in an "erratic way" and took "erratic decisions". Often this was done "without people being involved in the cases and leaving them essentially high and dry as they tried to progress their work". Also, when Mr McCarthy was asked in 2013 about the whereabouts of the Beige Notebook, and he was taken to his first notebook, he referred to the note of a discussion he had with Mr Alderman where the latter decided to go down the road of a civil settlement although there was good evidence for a prosecution. Mr McCarthy did not agree with that decision and when he asked Mr Alderman to write a decision note about it, Mr Alderman refused.

319. This general approach of Mr Alderman also featured in the CPS Report referred to above which observed (at paragraphs 8.5-8.8) that:

> "Civil recovery consent orders in cases settled before April 2012 [when Mr Alderman retired] are not disclosable, due to a provision in the orders themselves…The result is a concerning lack of transparency, and stakeholders… raise the suspicion that corporate bodies have been allowed to escape criminal justice on acceptance of a financial penalty. Cases such as Mabey & Johnson and BAE Systems have been criticised for this…there are few accessible records of the negotiation and decision-making process…
>
> [S]ome [SFO staff] have criticised the disinclination of those making the decisions in the past, within the SFO, to refer to case investigation teams, and consider the strategy in light of all the evidence…There is clear reputational risk to this, and it has served to undermine staff confidence."

320. There is no doubt an extent to which the 2009 Guidelines, formulated by Mr Alderman, contributed to the informality of the process at least in the sense that they promoted the idea of a SR, leading to a settlement which would avoid the need for a criminal investigation or

prosecution. But that did not mandate the failure to take proper notes, organise properly structured meetings or act in a generally transparent way both internally and externally.

The existence or otherwise of any relevant pressure on Mr Alderman

321. ENRC contends that all of the above would have combined to make Mr Alderman strive to obtain a "quick win" if he could, prior to his departure which was known to be in April 2012. It is said that this would have been firmly in mind by July 2011. I am not sure that I would go quite that far; it would probably be unrealistic, even on the basis of a speedy SR (as indeed matters proved here). On the other hand, I am sure that he would want to be seen to be acting as proactively as possible with potential new targets, of which ENRC was one. This is especially so given the adverse publicity it already had engendered.

322. It is true that Mr Gould said that he had received an instruction from Mr Alderman to reach a civil recovery settlement on ENRC. I can follow that, insofar as this would have been Mr Alderman's clear preference rather than to undertake a criminal investigation or prosecution. But again, it is unclear how such a settlement was to be reached in short order and absent a proper evidential foundation for the SFO. Indeed, if it is really suggested that Mr Alderman both wanted a very quick settlement for his own purposes, and yet wanted to assist Mr Gerrard to bring about a lengthy investigation generating huge fees, albeit stopping short of a criminal investigation, these are somewhat conflicting aims.

323. But what I think is much more relevant and telling from all of the above is that Mr Alderman was someone whose approach to observing proper, indeed sometimes legal, standards could be wanting to say the least. He clearly could ride roughshod over proper procedures, was prepared to be secretive or at least not transparent and I suspect felt he could probably get away with it to a large extent. He was also capable of providing misleading information. In those senses, I think it could be said that he would feel comfortable dealing with someone like Mr Gerrard whose own way of operating was similar.

324. What this means, in my view, is that Mr Alderman was certainly capable of engaging in the sort of behaviour alleged against him by ENRC (though perhaps not in its more extreme quasi-conspiratorial sense). That is so, especially if, from his point of view, to do so would enure to the benefit of the SFO because it would acquire a new target that would probably yield results.

THE AUGUST LEAK

Common Ground

325. The following facts are common ground. The August Leak claim is concerned with the August Article. Mr Robertson had been passed confidential ENRC documents by Mark Hollingsworth, a freelance journalist. The documents were copies of (a) WB1 (b) the HS Report (c) the PP Report and (d) the DLA Letter ("the Documents"), all accompanied by a two-page covering note ("the Covering Note"). On 10 November 2020 Mr Hollingsworth provided these documents to Quinn Emanuel Urquhart & Sullivan LLP ("QE") who were acting for ENRC in a claim brought against him for leaking the documents.

326. Mr Hollingsworth had, in turn, been passed these documents by Mr Trevelyan whose company, Cyntel, was already assisting Mr Findlay who was acting through his company B2, in respect of ENRC's investigations. Mr Trevelyan had in turn been passed the documents by Mr Findlay. There is an issue as to whether Mr Findlay wrote all or only part of the Covering Note or its contents, but that does not matter at the moment.

327. It is common ground that Mr Findlay had been supplied with a copy of WB1 earlier in the year.

328. The copies of the documents which ended up with Mr Robertson bore annotations as follows:

    (1) the HS Report had manuscript words added by Mr Gerrard by way of comment on internal pages (vi), (vii) and 34, together with vertical lines to the left and the right and some further asterisks;

    (2) the PP Report also had some vertical lines on the left-hand side, together with an exclamation mark and asterisk annotations;

    (3) the DLA Letter had vertical lines down the left-hand side of internal pages 1 to 4 and 6.

329. While Dechert accepted that at least some of the vertical lines in the HS Report were indeed Mr Gerrard's, he himself said in evidence that the lines he would put on would be on the right-hand side of a page (not the left), but that does not square with Dechert's original position. As for the PP Report and the DLA Letter Dechert's position in correspondence was that Mr Gerrard thought that the lines were not his but could not be sure. But since they appear to be of the same kind as those in the HS Report it is safe to assume that they are his. Moreover, there are other copies of these documents in the possession of others which do not bear those markings. On any view, it is Dechert's case that those three documents which

came into the possession of Mr Findlay somehow and which were later transferred down the line to Mr Robertson had come from Mr Gerrard to begin with.

330. At this point, the factual accounts diverged. ENRC's case relies on the evidence of Mr Findlay and Mr Trevelyan and other materials (including what it says are the clear deficiencies in Mr Gerrard's contrary account) and is that Mr Gerrard passed the documents (excluding the Covering Note) to Mr Findlay for the express purpose of having them leaked to *The Times*.

331. Dechert's case is that Mr Gerrard did no such thing and the leak was instigated by Mr Findlay himself. Moreover, there is a clear (and innocent) explanation for how Mr Findlay came to be in possession of copies of the HS Report and the PP Report which had emanated from Mr Gerrard. There is, however, no clear explanation advanced as how he came to be in possession of the DLA Letter (see below).

332. ENRC's case rests essentially on (a) the evidence of Mr Findlay and Mr Trevelyan, (b) inferences from a number of documents, (c) what ENRC says can be drawn from Mr Gerrard's own evidence about the August Leak and (d) broader matters concerning Mr Gerrard.

The witnesses

The evidence of Mr Findlay

333. On 30 January 2018 ENRC issued proceedings against Mr Findlay, alleging that he had passed the Documents to Mr Trevelyan who then passed them as described above. ENRC advanced no positive case as to how Mr Findlay had obtained the Documents. The essence of the claim was breach of confidence. It is not clear how much, if any, pre-action communication there was. At this stage, the extant 2017 claim against Dechert did not allege that Mr Gerrard had instigated the August Leak.

334. Mr Findlay's solicitors filed an Acknowledgement of Service on 7 February 2018. Shortly afterwards, on 19 February 2018 Mr Findlay entered into a Settlement Agreement with ENRC by which, first, the claim against him was discontinued with no order as to costs. Second, the Settlement Agreement went on to provide for the delivery of services to ENRC by Mr Findlay over the period of the SFO investigation, including the bringing of any charges against ENRC. The services included having meetings, giving advice, producing signed WSs and giving evidence in court. In return, Mr Findlay would be paid £210,000 for the first three months and then a monthly retainer of £12,000 plus expenses. The Settlement

Agreement was signed on behalf of ENRC by Mr Vulis. It was later varied so that Mr Findlay would receive payments grossed up to include his tax liability thereon. In neither of his WSs dated 11 December 2020 and 20 February 2021 filed for this trial did Mr Findlay deign to say how much in total he had by then received from ENRC pursuant to the Settlement Agreement. In fact, and as at 24 May 2021, it was £1,145,484.

335. Two days after making the original Settlement Agreement, Mr Findlay produced a WS for use in the 2017 claim. This was done in the presence of ENRC's solicitors and his own solicitors. It was obviously done at some speed and without reference to many of the relevant documents which emerged on disclosure only later.

336. In it, he stated that while he had got on with Mr Gerrard to begin with, he later felt that he was being manipulated by him. He said that Mr Gerrard had expressed to him his desire to "kick-start" the ENRC investigation and he wanted to turn the heat up by leaking sensitive information to the press. He wanted Mr Findlay's help to get an article into *The Times* for this purpose. It had been *The Times* which had produced the June Article. Mr Trevelyan said that he could use the same intermediate journalist (not disclosed to Mr Findlay but in fact Mr Hollingsworth) who had been involved in the investigation into the June Leak. Mr Gerrard said he would provide two lawyers' reports (i.e. the HS and the PP Reports), WB1 and a letter from DLA Piper. Mr Findlay then collected these documents in a sealed envelope at the beginning of August from Dechert's reception. He met Mr Trevelyan in a nearby park and passed the envelope to him without opening it.

337. He went on to say that following publication of the article on 9 August, he was having lunch with Mr Trevelyan at the Chelsea Brasserie. Mr Gerrard joined them for coffee. As he approached the table Mr Findlay recalled Mr Gerrard rubbing his hands and saying "*right boys, I'm in rape mode*". He said that the SFO had now written to ENRC because of the August Article printed the day before, that the key people from his team at DLA were now at Dechert and he was going to "*screw these fuckers for 25 million*".

338. Mr Findlay says that he was shocked by this and felt he had been played. His relationship with Mr Gerrard deteriorated subsequently and Mr Findlay tried to protect ENRC from Mr Gerrard's "exploitative tactics". Much of the rest of this WS is taken up with supporting the criticisms of Mr Gerrard's conduct and ways of working which ENRC alleged against him in the 2017 Action.

339. Mr Findlay went on to say that he was the author of WB2 (this is dealt with in detail at paragraphs 1485-1504 below). He said he pretended that the letter was based on a single conversation with Mr Gerrard one evening to fortify the allegations, but in fact there were a number of conversations, which he had recorded (unbeknown to Mr Gerrard). Equally, he had not recorded a single conversation but had recorded a number of them. He accepted that he may have embellished some aspects of WB2, but stood by all of the core allegations therein. The reference to Mr Gerrard as a "colleague" was to disguise Mr Findlay's identity.

340. Following the signing of Mr Findlay's WS on 17 May 2018, ENRC amended its Particulars of Claim to allege that Mr Gerrard had instigated the August Leak.

341. In Mr Findlay's WS dated 11 December 2020, his account of what happened at the Chelsea Brasserie was broadly the same. However it differed from his 2018 WS in certain significant respects. Mr Findlay said that he was correcting and revising his earlier WS as a result of seeing a number of documents. He now said that the first discussions about a leak (instigated by Mr Gerrard) had followed an email sent by Mr Gerrard to Mr Findlay dated 8 June 2011 shortly after publication of the June Article. This read as follows:

> "Think we have another very interesting option which may have been staring us in the face. Will not explore it here nor over the mobile. Will call when I get back to the office.
> Times, page 35. Explosive."

342. Mr Findlay could not recall receiving that email but said that it showed Mr Gerrard making a reference to what in fact was going to be the August Leak. Mr Findlay went on to say that Mr Gerrard gave him final details about the material to be leaked over dinner at the Adam Street Members Club on 5 July. Mr Trevelyan was going to meet his contact the following day and so Mr Gerrard and Mr Findlay wanted to discuss what documents would be passed over so that Mr Trevelyan could inform his contact. The documents concerned were as already described. Mr Findlay already had a copy of WB1, as already noted. But he had not seen the HS or PP Reports or the DLA Letter. Mr Gerrard wanted Mr Findlay to be "bloody careful"- i.e. that the leak could not be traced back to Mr Gerrard. Mr Findlay later prepared a note for Mr Trevelyan to brief the journalist; it was sent to Mr Trevelyan's "dead letterbox" which in fact was a "Drafts" folder in an email account to which they both had access but which would not itself leave any email trail. From his credit card records, Mr Findlay said that he had lunch with Mr Gerrard at Shaw's Booksellers directly after Mr Findlay had landed at City Airport having flown in from his home in Switzerland. It was here that Mr Gerrard handed Mr Findlay the Documents in the envelope. He took it to his London home. He later saw members of the investigation team who were going to Kazakhstan and Mr Trevelyan was

also there. He agreed to meet Mr Trevelyan the following day to hand over the documents. They both had dinner together that night at a hotel at Heathrow airport. They then met on the following day, 13 July, at around noon, in Green Park whereupon Mr Findlay handed over the envelope to Mr Trevelyan. He then had lunch with Mr Gerrard at Franco's later the same day and told him that the envelope and been delivered and then returned to Switzerland on 14 July.

343. So, the date and mode of delivery of the Documents to Mr Findlay by Mr Gerrard has changed. Mr Findlay's account of the Chelsea Brasserie encounter is, however, more or less the same. But he added this:

> "56. I remember that in the days that followed this meeting, Mr Gerrard and I had a furious argument, I believe outside ENRC's offices, during which he ranted and swore at me repeatedly. Mr Gerrard told me that there were distinctive notes and marks on pages of the documents that had been leaked to the press that could have identified him as the source of the leak. Mr Gerrard explained that he had "worked overtime" to "sanitise" (or words to that effect) the copies of the leaked documents in Dechert's possession by removing these notes and marks. I remember saying to him "what the fuck do you think we were up to Neil?" (or words to that effect). I did not understand why Mr Gerrard was so agitated and angry at me as, when I had given Mr Trevelyan the envelope Mr Gerrard had provided me with, I had simply executed the plan Mr Gerrard and I had agreed on.
> 57. Following this conversation, I do not recall ever discussing the leak again with Mr Gerrard."

344. As before, Mr Findlay says that he wrote WB2 in July 2012. However he now said that certain other parts were inaccurate. He also had not in fact instructed a firm of French lawyers, and also he had no basis for thinking that insider information had been provided to Mr Gerrard with the tacit agreement of Sir David and Mr Grieve.

345. Mr Findlay regretted making these false allegations and said that they were "misguided", but they were done to protect his identity and would lead to the SFO investigating the allegations.

346. As for Mr Findlay's oral evidence, there are a number of pertinent matters. First, on the question of the Chelsea Brasserie meeting, he maintained his account but added that what Mr Gerrard said had set off two "truth bombs" in his mind. First, that the August Leak was not somehow planned in the best ultimate interests of ENRC. Rather it was simply Mr Gerrard's greed. Second, since the August Article came out the day before and already the SFO Letter had been written, the SFO itself must have been forewarned of the August Leak and its contents. And this demonstrated to Mr Findlay that the SFO and Mr Gerrard were working in concert against ENRC. He felt that everything had now changed so far as his relationship with Mr Gerrard was concerned. Mr Findlay also said that his sending of WB2 was in part due to revenge, and in part an attempt to stop Mr Gerrard dealing improperly with the SFO and also in part to save Mr Gerrard from himself; this was because even then, Mr Findlay had a residual personal affection for him even though he could be a "beast" at work.

347. A further matter concerned the sending of a recording of a conversation between Mr Gerrard and Mr Findlay to Mr Trevelyan in early 2013. The recording had been edited so as to remove Mr Findlay's voice. Mr Findlay said that Mr Trevelyan had told him that a journalist had wanted additional material on Mr Gerrard and Mr Trevelyan kept badgering Mr Findlay to provide it and eventually persuaded Mr Findlay to pass over the recording. I think that this is a disingenuous account on the part of Mr Findlay who had no obligations to Mr Trevelyan. I suspect he agreed to hand it over for a price. I note that Mr Findlay said in evidence that in handing over the recording to Mr Trevelyan he told the latter to be "bloody careful" which was the same expression he said had been used by Mr Gerrard at their dinner on 5 July.

348. Mr Findlay said that paragraphs 1 and 2 of the Covering Note came from Mr Findlay's original briefing note to Mr Trevelyan, but not the rest of it. It is a fact that if Mr Findlay had written all of the Covering Note, then, because of what was said on the first page especially with regard to "personal annotations" on some pages, it would follow that he had seen the Documents. Mr Findlay does not say that Mr Gerrard told him of any of the annotations at the time although, of course, that came up later according to Mr Findlay, as set out in paragraph 56 of his WS.

349. It is not possible to come to a concluded view about the truth of Mr Findlay's evidence on the key points of the August Leak unless the other witness and documentary evidence is considered but the following at least can be said at this stage: Mr Findlay was in my view capable of lying when it suited him; as he accepted he had done in relation to WB2. Second, he had a clear *animus* towards Mr Gerrard certainly by July 2012 and probably much earlier. Third, he himself would be prepared to leak if he could gain from it; that is, in effect, what he did in January 2013. Fourth, he was capable of being tempted into giving a false account that implicated Mr Gerrard because of the money he was receiving from ENRC even if sometimes he had to work very hard to receive it.

Mr Trevelyan's Evidence

350. Mr Trevelyan, too, signed an agreement with ENRC some years after the events in question. Here, it was 21 September 2017. In exchange for providing services in relation to the SFO investigation, Mr Trevelyan was engaged at a rate of £300 per hour, with £15,000 paid on account of the start. In practice he has been paid £15,000 per month. In addition, he made a further agreement with ENRC on 14 February 2019, pursuant to which he has been receiving £20,000 per month.

351. Mr Trevelyan is no stranger to leaking. As is set out in two other separate claims made by ENRC against Ake-Jean Qajygeldin (a former Prime Minister of Kazakhstan) and Mr Hollingsworth, Mr Trevelyan was admittedly involved in supplying confidential ENRC information to the former, as from 2012 and to the latter, as from 2010.

352. Mr Trevelyan's WS recounts that he was able, through Mr Hollingsworth, to get the information that it was SPJ who had leaked the information that led to the June Article, in exchange for the payment of £5,000. At around this time, Mr Findlay had told him that Mr Gerrard wanted to place material in the press to "kickstart the investigation". He agreed to ask his same contact (i.e. Mr Hollingsworth) if he could get material published in *The Times*. Later, Mr Hollingsworth said that he could assist. Mr Trevelyan went on to say that while he gave the Covering Note to Mr Hollingsworth, it would have been provided to him in its entirety earlier on by Mr Findlay via the dead letterbox. He agreed with Mr Findlay's evidence that shortly after their dinner at the hotel at Heathrow, they met at Green Park and he received the envelope from Mr Findlay and then passed it to Mr Hollingsworth later the same day.

353. At paragraphs 37 and 38 of his WS, Mr Trevelyan gives an account of events at the Chelsea Brasserie in materially the same terms as Mr Findlay, including the specific reference to "rape mode" and obtaining up to £25 million in fees.

354. His oral evidence maintained his account set out above. He expressly denied writing the Covering Note and agreed that whoever wrote it must have had sight of the Documents.

355. As to WB2, he said in evidence that he had not been involved in it. He only found out about it in January 2013 when Mr Findlay told him he had a whistleblower letter which had been sent to the SFO from someone at Dechert. Mr Trevelyan was keen to provide it to Mr Hollingsworth who was apparently writing an article about Mr Gerrard. Mr Trevelyan obtained a copy from Mr Findlay and sold it to K2, a company run by someone called Charles Carr, for £20,000. That was in addition to providing a copy of WB2 to Mr Hollingsworth. He also gave to Mr Hollingsworth a copy of the tape-recording with Mr Findlay's voice left off. In fact, Mr Hollingsworth then sold WB2 to K2 again, as it were, for £2,000.

356. In cross-examination, it was not actually put to Mr Trevelyan that, contrary to his WS, Mr Findlay had <u>not</u> told him that Mr Gerrard had initiated the August Leak. Rather it was put to

him (and he agreed) that his only knowledge of Mr Gerrard's involvement in all of this came from Mr Findlay.

Mr Gerrard's Evidence

357. Mr Gerrard's account of matters has, too, changed over time.

358. First, as to the "explosive" email, Mr Gerrard did not originally advance a positive case as to the meaning of the first part of the email, save to doubt that it had anything to do with The August Article. The email had first been referred to originally in paragraph 59B of the Re-Amended Particulars of Claim and the original response at paragraph 147B of the Re-Amended Defence merely stated that it was denied that the email was sent "upon reading" (i.e. as a result of) the June Article. However, paragraph 147B was then amended in the Re-Re-Amended Defence to say that:

> "It had occurred to Mr Gerrard when reading The Times article that the investigation into the source of the leaks could be approached from a different angle by searching for who at ENRC had been sent documents containing the phrases that had been directly quoted in the article. Mr Gerrard wanted to discuss this idea with Mr Findlay."

359. That plea was then reflected in Mr Gerrard's second WS of 26 February 2021.

360. Second, as to how Mr Findlay had ended up with the HS and PP Reports, Mr Gerrard in his first WS suggested at paragraph 101 that for the purposes of Mr Findlay's work, *"Dechert were routinely providing Mr Findlay with information material and documents"*, in other words, he would have received those reports as part of that work.

361. However, in the Re-Amended Defence dated 19 February 2021 and in his following second WS, Mr Gerrard said that he had in fact given the reports to Mr Findlay on 14 June 2011 and that emails from his PA, Ms Adams, support this.

362. Third, Mr Gerrard had consistently denied being at the Chelsea Brasserie at all on 10 August 2011. He had said so in terms in earlier proceedings (*RAK v Azima* [2020] EWHC 1686). However, in the course of the cross-examination of Mr Findlay it was suggested on behalf of Dechert for the first time that (a) Mr Gerrard <u>did</u> go to the Chelsea Brasserie on 10 August but (b) this was for the purpose of remonstrating with Mr Findlay about his failure to get all the data that was needed for the AC meeting which was going to take place later that day. However, he continued to deny using the words alleged by Mr Findlay and Mr Trevelyan or anything like them. This new point has become known as the "Row [in the sense of argument] Allegation". It was not presaged in either of Mr Gerrard's WSs or in Dechert's opening and only emerged during the trial.

363. I now turn to consider the evidence in detail.

The "explosive" email allegation

364. On the face of it, it is very odd that Mr Gerrard should have been so secretive about his idea of searching for phrases - if that is what it was. He could simply have explained to Mr Findlay there and then. And to the extent that it was suggested that the actual leaker for the June Article (whoever that was) might be put on notice somehow if Mr Gerrard made explicit his suggestion in the email, there are many other emails dealing with the investigation of that leak and searches for keywords and phrases which were completely open.

365. Second, a review of the contemporary emails gives no support to the notion that Mr Gerrard had the idea for the phrase searches. Rather they show that it was the idea of Mr Jobson, the Head of ENRC's IT.

366. Mr Jobson certainly had that idea by 23 June because on that day he asked Ms Penrice to send him a copy of the email which she had mentioned and which he said contained the leaked information, because "I would like to search on the exact words trace it through our system." Mr Jobson then took this forward with Mr Findlay, in his email of 23 June. Here, he said this:

> "yes the list of names is fine.…In addition please could you do a separate search on the email database image from early June on the following phrases (across any inbox not just the names listed). These phrases are taken from the leaked email and I want to trace who may have had or transmitted content of this email. For this search, the date range can be restricted to 1st May to 8th June. The phrases are
>
> > I think it would be very, very unhelpful
> > Just to be crystal-clear
> > What we can't be is a hybrid
> > that I do not believe that he should become chairman"

367. By 29 June, Cyntel had produced some results. See the email from Simon Lewis of that date. The point is that the list of senders and recipients of the original email would then give a list of possible leakers. That email was then copied by Mr Findlay to Mr Gerrard.

368. Mr Gerrard in turn emailed on 30 June to say that the author of the original leaked email was SPJ and that he did not recognise the names of all the recipients identified by Mr Lewis. On 1 July 2011, Mr Jobson responded to Mr Findlay who had forwarded the email from Mr Lewis and added some further information. Mr Jobson gave a list of further searches which he wanted undertaking concerning the original email and phrases within it.

369. On the face of those documents, the initiator of the phrase search was Mr Jobson. Dechert's riposte to the apparent lack of any initiative from Mr Gerrard is to say that when forwarding Mr Jobson's email to him on 23 June, Mr Findlay said that it was referring to "Operation Trojan Horse". Dechert contended that this reference shows that first the phrase search had

been given a distinct name (as opposed to Operation Judas) and that this new project was already in existence at least as a plan. However, there appears to be no prior reference to Trojan Horse in the contemporaneous documents, although Mr Findlay was inclined to agree in evidence that this expression did refer specifically to the search for phrases. This was by reference to what he had said when forwarding the 23 June email from Mr Jobson and also what he said in an email the following day to Mr Trevelyan where he made reference to Operation Trojan Horse, Operation Judas and Operation Judas 2. However, that does not really assist at all on who initiated the phrase search. Insofar as the 24 June email suggested that Operation Trojan Horse should be finished "today" that does not actually sound right because Mr Lewis's email back to Mr Findlay on the results of that search was only sent on 29 June.

370. Dechert's case is effectively that Mr Gerrard thought of the phrase search idea and communicated it to Mr Findlay on or around 8 June 2011, perhaps on one of the telephone calls, but then it was all put on ice because of, among other things, the impending AC meeting on 14 June and Mr Findlay's holiday in Scotland. However, Mr Gerrard's WSs did not refer to any delay of this kind in the phrase search (cf paragraphs 80 and 81 of Dechert's Closing). Further, in cross-examination, Mr Gerrard merely said that the search took a while but that was because of Mr Jobson's inefficiencies (Day 18/58).

371. I agree that it is true that in relation to Mr Jobson's email of 22 June which covered search terms and media representatives who may have been in contact with ENRC, Mr Findlay forwarded it to Mr Trevelyan by reference to "search terms for leak enquiry (Judas)". This was said to show that this was the "original" leak enquiry search, distinct from Operation Trojan Horse. Again, that hardly demonstrates that the phrase search was already in existence, as an idea from Mr Gerrard, before then.

372. Dechert also placed reliance on Mr Findlay's email to Ms Black on 24 July 2011 which stated that "we have the files for Operation Judas and Operation Trojan Horse on which Neil is instructed on". But again, this hardly shows Mr Gerrard had the idea in the first place.

373. It is also important to recall that the suggestion that this is the meaning of the "explosive" email was something that only emerged in Mr Gerrard's second WS in February 2021.

374. In my judgment there is no basis for this suggestion and I think it is a construct on the part of Mr Gerrard to give an innocent explanation to the email relied upon by Mr Findlay. Since no other explanation for the words used has been put forward, it remains the case that the

language and secrecy accompanying whatever Mr Gerrard was talking about is consistent with the idea of a leak which, by definition, could hardly be broadcast within ENRC or indeed Dechert.

The Taxi allegation

375. It is common ground that Mr Gerrard was with Mr Findlay in Dechert's offices in the morning of 14 June. They were due to fly to Zurich to see Mr Ammann and return to London in the evening. Mr Findlay was due to go on holiday in Scotland the following day. On 13 June, Ms Adams emailed Dechert's general office asking them to "*book taxi for Neil Gerrard for tomorrow at 11:15am from the office taking him to London City Airport"*. The following day he sent a further email as follows:

> "Can I also book a return taxi for Neil from City airport please. He will be landing at 21.05 this evening. He will want taking to SE1 and his client will then go on to SW11.
>
> I also have a package for the driver to collect from me to give to Neil when picking him up. Please can you let me know what time you need this ready for?"

376. The office responded to say that the taxi had been booked and "*you could let us know when the package is ready and I can leave it at reception, the driver will collect from there this evening…"*. Ms Adams responded that "*as the document is highly confidential can I leave it on reception at 6pm on my way home?"*. The office replied that this could be done and that the package should be left at the Dechert reception on the third floor.

377. There are then two manuscript notes from the office referring to the booking of the taxi.

378. There are also some manuscript notes made by Ms Adams. A note dated 14 June makes reference to the trip to Zürich. After a reference to 15 June and on the following page there are in manuscript the words:

> "HS + Peter + P report Cameron SW11"

with an uneven line through them.

379. The hearsay statement from Ms Adams in its material parts states as follows: she explains that her reference to "client" in the email was just a shorthand way of saying that it was someone not from Dechert. She said it was not unusual for her to arrange for documents to be taken to Mr Gerrard in a car that had been booked for him. She would put the documents in a sealed envelope, particularly if they were "highly confidential" as was the case here. The drivers knew Mr Gerrard. She would not have given the documents to a driver who was unfamiliar with this practice. Her email here would have been prompted by a request from Mr Gerrard and it was not unusual for him to rush from a meeting to a taxi and forget to take documents with him. As for the manuscript entry crossed out, she had no specific recollection of it. She said that this note and its place in her notebook was likely to have been the result of

Mr Gerrard calling her after he had left the office and asking her to send him the HS and PP reports. She said she would have made certain that it was those specific documents and no others which she left for the driver in a sealed envelope. She thought that the second part of her note which referred to "Cameron SW11" would have related to Mr Gerrard asking her to arrange for Mr Findlay to be dropped off in SW11 after being collected from the airport.

380. Dechert disclosed Ms Adams' notebook in October 2019 and the emails referring to the taxi booking in November 2020, the latter in close proximity to Mr Gerrard's first WS. As the documents were Dechert documents to begin with, Mr Gerrard would presumably have had access to them for some time prior to their disclosure. This makes it very odd that the first WS made no reference to the emails of 13 and 14 June at all. I do not agree with Dechert that this delay in making the allegation is irrelevant. It is capable of supporting ENRC's case that it was late because it was a late attempt to try and explain how it was that the HS and PP reports got into Mr Findlay's hands innocently.

381. Further, if this incident was (still) the subject of personal recollection by Mr Gerrard (albeit assisted by the documents) at trial, as he says it was, then it is also very odd that he failed to mention it to his client after publication of the August Article, which was much closer in time to it. On his case, it would clearly have pointed to Mr Findlay as possibly having made the unauthorised use of the documents he had been given a little under two months earlier, and thus being the perpetrator of the leak.

382. There are also a number of problems with why Mr Gerrard should have thought it necessary to give the two reports to Mr Findlay. The latter's role, formally at least, was limited to collecting data relevant to the underlying investigations and his assistance with the June Leak enquiry. Dechert says that the reports were necessary for Mr Findlay for when he would attend the AC on 21 June, following his return from holiday. In fact, while he did attend the second part of that meeting, the reports were discussed only in the first part from which he was excluded. Moreover, the reports had previously been regarded by ENRC as highly sensitive and confidential and yet on Dechert's case were now to accompany Mr Findlay on a walking holiday.

383. Further, on the face of it, Mr Gerrard gave Mr Findlay his personal (and only) annotated copies. On Mr Gerrard's case, he never asked for them back at any stage. This is surprising not least because Mr Gerrard was in that part of the AC meeting that discussed the reports. Dechert agrees that there were no other annotated copies retained - or at least, on their searches for the purposes of disclosure, none were found. Indeed, if Mr Findlay really needed

the reports they could have been emailed to him on a confidential basis. Other documents, including reports, had been emailed to Mr Findlay by Ms Adams.

384. Yet further, hard copies could have been given to Mr Findlay by Mr Gerrard before they went to the airport on 14 June and while he was still at Dechert's office or indeed when they were next due to meet on 20 June.

385. The alternative is that the reports were needed by Mr Gerrard for his own purposes. That is reflected in the wording of Ms Adams' email saying that the documents should go to Mr Gerrard. At one point in cross-examination, Mr Gerrard accepted that a likely explanation was that he needed the reports himself for an FRA meeting the following day although later he said that he would not have wanted to read the reports late at night. Perhaps, though, he could have read them early the following morning. FRA was certainly interested in the RTS issue which had been addressed in the HS report, as can be seen from the email from Mr Lawler to Mr Gerrard dated 24 May 2011 and the following correspondence. In that context Mr Gerrard actually asked Ms Williams at Dechert to look into the point by reference to the HS report itself.

386. The reports going to Mr Gerrard would make much more sense because he accepted that he used both reports in the period between 14 and 21 June.

387. There are other difficulties with Mr Gerrard's account:

(1) His second WS suggests that he had voluntarily provided the reports to Mr Findlay, while in cross-examination, he said that Mr Findlay had asked him for the reports;

(2) Mr Gerrard also said that Mr Findlay had been given access to the reports much earlier, in the context of making the point that he would not have been regarded as a security risk for them; but there is no record of a request for such access, nor did it feature in his second WS. Of course, if he had been given electronic access to the reports at an earlier stage, then it is hard to see why he would now require the provision of hard copies;

(3) Mr Gerrard's suggestion that Mr Findlay might have wanted the report because he wanted to explore similarities between the outsourcing to catering companies in Kazakhstan presently being investigated and a previous outsourcing to transport companies discussed in the PP report I did not find plausible; Mr Gerrard's second WS at paragraph 13 does not itself postulate any reason why Mr Findlay may have wanted both reports.

388. One then has to consider Ms Adams' note where there is a specific reference to the reports and then to "Cameron SW11". She herself did not suggest that the reference to Mr Findlay had anything to do with the two reports, rather it was referring to the instructions for the taxi to take him home. Dechert suggests that the fact that the reference to the reports is struck through means that it was a task completed which would then somehow support Mr Gerrard's account. However a review of a number of other pages suggests the opposite. There are items which are ticked which presumably suggest points which have been actioned and struck through items which chronologically would be unperformed or cancelled. Ms Adams own hearsay statement does not deal with this aspect of the matter. On any view, this piece of evidence does not assist Dechert.

389. Finally, the Taxi Allegation does not explain how Mr Findlay obtained an annotated copy of the DLA Letter which ended up in his hands. He does not suggest it was passed to the latter on 14 June. As to that, Dechert postulates that Mr Findlay may have had his own copy of the DLA Letter, perhaps because he had helped Mr Gerrard to draft it. But Mr Gerrard's second WS does not suggest this and he denied it in cross-examination as did Mr Findlay. Moreover, while that might possibly leave Mr Findlay in possession of a clean draft or copy of the DLA Letter it could not explain why he ended up with one which had been annotated.

390. There is documentary evidence showing that Mr Gerrard was looking for a copy of the DLA Letter - see the email from Ms Adams to Ms Coppens dated 30 June. While Mr Gerrard says that it would make no sense to publicise an attempted leaking of this document, that is beside the point since the request transmitted through Ms Adams here, on the face of it, was entirely innocent. As it happens, this access was sought a few days prior to the Adam Street dinner. Mr Findlay's obtaining of the annotated DLA Letter has not been satisfactorily explained. It is, however, consistent with Mr Gerrard giving it to him as part of the material for the August Leak.

391. Overall, I do not accept the Taxi Allegation as posited by Dechert. Since there is no alternative explanation, this then means that the only credible account is that given by Mr Findlay as to how and when he received the Documents.

The "should this be destroyed" note

392. On 26 June 2021, ENRC's solicitors conducted a physical inspection of the originals of files that Dechert had copied and provided to Fulcrum Chambers in May or June 2013. This was

pursuant to permission given by Dechert only recently. Previously ENRC's solicitors had received copies of the files which had themselves been copied to Fulcrum Chambers.

393. In conducting this inspection a post-it note was found, bearing the manuscript words "should this be destroyed". The post-it note was attached to a copy of the PP report which itself was in a correspondence file belonging to Ms Coppens. That file had been started while she was at DLA and was transferred to Dechert ahead of her own transfer there, but after Mr Gerrard's. It is not seriously in dispute that the handwriting on the note was that of Ms Adams. An image of the note is at paragraph 370 of ENRC's Closing.

394. The question is why this note was made. Ms Coppens said that she might have got rid of documents when she moved firm, but since her file went ahead of her this could not be the explanation. For his part, Mr Gerrard could not think of why a legal secretary would make such a note.

395. ENRC says that the obvious inference is that Mr Gerrard wanted to have destroyed his original copy of the PP (or HS) report with his annotations on, that had itself been copied and given to Mr Findlay for the purpose of the August Leak. The note had originally been attached to that copy of his and Mr Gerrard, or someone acting on his behalf, had answered the query by saying that this copy should indeed be destroyed. In cross-examination the suggestion put to Mr Gerrard was that if his own copy of the PP or HS report was retained, then it could be seen to have the same annotations as the version provided to Mr Findlay. To avoid this, he wanted it destroyed. If the copy was not there, then in response to any enquiry about the August Leak, it could legitimately be suggested that someone must have taken it i.e. someone other than Mr Gerrard. Mr Gerrard denied this suggestion.

396. ENRC's theory here is not an impossible one, but I do consider it somewhat speculative. Unfortunately, the post-it note was not dealt with in Ms Adams' WS (served on 26 February 2021) and of course she did not give evidence. I am also not sure how this fits in with the June 2013 Material allegation against Mr Gerrard (see paragraphs 1464-1481 below) and the argument about the redactions which has relevance to the August Leak (see paragraph 413 below).

397. In the end, I consider that I am not really assisted by the post-it note.

The Row Allegation

398. Mr Gerrard's case now is that he did indeed see Mr Findlay and Mr Trevelyan at the Chelsea Brasserie on 10 August, a fact which ENRC had always maintained but which, until Day 15 of the trial, Mr Gerrard had always denied. This iteration of his account was therefore so late that it does not have the benefit of any explanation of its genesis prior to trial.

399. There was no request prior to the start of Mr Gerrard's evidence for permission to elicit the allegation by means of some extra questions in examination in chief or a short supplemental WS. So it was left to ENRC to explore it in cross-examination. The core of the allegation is that by August 2011 Mr Findlay had failed to deliver on his promises over timely data collection and now he and Mr Gerrard were facing a critical juncture in the form of the AC meeting later that day.

400. In oral evidence Mr Gerrard said at one point that the conversation at the Chelsea Brasserie, when he got there, was largely with Mr Trevelyan, at Mr Findlay's request, and that there was no altercation. He could not really explain the inconsistency with the suggestion of a row.

401. Further, the notion that there was to be an impending grilling of Mr Gerrard and Mr Findlay at the AC meeting by Mr Ammann, was not put to the latter. Much was made in Dechert's closing oral and written submissions of a stream of emails said to lead up to something of a confrontation on 10 August. While Mr Findlay was understandably being pushed to obtain relevant data, there is no sign of difficulties between Mr Gerrard and himself as a result. In fact, on 28 July Mr Findlay told Mr Gerrard that he would not be able to get the education material (this refers to the "Education Allegation" addressed in paragraphs 959-960 below) before the AC which Mr Gerrard had asked him to do, while recognising that it was "Probably a tall order in the timeframe". Mr Gerrard's reply was "Rodger".

402. It is correct that Mr Gerrard was trying to get hold of Mr Findlay on 10 August in relation to the presentations to be given to the AC that day. However, the contemporaneous documents do not reveal concerns over the documentary review side of things. The AC meeting did not appear to criticise Mr Findlay or B2. Rather, Mr Gerrard said that the general lack of progress was because of SSGPO's obstruction and falsification of documents.

403. Next, Mr Findlay did in fact attend the second part of the AC meeting. It is not the case that he stayed away because of the supposed argument over his performance, which is how the matter was put to him in cross-examination. He did not attend the first part of the AC meeting

because Mr Gerrard and SPJ told Mr Ammann and that they wanted it in private. Moreover, later documents show Mr Gerrard and Mr Findlay's relationship at that stage to be cordial.

404. However, Dechert says that Mr Gerrard's account is given crucial support by a recording made by Mr Findlay of a telephone conversation between them in late January 2012 (perhaps 27 January), as already stated, unbeknown to Mr Gerrard at the time.

405. The relevant extracts from the transcript of this call are as follows, which arose in the context of a discussion about how long it would take for Cyntel to do the OCR'ing of the relevant documents from Kazakhstan and the work going to FRA:

> "CAMERON FINDLAY: Yeah, well, yeah, I also want to make sure that, you know, yeah. I would like to be there too for that Because I don't want us to be blamed because the FRA can do it three weeks quicker than us.
> NEIL GERRARD: It's bit more than that mate.
> CAMERON FINDLAY: No it's not [laughs].
> NEIL GERRARD: It is.
> CAMERON FINDLAY: I can assure you it's not.
> NEIL GERRARD: I can assure you it is. Even by Rob's own estimate, he was eight weeks from getting it all on. But we've been through this for ages, we're not going to blame anyone. I told you that in Zurich. We've just got to get this over quickly, You know, this is just not what Rob does. He's great on the imaging side, he's been fantastic but we've been, we've known we've had a problem for months and months, we've just got to get this on. Otherwise we're goanna end up being fucked…
> CAMERON FINDLAY: You know I don't understand where this months and months has come from because the meeting was on 6 December...
> NEIL GERRARD: No, hang on. You and I fell out God knows when and…
> CAMERON FINDLAY: December.
> NEIL GERRARD: ...yep…and we've been having emails, I'll go back, if you want me, I'll get the emails, the constant emails and moaning we've had on both sides for months and months. We've been worrying about…
> CAMERON FINDLAY: 6 December...
> NEIL GERRARD: No, well before then,
> CAMERON FINDLAY; No, no, the meeting took place on 6 December",
> NEIL GERRARD: No, no...which meeting was that?
> CAMERON FINDLAY: ...with Simon. Simon, Caroline and Karen...
> NEIL GERRARD: Which meeting was that?
> CAMERON FINDLAY: In Dechert's office.
> NEIL GERRARD: No.
> CAMERON FINDLAY Simon...
> NEIL GERRARD; No, what about the time way before that when we had coffee?
> CAMERON FINDLAY: And you said "don't worry about it, we'll sort it out next year". That's exactly your words
> NEIL GERRARD: When we had coffee at Sloane Square or whatever?
> CAMERON FINDLAY: Exactly, yes because Rob and I had talked about it.
> NEIL GERRARD: Yeah I know, I know mate but it's been going on for months. The concerns have been going on for months am!...
> CAMERON FINDLAY: But the meeting took place on 6 December. We've got the email records, we've got the...
> NEIL GERRARD: Look let's not get..look…OK. I tell you what I'll do, I'll go and get the email records as well and we'll put on record and…you know, why are we arguing about it? You know, you know that Rob can't and his team can't do this, we've got to get it done before...
> CAMERON FINDLAY: No, no, no, we can't do it to your timescale, there's a difference. We've got the kit, we've got the technology, we just can't do it as quickly as you want us to because at the meeting on 6 December you wanted a solution, eventually we agreed a solution which was done over Christmas, on 4 January Caroline said do the OCRing so we had to go and order the new software and we started that 10 days later...

NEIL GERRARD: You had to have an OCR .
CAMERON FINDLAY: Hey?
NEIL GERRARD: You had to have an OCR.
CAMERON FINDLAY: Well we were never told that until the 4 January.
NEIL GERRARD: . Ha, your guys are supposed to be the bloody experts! How on earth were we ever gonna get it on our system?"

406. Dechert says that on a correct interpretation of this conversation, both Mr Gerrard and Mr Findlay were referring to a "row" about data collection when they both had coffee in Sloane Square and that this was clearly the incident at the Chelsea Brasserie on 10 August 2011. However, taken overall, it looks as if the reference to the row was 6 December although the subject had been raised for some time before. Also, on Mr Gerrard's oral evidence, there was no row as such. Nor do I accept that there could only have been one occasion when they had coffee, whether in Sloane Square or somewhere else. Indeed, when Mr Onslow QC opened the case for Dechert, he made a reference to this transcript but on the basis that the row was on 6 December. In fact, the reference to "next year" in the transcript makes much more sense if the date was indeed December (i.e. close to the end of the year) and not August.

407. So I do not think that the transcript provides the strong corroboration for Mr Gerrard's account of the Row Allegation which is contended for.

408. As against all that, Mr Findlay's and Mr Trevelyan's account has always been the same as to what actually happened at the Chelsea Brasserie. Of course, they both could have put their heads together to invent this, although Mr Trevelyan says that they had actually fallen out themselves into 2014 and had only recently been in the same room together, on one day, when both were dealing with ENRC's lawyers, presumably in the context of this litigation.

409. If Mr Gerrard's Row Allegation is not correct, then, in my judgment, there is no alternative account of what he said other than that given by Mr Findlay and Mr Trevelyan. One then has to ask whether there is any reason not to accept their account if the Row Allegation is wrong. In my judgment, there is not. First, I have little doubt that Mr Gerrard could and did use words like "fuckers"; for example he referred in a conversation to Alstom as "fuckwits" and made repeated use of the word "fucking" in another of his calls with Mr Findlay. Again, in the meeting on 2 February 2012 with Mr Ehrensberger, Mr Hanna, Mr Prosper and Mr Larson, he referred to Mr Ehrensberger and Mr Hanna as "two fuckers" according to Mr Prosper and Mr Ehrensberger, and Mr Gerrard did not deny that he might have used language like that (see paragraphs 1057-1060 below). As for the shocking expression "I'm in rape mode", it is so obviously appalling that one has to question whether it is really likely that a solicitor would use it, especially in a restaurant where others might overhear. For his part, in

cross-examination Mr Gerrard indignantly denied it. However, I regret to say that Mr Gerrard, being the volatile character that he is, was in my view capable of saying it. Moreover, if the Row Allegation is not plausible, then the account given by Mr Findlay and Mr Trevelyan is the only other one. It could be, of course, that Mr Gerrard did say something else, but no one suggests that this is the case.

410. I do not consider the Row Allegation to be a plausible one.

Mr Trevelyan's evidence about Mr Gerrard as the leaker

411. Mr Trevelyan's evidence is that Mr Findlay had told him that the instigator of the leak was Mr Gerrard. That Mr Findlay said as much to Mr Trevelyan was not in fact challenged. Of course, if Mr Findlay was making up the allegation, the fact that he told Mr Trevelyan is neither here nor there. Mr Trevelyan had no independent source of knowledge. But it is hard to see why Mr Findlay would make up a story to Mr Trevelyan which wrongly implicated Mr Gerrard in the leak. I suppose that Mr Findlay might have done it to somehow protect himself if it all went wrong, by telling Mr Trevelyan falsely that Mr Gerrard had instigated the leak (not that this was put to Mr Findlay). But this does not really add up because in that event, Mr Gerrard would learn that Mr Findlay was telling a false story about him at a time when they were both getting on well with each other. It would be hugely risky for Mr Findlay to say such a thing unless it was true.

The significance of Mr Gerrard's annotations on the Documents

412. A major point advanced by Dechert is that the August Leak allegation pre-supposes that Mr Gerrard would have been so foolish as to provide, ultimately to the press, documents which had his handwriting on them. I have referred above to his handwriting on the HS report. He simply would not have been so stupid and therefore this is a powerful reason to conclude that he was <u>not</u> the leaker.

413. There is force in this point. However, not as much as Dechert contends, in my view. First there are only three instances of Mr Gerrard's actual handwriting on the HS report. While there is much underlining that I consider was his, this is obviously not as revealing as when actual words are written down. Second, I would not put it beyond Mr Gerrard that he simply forgot about his handwriting on the Documents so that he carelessly omitted to remove the markings in a further copy or find a "clean" copy to pass over. Third, on the above basis, paragraph 56 of Mr Findlay's WS does actually make some sense. It reads as follows:

> "I remember that in the days that followed this meeting, Mr Gerrard and I had a furious argument, I believe outside ENRC's offices, during which he ranted and swore at me repeatedly. Mr Gerrard told

> me that there were distinctive notes and marks on pages of the documents that had been leaked to the press that could have identified him as the source of the leak. Mr Gerrard explained that he had "worked overtime" to "sanitise" (or words to that effect) the copies of the leaked documents in Dechert's possession by removing these notes and marks. I remember saying to him "what the fuck do you think we were up to Neil?" (or words to that effect). I did not understand why Mr Gerrard was so agitated and angry at me as, when I had given Mr Trevelyan the envelope Mr Gerrard had provided me with, I had simply executed the plan Mr Gerrard and I had agreed on."

414. True it is that this passage was not mentioned in Mr Findlay's February 2018 WS. But when Mr Gerrard did discover or remember (as he must have done - see below) that his handwriting was on the HS report as leaked, he would be angry. More importantly, he might try and do something about it to protect himself. It seems that he did, because the version of the HS report sent to the SFO in June 2013 had his words on it clearly removed. It is very hard to see that anyone other than Mr Gerrard could have or had reason to redact the document in this way. This makes the evidence in paragraph 56 of Mr Findlay's WS more plausible.

415. For its part, Dechert says that this addition to Mr Findlay's evidence, not contained in his 2018 WS, shows that he was simply trying to concoct a story, designed to meet the obviously strong argument about the likelihood or otherwise of Mr Gerrard giving to Mr Findlay a document with his handwriting on it. I understand the point but disagree.

416. The Covering Note only emerged as a document relating to the August Leak when it came back in November 2020 with the other documents, from Mr Hollingsworth. In his WS Mr Findlay said that he had provided Mr Trevelyan with a brief note drawn up following Mr Findlay's dinner with Mr Gerrard on 5 July 2011 at the Adam Street Members Club. This brief note was sent to Mr Trevelyan ahead of delivery of the Documents, through the dead letterbox which they both used.

417. In evidence, Mr Findlay said that his brief note was not the same as the Covering Note which he did not write. However, he thought that the two numbered paragraphs on the second page of the Covering Note had come from his brief note. That would mean that Mr Trevelyan had drafted the Covering Note since it was not suggested that Mr Gerrard had.

418. Mr Trevelyan, however, said that he did not write the Covering Note and thought that Mr Findlay had drafted it and then provided it to him via the dead letterbox ahead of receipt of the Documents. He would then have passed the Covering Note to Mr Hollingsworth probably in advance of the Documents. He was equivocal as to whether he actually read the Covering Note the time. However, he did agree that whoever wrote the Covering Note must have looked at the underlying documents.

419. I think the truth is that Mr Findlay wrote the whole of the Covering Note and I do not see any reason to doubt Mr Trevelyan, who was more of a conduit than Mr Findlay. Also, it is noteworthy that both parts of the Covering Note (the one that Mr Findlay said did come from him and the other that he said did not) refer to Mr Vulis as "Mr Vilus" and, as Mr Findlay accepted, the only documents in the case where that error was made came from him.

420. I think that Mr Findlay was probably unwilling to accept responsibility for the whole of the Covering Note because it might be suggested that such familiarity with what was going on at ENRC could suggest that he had instigated the leak himself and/or it showed that he must have read the Documents - not least because of the reference to personal annotations.

421. Dechert makes the point that Mr Findlay could not admit to knowledge of the annotations because, if so, he would have been bound to know that any leak would come back to Mr Gerrard which would be a disaster. I am not sure that one can assume this much. After all, on the basis either that Mr Findlay was the true instigator or that he was acting at the behest of someone else, he let the documents go, knowing of a risk that they could be traced back to Mr Gerrard who, on this analysis, was not the instigator. That would surely have been an even more rash thing to do.

422. I think that the truth is more prosaic. Mr Findlay did read the Documents but does not want to admit that now. He put some instructions in the Covering Note designed to minimise the risk of the source being traced back, in circumstances where Mr Gerrard had let them go out in this form. After all, on the hypothesis that Mr Gerrard had not instigated the leak but Mr Findlay had, knowing of the annotations, the logical thing in fact would have been for Mr Findlay to make a copy of the HS report at least, with the handwriting blanked out - which is in fact what happened in June 2013.

423. In one sense, the proof of the pudding is in the eating. Following publication of the August Article, the leak was not traced back to Mr Gerrard. The first person to be accused of the leak by ENRC was Mr Findlay himself and Mr Trevelyan must have provided some information there, since his agreement with ENRC was made previously.

424. Furthermore, if it was so obvious that leaking the annotated documents would have led swiftly back to Mr Gerrard, but he did not instigate the leak, then he would surely have reported back to ENRC that he had provided such documents to Mr Findlay two months earlier and that Mr Findlay himself was the prime suspect for the leak. As already noted he did not do this. He did not even, as between Mr Findlay and himself, make any enquiries. On

that analysis, he simply stood by and let the leaker get away with it. Of course, Mr Gerrard might have been assumed to conclude that the instigator was SPJ but in fact there is no evidence that he confronted SPJ about this or reported his suspicion back to ENRC even though he knew that SPJ had been identified as the leaker of the June Article.

425. For all of those reasons, I do not consider that Dechert's point about the unlikelihood of Mr Gerrard instigating the leak because of the annotations is by any means as strong as it has suggested.

Mr Gerrard's knowledge of the SFO Letter

426. It is not in dispute that the SFO Letter was only sent by post, sometime after around 11:30am on Wednesday 10 August. Mr Ehrensberger received it on Thursday 11 August. He told the Board about it in the course of its meeting at 12 noon that day, in these terms:

> "A letter had been received from the SFO following the recent press reports on internal investigations. The letter confirmed that no action was being taken by the SFO at this time."

427. Mr Ehrensberger does not suggest that he told Mr Gerrard about it until the following week, commencing 15 August. According to the documents, Mr Gerrard certainly knew about the SFO Letter by Monday 15 August because Mr Ehrensberger had asked Mr Ammann that day by email to instruct Mr Gerrard to speak to JD about it and how to address the SFO. There is also a reference to the SFO Letter in Mr Gerrard's notebook for that day.

428. According to Mr Findlay, however, Mr Gerrard was aware of the sending of the SFO Letter on the day it was written, namely 10 August, because he referred to it at the Chelsea Brasserie. For his part, Mr Trevelyan did not recall Mr Gerrard mentioning the letter.

429. The date of Mr Gerrard's knowledge about the SFO Letter is important. If he knew about it on 10 August, it can only be because he was tipped off by someone at the SFO that it, or at least a letter from the SFO, was going to be sent.

430. It is of course possible that Mr Findlay simply got this aspect of what happened at the Chelsea Brasserie wrong, mixing up when he was told about it by Mr Gerrard - which might have been some days later on 15 August. It should be remembered here that Mr Findlay, albeit unaided by the documents or at least substantial disclosure, first said that he had met Mr Gerrard at the Chelsea Brasserie "a few days" after the August Article, as opposed to the day after. It is possible that the words used by Mr Gerrard, but denied by him, were referable to the August Article alone which itself might suggest that the SFO would get involved and so the workload would significantly increase for Mr Gerrard. However, this does not strike me as realistic. If Mr Gerrard used the words, they are more consistent with knowing that the

SFO was definitely swinging into action in some way which was bound to transform the landscape of his work.

431. On this particular point, if I was satisfied that he spoke the words alleged by Mr Findlay and Mr Trevelyan, there is no reason here not to accept that he made some reference to a letter from the SFO. That, of course, has implications for the issue of DC1 which is the next matter I address. But whether those implications run as far as a conspiracy with Mr Alderman or disclosure to Mr Alderman of all the Documents which were the subject of the August Leak, is another matter.

Conclusion on facts of the August Leak

432. In reaching my conclusion I have taken into account all the various pieces of evidence along with the general features of the evidence of in particular Mr Findlay, Mr Trevelyan, and Mr Gerrard and the unreliable features of their evidence. That now extends, so far as Mr Gerrard is concerned, to the impact on his credibility of the evidence about the Depel Interview discussed above. I have also taken into account the point that for a solicitor instructed on behalf of a client to cause a leak of the kind in issue here is extremely serious conduct which it might be thought would be almost unimaginable in the case of a straightforward competent solicitor. I regret to say that I do not regard it as unimaginable in the case of Mr Gerrard. I accept that Mr Gerrard did indeed instigate the August Leak and pass the Documents to Mr Findlay for onward transmission to Mr Trevelyan and, through his contacts, ultimately to *The Times*, essentially in the manner alleged by Mr Findlay. In so doing, and as indicated above, I reject the arguments advanced by Dechert in relation to the "explosive" email, the Taxi Allegation, the Row Allegation and the significance of Mr Gerrard's handwriting on the Documents.

433. The fact that Mr Gerrard instigated the August Leak is of considerable importance beyond that particular allegation. First, it shows that he lied continuously on this particular issue- there is no question of being mistaken. Second, it suggests that he was capable of very serious professional wrongdoing. I take that into account when I deal with all the other numerous allegations against him. On the other hand, it does not necessarily mean that in relation, for example, to each of the DCs, he would always go deliberately too far. Sometimes the way in which he communicated may be put down to his over-assertive style, his lack of preparation and/or his lack of self-control. For these reasons, each of the DCs needs to be considered carefully and objectively. After all, in many of them, what is actually said is often not in dispute; rather, it is the likely meaning and context.

The August Leak and Dechert's breach of duty

434. Accordingly, Dechert was in breach of the Core Duty and Non-Disclosure Duty and in breach of fiduciary duty. Dechert was also in breach of the Disclosure Duty in relation to its own wrongdoing. Had Dechert complied with that duty and informed ENRC that Mr Gerrard had instigated the August Leak, Dechert would undoubtedly have been sacked on the spot. All of these breaches of duty were deliberate. They can have been nothing less, on my findings above.

"OFF THE BOOKS"

435. There was an internal SFO meeting on 21 February 2013. This was to discuss the way forward with the investigation, as Sir David was not clear where it was going. During the meeting, Mr Milford asked what the team had been told by Mr Alderman and the previous senior team. Mr Thompson said that Mr McCall had told him that it was a "very messy case" and Mr Thompson should keep the investigation "off the books with no case drive."

436. Mr McCall himself gave evidence, but could not recall anything about the "off the books" instruction.

437. In addition, when forwarding Mr McCarthy's email to Mr Alderman following OM1 to say that "our tactics worked" (see paragraph 567 below), Ms Williamson said "To note on list of cases - it's a sensitive one this". I do not read too much into this. A possible investigation into, or engagement in, an SR process with a substantial FTSE 100 company, even one where there was considerable bad publicity, might well be regarded as sensitive.

438. On 16 November 2011, it was known that there was going to be OM2 on 30 November. A calendar invitation went out referring to a meeting with Mr Alderman and Mr Gerrard about ENRC. Mr Thompson thought that they may need to be more subtle if "the aim is to keep this work below the radar".

439. The next day, Mr McCall emailed Ms von Dadelszen to say that Mr Alderman wanted her to be involved in "a potential new case" which needed to be "handled sensitively and needed her complete discretion".

440. I think that all of this was about limiting the number of SFO employees who knew about the ENRC case at this early stage. This is possibly because of the fear of leaks or just because of what ENRC was (i.e. a FTSE 100 company). That would also explain the reference to

"Project X" and it might also explain the lack of a case drive at least initially. Mr Alderman and others may also have been unsure quite how to play it at the start.

441. I agree that it is a rather curious way to go about things but I do not think that it can clearly be inferred that all of this was driven by Mr Alderman and a wish to cover up his initial wrongdoing on DC1. After all, there was no record taken by him of any such contact. So it is unclear what further assistance would be gained by somehow keeping ENRC "off the books". In any event, it could not really be kept off the books and was not, once ENRC agreed to engage.

442. Accordingly, I do not think that I can treat this as separate evidence against the SFO (or against Mr Gerrard for that matter).

DOUBLE DELETION

443. I can deal with this topic briefly. ENRC alleges that Mr Gould and Mr Thompson each double-deleted some documents or emails which are of significance in this case, including, in the case of Mr Thompson, the 18 June Letter (as described at paragraph 718 below). ENRC says that this shows that they were acting dishonestly because, in effect, they were seeking to dispose of evidence which showed their wrongdoing.

444. They both deny this. They said they needed routinely to double delete, otherwise the undeleted emails would count towards the maximum quota for their inboxes. Mr Marsh supported this. There were also other emails not contentious that were double deleted.

445. In addition, of course, it would not be a very effective means of getting rid of evidence since the recipient would still have the document and it would be on the recipient's server e.g. Dechert.

446. I am not satisfied that the double-deletion here was deliberate as alleged. Moreover, in fact, as will be seen, this allegation does not actually matter, given my findings on the DCs.

THE DISPUTED CONTACTS: GENERAL INTRODUCTION

447. I should refer at the outset (as previously noted) that in relation to the claims made against the SFO in respect of the DCs numbered 4-7, 9, 10, 14, 16-21, and 23-25A, the SFO makes an abuse of process argument which, if correct, would now debar consideration of those claims by me. For the reasons set out in paragraphs 901-916 below, I reject that argument. I also reject the secondary argument that I should in any event give weight to the relevant

observations or findings by Andrews J in the Privilege Proceedings which are the foundation for the abuse of process argument.

448. On that basis, I proceed to deal with all of the DCs, so far as the SFO is concerned, in the normal way.

449. It is important to emphasise that while (mere) negligence on the part of Mr Gerrard would be sufficient to establish breach of his general duty to ENRC (albeit that ENRC puts the case higher), negligence will not do in respect of the SFO. Whether the claim is framed in inducement or misfeasance, there has to be shown, apart from anything else, a deliberate or reckless breach of duty on the part of the SFO at the relevant time. But since the relevant SFO officers must be taken to have known of their own state of mind at the relevant time, what this means is that if, for example, Mr Thompson says that he did not suspect Mr Gerrard of acting without authority when speaking to him on a particular occasion, there are only two possibilities. Either Mr Thompson is telling the truth or he is lying. There is no middle ground of being wrong but mistakenly so. If he suspected a lack of authority at the time, it is not plausible that he somehow had forgotten that fact. This is especially so for Mr Thompson who has already given evidence about a number of these matters once before, in the Privilege Proceedings. But in any event, both he and Mr Gould have lived with this litigation, and the claims made in it, for a number of years now. And to be fair to ENRC, in relation to both Mr Gould and Mr Thompson, its case is that they were indeed lying when being asked questions about their own conduct and their denials of any relevant suspicion.

450. All of that said, this does not mean that in a general sense, it is necessary to show that the relevant SFO officer behaved outrageously or disgracefully, or acted dishonestly, as if a thief. Their motive could be simply to get information which might prove useful one way or another in relation to ENRC and which might assist the SFO. I describe this as "bad faith opportunism" in paragraph 893 below. The point is that this will not matter, provided that they acted deliberately or recklessly in the relevant sense.

451. I should add that, save for any particular occasion on which it is said that the evidence showed that there was in fact actual authority for what Mr Gerrard said to the SFO, the latter did not generally challenge the evidence from ENRC that the content of the DCs said to be unauthorised was indeed unauthorised. That evidence is to be found in the WSs of Mr Dalman, Mr Ehrensberger and Mr Ammann. This is unsurprising since the key focus of the SFO's defence where a lack of authority was allegedly involved was the state of mind of the relevant SFO officer, as Mr Colton QC made clear in oral closings.

452. Some of the 8 OMs are more relevant to the claims in respect of the DCs than others. Nonetheless I have made mention of each of them in this context. They are considered further in detail in paragraphs 1071-1327 below.

DC1

Introduction

453. Paragraph 11.9 of the 2019 POC pleads that:

> "It is to be inferred from the facts and matters pleaded below that Mr Alderman had been provided by Mr Gerrard with the 2011 Leaked Material (or, alternatively, the substance of the confidential and privileged matters addressed in the August 2011 Article) prior to publication of the August 2011 Article."

454. As formulated in ENRC's closing submissions, the allegation is that Mr Gerrard had at the very least tipped off Mr Alderman in advance about the leaking of documents to the press so that a reaction (i.e. the SFO Letter) was to be expected. The likelihood of Mr Alderman getting involved in some unauthorised contact with Mr Gerrard, prior to the SFO Letter depends to some extent on the nature of what is said to have happened. In my judgment, it is more likely that Mr Alderman would engage to some extent in prior contact with Mr Gerrard if the extent of that contact was essentially to tip off the SFO as opposed to passing him the particular documents to be leaked and/or inviting Mr Alderman to join with Mr Gerrard in ramping up the enquiries into an engagement with ENRC in order, among other things, to ensure that Mr Gerrard would earn large fees.

455. It seems to me that the most likely (or the least unlikely) version of DC1 is that Mr Gerrard tipped off Mr Alderman that another article about ENRC would be coming soon with some serious content - or something along those lines. Mr Gerrard's motivation would be to pique the SFO's interest in advance and possibly to ingratiate himself with Mr Alderman. From Mr Alderman's point of view, his involvement would have been to agree to talk with Mr Gerrard and then receiving the information imparted to him. The question of what, if any, consequences flowed from this contact, if it existed, will be discussed later.

456. I therefore concentrate on this fairly attenuated version of DC1 because, having regard to all the features of Mr Alderman and his position as set out above, I simply do not consider that he would have gone so far as effectively to conspire with Mr Gerrard or to take custody of what would have been a secret hoard of documents, never to be disclosed, but nonetheless somehow to be made use of.

457. That said, I consider the existence or otherwise of DC1 by reference principally to the factors relied upon by ENRC to establish it. This is, of course, a case of inference since there is no

direct evidence of any such contact. Nor is it as if Mr Alderman gave evidence and admitted it, which, for his part, Mr Gerrard denied.

The Desire of Mr Gerrard to kick-start engagement by the SFO

458. As already noted, this was Mr Gerrard's motivation for instigating the leak. I agree that it does not follow from this that he would have needed to communicate the fact of the leak, or what it was likely to be about, to the SFO in order to get it interested. The leak itself is likely to have done that. However, I do not think it was beyond Mr Gerrard at all to have wanted to give the SFO a tipoff; see paragraph 455 above. It is in this regard that the Alstom matter becomes relevant.

Alstom

459. The email which is the direct subject of DC7 was from Mr McCarthy reporting back to Mr Alderman on Friday, 21 October 2011. The second part of that email reads as follows:

> "On a separate matter NG raised a "hypothetical" issue concerning a large multinational , who he said may have approached him, that might be upset with the behaviour of a "white collar" law firm in dealing with SFO enquiries. The hypothetical company were being advised to prevaricate rather than assist. I told NG that he should seek to speak with you personally on a hypothetical basis to discuss matters informally , (certainly before the 26th October).
> I am back in the office on Monday and happy to discuss further if required."

460. Mr Alderman queried who the company might be and Mr McCarthy replied that he thought it was "A" because of the reference to the date, which was when there was going to be a meeting with Alstom.

461. On the face of it, Mr Gerrard, as reported by Mr McCarthy, was clearly saying that the company in question had received legal advice to prevaricate rather than assist and it had approached him because it was dissatisfied with that advice being given by its current lawyers. It is all very well saying that this was "hypothetical" but I do not see how that changes the position. Of course, Mr Gerrard could have been instructed by a client to make such an initial approach to the SFO on a "no names" basis. However, it would be difficult to assume this, especially as Mr McCarthy guessed that the company in question was Alstom where a meeting had been scheduled for the following week, presumably with the existing lawyers.

462. In cross-examination, Mr Gerrard said categorically that he was not referring to Alstom and he had never spoken to the SFO about Alstom. In itself, in terms of what he had told Mr Findlay, that was unlikely because in their January 2012 recorded conversation (see paragraph 405 above) he said that he <u>had</u> been asked by the SFO to get involved in Alstom. However, in cross-examination, Mr Gerrard went further and said that the company

concerned was actually a sovereign wealth fund in the UAE which was concerned about its subsidiaries. Yet he could not recall the client's name and Clyde & Co later confirmed that there were no meetings around that time scheduled with a Dubai/UAE wealth fund. In my view, Mr Gerrard was obviously lying here and the company was Alstom.

463. In addition, this episode shows that while Mr Gerrard was keen to deny in his evidence that it was Alstom, he obviously felt no compunction about approaching Mr McCarthy and Mr Alderman in this way for some kind of "fireside chat". It is unlikely that it was the first time. Mr Gerrard must have known how Mr Alderman worked by that point.

464. It is very hard to see how Alstom could have properly agreed to Mr Gerrard having an informal meeting in these circumstances where it was far from clear that he was actually being instructed by that company. The fact that Mr Alderman did not, it seems, reject the proposed discussion outright shows that he was indeed prepared to see people like Mr Gerrard on an exceedingly informal and possibly unauthorised basis. This means that it is entirely plausible that he would have entertained a chat with Mr Gerrard back in July 2011 (which led to the tipoff) even if Mr Alderman did not initiate it.

465. On this point, the SFO has invoked paragraphs 2 and 20 of the 2009 Guidance. However, paragraph 2 simply says that there may be early engagement between the company's advisers and the SFO to obtain an early indication of the SFO's approach. Paragraph 20 is concerned with when company A might wish to obtain a view from the SFO about company B which it is proposing to acquire; see the prior paragraphs 18 and 19. All paragraph 20 says is that such matters would be very confidential and advisers may wish to discuss a possible approach to the SFO before the acquisition is made. I can see that both paragraphs 2 and 20 postulate a possible early "no-names" approach. But the question here is not about the anonymity of the client; it is where it is not clear that the lawyer making the approach is in fact instructed by that client at all, and where it is not about an enquiry as to the SFO's possible approach but the communication of privileged information.

Close relationship with Mr Alderman

466. I cannot say for sure that Mr Alderman and Mr Gerrard were close friends. But they clearly knew each other and Mr Gerrard accepted that he may have seen Mr Alderman before the August Article. The point is more that they knew how each other worked to the extent that I am sure that if Mr Gerrard wanted to see Mr Alderman for a quiet chat, Mr Alderman would readily have agreed.

Timing of the SFO Letter

467. I do find it odd that the morning after a newspaper article, the SFO was able to send the SFO Letter. The issue is not how long it would have taken to draft it. Rather it is why the SFO saw it as so urgent to send it out the following day on the assumption they had no advance warning of the August Article. Indeed, the instruction from Mr McCarthy to type up the letter was marked as "URGENT".

468. The SFO submits that the idea of investigating ENRC had been raised some time before July 2011. It refers to an email from Mr Collins to Mr Morling, Mr McCarthy and Mr McCall on 24 May 2011 after hearing Mr Joyce speak in the Commons about ENRC. It is worth citing almost all of that email:

> "He is quite right re the ownership of ENRC… His summation re the takeover of the Kolwezi mine is almost correct. The problem he has is that he is unaware of the consent SAR submitted on behalf of ENRC. Whilst other organisations may have felt there were issues and possible Proceeds of Crime implications by obtaining consent to the deal from the Met Police ENRC must have felt they had done nothing wrong, and therefore if the appropriation is ruled illegal then it is the government of the DRC who will have to recompense First Quantum.
> That is not to say that ENRC are innocent of all charges, and in respect of there actions in the DRC there are moral issues, but at present there is no evidence of criminality on their part re this deal. That is not to say that when the Bribery Act comes into force we may want to invite them in to tell us of the procedures they have in place to prevent the payment of bribes to overseas officials, but a lot of UK companies deal in natural resources in Africa.
> Re the proposed sacking of non exec directors and Sir Richard Sykes there is no evidence of criminality of a nature which would concern the SFO. This is, in my opinion, an area for the FSA to look into.
> However in view of the names of some of the MP's who were at the House and voted on a earlier motion it may be worthwhile re asserting our commitment to deal with corruption where there is evidence."

469. Taken in context, that is hardly a clear decision to approach ENRC and indeed the SFO did not do so upon the Bribery Act coming into force on 1 July. So I still find the timing of the SFO Letter odd.

470. It would be less odd if Mr Alderman already knew, before the article was published, that it was going to appear and would say damaging things about ENRC which perhaps could not be ignored. The only documentary evidence going to the timing is that, by 8:20am on 10 August, Mr McCarthy clearly knew that ENRC was going to be invited to something, because he was emailing about this to Alex Daley, being Mr McCarthy's Staff Officer. Mr McCarthy's instruction to Ms Carlyle to draft up the letter later in the morning also asked her to send a copy to Andrea Johnson who was Mr Alderman's Senior PA. The covering email for that referred to the fact that Mr Alderman had asked Mr McCarthy to invite ENRC in. It is impossible to say if and when Mr Alderman discussed the writing of this letter for the first

time with Mr McCarthy, but overall, I think its timing does suggest some foreknowledge of the article on the part of Mr Alderman.

471. Another matter relied upon by ENRC is that Mr Gould said he was unaware of how the case got to the SFO in the first place. He may have been, but then, on any view, he was not in at the beginning as it were. His involvement only really started in around December 2011. By then, OM1 and OM2 had taken place and ENRC was very much on the SFO's radar. I doubt it would have been of much concern to Mr Gould at the time exactly how the case started. So this does not take the matter much further.

472. Another piece of evidence concerning Mr Gould is that he agreed that he had heard a rumour that Mr Gerrard was the original informant for the SFO. But that was not at the time of his involvement, but subsequently. I do not think any real weight can be placed on this.

473. ENRC also made the point that the SFO Letter was surprising, not merely because it was only one day after the August Article but also because it represented something of a U-turn in the SFO's view of ENRC. The strength of this point rather depends on whether one is talking about an inclination to start a criminal investigation or something less. Despite Mr Collins' views on the former, there was still intelligence gathering going on by Mr Collins himself. Indeed, ENRC relies upon Mr Collins' continuing involvement. So in an email to Mr Morling, his manager, on 17 June 2011 he lists ENRC as one of his "big pre projects".

474. It should also be recalled that Mr Collins and Mr Alderman met Mr Joyce at Portcullis House on 20 July 2011. It is true that if this meeting was Mr Alderman's idea it could have been sparked by what Mr Gerrard told him, since by then Mr Gerrard would have known of the likelihood of an article. Nonetheless, the distinction between continuing intelligence gathering and any intention to even start to go down the road of a criminal investigation is borne out by the wording of the SFO Letter itself. Also, Mr McCarthy's instruction to Ms Carlyle about the SFO Letter said that Mr Collins should be asked to continue "his discreet, covert, enquiries…".

475. ENRC also relies on what Mr Joyce says he was told by Mr Collins when they met on 20 July, namely that the SFO had a source which was a channel for a rich vein of material from the company, and there was mention of a Kazakh whistleblower. The suggestion is that the former was Mr Gerrard who, as a source, was improperly communicating details of wrongdoing etc. to (at least) Mr Collins. The difficulty with this is that first, Mr Joyce was not a wholly credible witness**,** but in addition, there is no documentary evidence of this

source at all. Of course, ENRC argues that the absence of any document is because Mr Alderman (and perhaps Mr Collins) knew that they should not have been communicating with Mr Gerrard anyway as he was ENRC's solicitor and his communications were plainly unauthorised. Nonetheless, it is surprising that there is nothing even sketching out the information provided and if it was so sensitive, it is difficult to see why Mr Collins would tell Mr Joyce about it.

476. Even if something was said about a source, it could have been the source which provided information on 8 September 2010 during an informal interview which was recorded. Further, knowledge of the Kazakh whistleblower who wrote WB1 was extensive within ENRC. Mr Hollingsworth had himself heard about it by 5 April 2011 and it is not implausible that someone mentioned it to the SFO as well. It did not have to be Mr Gerrard.

477. I do not consider that the SFO wholly reversed its earlier position on ENRC. There was already an amount of information about ENRC, and pressure from an MP like Mr Joyce may well have heightened a sense that the SFO should do something, even though the SFO Letter itself would not be publicised.

478. ENRC also relies upon the fact that Mr Thompson and Mr Gould seem to have been kept in the dark about the meeting which Mr Alderman and Mr McCarthy had with PwC on 27 October. But that does not really go much beyond Mr Alderman (and Mr McCarthy) not keeping other personnel informed.

479. It is true that Mr Alderman was probably prepared to make judicious leaks to the press when it suited him. But it does not really show that he had embarked on a series of communications with Mr Gerrard or received actual privileged documents or assisted Mr Gerrard with his aim of kick-starting an investigation.

480. ENRC places reliance on the apparent instruction to keep the case "off the books". The evidence as to how this is said to have emerged is not straightforward and I have dealt with this generally in paragraphs 435-442 above. But in the context of DC1, it is said that this instruction must have emanated from Mr Alderman and the reason for it was to ensure that there would be no record of Mr Alderman's earlier improper communication with Mr Gerrard. But that does not make much sense. The instruction was only given in November 2011 when the case was most certainly on the books in the sense of OM1 and the notes taken of it. And if there had been an improper meeting between Mr Gerrard and Mr Alderman

much earlier, there was no record of it anyway and no evidence that Mr Alderman (or perhaps Mr McCarthy if he knew) told anybody anyway.

Conclusion on the Facts

481. In my view, the true position was this: Mr Gerrard knew Mr Alderman well enough to have a quiet chat with him. He did tell him at some point before the article that it was going to be published and at the very least said that it would contain important and damaging information about ENRC which had been leaked. In addition, Mr Alderman must have understood that Mr Gerrard was involved in the leak. That is either because Mr Gerrard said or implied as much or because it was obvious, given that he was tipping-off Mr Alderman in advance about a significant article based on leaked information.

482. Mr Alderman was thus alerted to this and in the context of other information about ENRC, although it did not justify (in the eyes of Mr Collins) a criminal investigation either then or shortly thereafter, it would justify the SFO taking a formal interest especially in the light of the introduction of the Bribery Act. Mr Alderman probably then gave thought to the writing of a letter sometime before the article was actually published. When it was published, he was ready to move. He probably told Mr McCarthy about this, too.

483. He then returned the favour to Mr Gerrard by telling him on 10 August that a letter was coming out. That explains how Mr Gerrard knew this on that day but he was hardly likely to tell anyone at ENRC then, for obvious reasons.

484. But DC1 goes no further than that. I have no doubt that, absent the tip-off, the SFO would still have written the letter although a little time later. I deal with the question of breach of duty on the part of the SFO here at paragraph 485 below and with causation on this point at paragraph 1678 below.

Breach of duty by the SFO in relation to DC1

485. In my judgment, by at least entering into a conversation with Mr Gerrard, who must at least have said he was acting for ENRC (otherwise Mr Alderman would not have understood why he was there) and receiving the information about the leak to the press, Mr Alderman acted in gross and deliberate breach of his Independence Duty. He would have known that Mr Gerrard could have had no authority to be involved in any kind of leak, nor would he have had authority to speak to the SFO about it. On my findings, Mr Alderman clearly did receive information about the leak and as a quid pro quo, he told Mr Gerrard that the SFO Letter, or

at least a letter from the SFO to ENRC, was on its way. Mr Alderman should never have dealt at all with Mr Gerrard at this stage and in those circumstances.

Breach of Duty by Dechert on DC1

486. It also follows from the facts found above that Mr Gerrard was, again, in gross and deliberate breach of duty by communicating with Mr Alderman in the way set out above in respect of the forthcoming article and the SFO Letter.

CONTACTS: DC2-DC13

Introduction

487. I turn first to the DCs which followed DC1 up to DC13. I shall deal with them chronologically and intersperse, as necessary, other relevant events. These will include in particular the various OMs between the SFO and ENRC. I then pause, as it were, to deal with the Depel Interview claim against the SFO because it is important to deal with it when it arises in the chronology. I then revert to the remaining DCs.

488. I make the following introductory observations applicable to all the DCs considered.

489. Sometimes, it will be necessary to consider one DC in the context of a later (or earlier) DC or OM. This is not merely to provide context and a sense of chronology. It is also because it assists in determining the credibility or otherwise of Mr Thompson and Mr Gould (as well as Mr Gerrard).

490. Of course, in normal circumstances and in a conventional SR process, one starts with a strong presumption that when a solicitor communicates with the SFO purportedly on behalf of his client, he is indeed acting with that client's authority. But as the whole process of engagement with the SFO here shows, this was far from a normal engagement. See the remainder of this section, the DCs considered hereafter, and the discrepancies between what was said in the DCs and in the OMs also considered hereafter. But that presumption is why the focus has been on occasions when Mr Gerrard was plainly acting without authority (or not) so far as the SFO officers were concerned (see paragraph 180 above).

491. It may be one thing if there is an isolated occasion where an SFO officer fails to spot or even suspect that someone like Mr Gerrard is plainly acting beyond his authority or against his client's interests. It is quite another if there is a series of such occasions as there was here.

492. Nor is it in dispute that the SR process will usually involve disclosure of wrongdoing on behalf of the company – indeed that is usually the start of the process, although not here. But that does not mean that the disclosures made by Mr Gerrard here and the way that they were

made was a natural part of the process. (Indeed the whole process here was not a typical one. See in particular paragraphs 141-146 above, and 996-1014 below.) To take but two examples, it is very hard to see how an SFO officer could assume that a solicitor was acting within his client's authority when he imparted information he did not know "officially" or expressed concerns about his own professional position as against that client. Equally, as I explain below, simply to invoke the concept of being "full and frank" in the SR process, without more, does not assist. See paragraph 1017 below.

493. I now turn to Mr Thompson. As will be seen hereafter, I have rejected his account of what he thought at the time in relation to Mr Gerrard's unauthorised communications at DC8-10, DC15 and DC23-24. These span the period 30 November 2011 to 28 February 2013. All of these matters bear upon each other in terms of Mr Thompson's credibility. He is obviously no one's fool. He is a Cambridge graduate and a qualified accountant and was at times a plausible and persuasive witness. However, in relation to the relevant DCs, his evidence simply did not stack up in my view and was implausible. He was plainly not as naïve as he sometimes suggested.

494. As for Mr Gould, I have rejected his account of what he thought in relation to DC13, DC15 and DC19A-20, which ran from 9 May to 20 December 2012 although he had been involved in the investigation prior to DC13. His particular problem, apart from the implausibility of his evidence in relation to these matters, was that he got far too close to Mr Gerrard as I shall explain below.

495. In addition, of course, as matters moved on, while there was between Mr Thompson and Mr Gould some friction after the former became the latter's superior, they both worked together on ENRC and both attended one of the relevant meetings together where I have rejected their accounts. It is impossible that they did not talk about Mr Gerrard and share a view of him which included appreciating or at least suspecting (but doing nothing about it) that he sometimes acted out of line, as it were.

496. The upshot of all of this is that in rejecting their accounts I consider that they were lying.

497. I should also deal here with a point which Mr Gerrard often made when dealing with particular DCs and the question of authority to say or impart what he did. Indeed, it became something of a mantra. This was that he had ENRC's authority to "manage" the SFO as he thought fit. However, there is no clear evidence of any such authority having been given in such wide terms and secondly, it is not clear, on analysis, what it means. It could mean a

degree of discretion as to what or what not to say, or what strategy to adopt in respect of the SFO, at any given time where all of those matters would have been authorised. That is one thing, but it could not encompass saying (and I think this was Mr Gerrard's case) something which on its face was not in ENRC's interests and which he could not have had authority to say. He could not possibly have genuinely thought that ENRC was empowering him to do that, especially in the absence of any express indication and especially where the thrust of ENRC's own, plausible, evidence was that it did not do so.

498. I therefore do not, in any particular instance, consider that if Mr Gerrard was otherwise in breach of duty (including being reckless or deliberate), he can be saved by some supposed general power to manage the SFO in any way he saw fit.

499. There might even have been times when, somewhat perversely, Mr Gerrard actually believed that some ultimate interest of ENRC might be best served by him persuading the SFO that they could trust him as ENRC's lawyer and effectively a negotiation partner, and was halfway to being "one of them" precisely <u>because</u> he was prepared on occasion to "tell tales out of school", and thus it would assist him to deliver for ENRC a beneficial result which would be the avoidance of a criminal prosecution after a perhaps lengthy SR process. But if he had that sort of motive, it cannot excuse him either, because he would still have known that he had no actual authority and that when he actually said something that was at that point clearly against his client's interests he knew it was so, or was recklessly indifferent to that.

500. Furthermore, as already noted above (and see below), I do not believe that any such motive was wholly "pure" in any event. It was tainted by Mr Gerrard's desire to fuel the work that needed to be done and also a separate desire to ingratiate himself with the SFO for personal reasons, unconnected with ENRC.

501. Many of the DCs require consideration of the meaning of the particular words used. But that does not mean over-interpreting them. They should be looked at objectively, and not speculatively, and in fact their meaning is often obvious.

502. Much has been made of the fact that, especially under Mr Alderman, the SR process could be relatively informal. Further, it would involve the disclosure of criminal wrongdoing on the part of ENRC. However, that cannot override a breach of duty on the part of a solicitor communicating information without authority. Moreover, part of the problem here was the nature of the actual engagement undertaken by ENRC. I have discussed this in detail in paragraphs 920-1070 below.

DC2: Telephone call between Mr Gerrard and Mr Alderman in week commencing 29 August 2011

503. As at 25 August, it would appear that Mr Ehrensberger had not yet decided who would attend OM1 on 3 October. However, according to Ms Black's notebook, Mr Gerrard told her on about 25 August that he had been instructed to have a "private meeting" at the SFO with Mr McCarthy (the author of the SFO Letter) or someone else, to find out what other areas of interest to the SFO there might be.

504. Mr Ehrensberger was asked about this in cross-examination. He said that it had been discussed that Mr Gerrard should at some point get in touch with the SFO prior to OM1 subject to Mr Ehrensberger deciding who should attend OM1. At that point, Mr Gerrard was not dealing with Africa, only Kazakhstan. It was thought to be probably a good idea to find out in advance the areas on which the SFO wanted some elaboration from ENRC. Whether Mr Gerrard would actually attend OM1 was a different matter. Mr Ehrensberger then accepted that Mr Gerrard had nonetheless been asked to have a private meeting to find out what the SFO was interested in. I do not think much turns on the use of the word "private" here. It really just meant a meeting between the SFO and Mr Gerrard alone. Mr Gerrard's own evidence that he had been instructed to request a "pre-meeting" was not itself challenged.

505. I think that Mr Gerrard then wanted to speak to Mr McCarthy to arrange such a meeting. The documents show that Mr McCarthy was in fact away that week and Mr Gerrard spoke instead to Mr Alderman, as Mr Gerrard agrees. On 5 September, Ms Johnson emailed Mr McCarthy to say that Mr Alderman wanted the latter to contact Mr Gerrard to come in for a meeting with them both regarding ENRC. Mr McCarthy, for his part, said in his reply that he did not know what Mr Gerrard had to do with ENRC. There is nothing surprising in that. First, Mr Alderman may not have informed Mr McCarthy of DC1. Second, ENRC would not have told Mr McCarthy about the status of Mr Gerrard if it had not even been decided whether he would attend OM1.

506. Mr Gerrard's evidence as to what was said in his call with Mr Alderman is unsatisfactory because he contradicted what he had said in his WS to the effect that he was to approach the SFO to find out what it was concerned about. In evidence he said that was a "ridiculous" suggestion. Nonetheless, that does appear to have been his instruction.

507. All ENRC could allege here was that while the contact was itself authorised, it should be inferred that Mr Gerrard took the opportunity to disparage ENRC in that call. That is pure

speculation in my view even on the basis, as I have found, that a version of DC1 occurred. Moreover, not much of note appears to have happened, since all Mr Alderman did was to say there should be the meeting referred to above.

508. Accordingly, in my view, there was no breach of duty either by Dechert or the SFO in relation to DC2.

Mr Gerrard and Jones Day

509. At this point in the chronology, it is necessary to say something about Mr Gerrard's views about JD. In July 2011 and following his (re)-appointment as General Counsel, Mr Ehrensberger engaged JD to give strategic direction to ENRC's response to the coming into force of the Bribery Act.

510. In a meeting on 25 July, Mr Gerrard told FRA that JD was not experienced in the Bribery Act area and ENRC had given itself problems by asking JD for a report on it.

511. On 15 August, Mr Ehrensberger agreed with Mr Gerrard that both firms should work together and that Mr Gerrard was authorised to share progress on the internal investigation with JD.

512. On 16 and 17 August, Ms Territt sent draft responses to the SFO Letter. At this stage, of course, neither firm had been instructed to deal with the SFO specifically, as the latter had only just become involved.

513. On 18 August, Mr Gerrard told an internal Dechert meeting that JD were "encroaching" and were "interfering" on [the] education [allegation] (this refers to the "Education Allegation" addressed in paragraphs 959-960 below). He also said that Mr Richards would try to take control. On the same day, Mr Ehrensberger told Mr Gerrard that at the meeting with the SFO to be arranged, he would take Mr Gerrard and probably JD, as they were the main advisers on compliance systems.

514. On 1 September, Mr Anderson instructed Ms Adams to draw up a letter to come from Mr Ehrensberger to confirm that Mr Gerrard was instructed to discuss the affairs of ENRC with the SFO; however, no such letter was ever signed by ENRC. The next day, Mr Gerrard is recorded as saying to FRA that Mr Ehrensberger appeared to want Mr Gerrard to run the SFO engagement and the investigation, with JD dealing with the compliance side.

515. By 6 September, it seems clear that both Dechert and JD would attend the forthcoming meeting with the SFO which became OM1.

516. On 8 September, Mr Gerrard met with Mr Ehrensberger and JD to discuss preparations for OM1. Mr Richards' note recorded that Mr Gerrard thought there would be increased concern if he was not at the meeting.

517. On 20 September, Mr Gerrard told FRA that JD had considered the report i.e. the Internal Audit report on the Education Allegation (see paragraphs 959-960 below), and did not see an issue since the scholarship was a one-off payment or the payments had been stopped. Mr Gerrard questioned how they knew that, and who had sanctioned it, and might there be fallout accordingly. He thought that JD were not going through the process of investigating but rather the process of "neutralising". He later said that they were not independent, Camrose was one of their deals, and questioned if there had been any due diligence and he was "very uncomfortable". In fact, there had been extensive due diligence or at least there was due diligence in the Camrose Due Diligence document referred to above. In addition, EY conducted financial due diligence and SRK Consultants carried out technical due diligence.

518. As will appear hereafter, Mr Gerrard continued to seek to sideline JD for no good reason, in my view, other than to ensure Dechert's control of the investigation.

519. I now turn to DC4 as DC3 has been abandoned as an allegation.

DC4: Meeting between Mr Gerrard, Mr McCarthy and Mr Alderman on 26 September (P)

520. This was the meeting whose planning is referred to in paragraph 503 above. The meeting itself was therefore authorised. There are two elements to the evidence of what was said or discussed at this meeting. The first is contained in Mr Alderman's own note which reads as follows:

> "Neil Gerrard
> Represent Audit committee
> Africa
> Jones Day too close
> PwC—auditors
> If they go offshore it will be [because] of [possibility] of [increased] o/sight by NEDs
> DoJ involvement. US Citizens are directors/NEDs.
> V Russian culture. They need to understand big problem."

521. The second is the notes taken (at some point) by Mr Gerrard, purportedly of, or in relation to that meeting. This note said:

> "- Company within our sights
> - If prepared to move in right direction
> - doesn't matter bad
> - " problems
> = Must be genuine - chances of a
> raid high
> - people talking
> about Africa

-
Must build confidence or ??
- This is not a threat → cooperation with DoJ.
- range of issue re Africa
- issues pre date article.
- Advisors"

522. I deal with the first note first. As a preliminary point, I consider that this was Mr Alderman's note of what Mr Gerrard told him, not what he told or suggested to Mr Gerrard. The latter possibility does not seem to me to make much sense and the note is drafted as a record of what Mr Alderman and Mr McCarthy heard as opposed to, for example, any action plan on the part of the SFO.

523. As for the phrase "Jones Day too close", ENRC suggest that this was plainly damaging to ENRC's interests and in effect was criticising its own lawyers in a way that could not have been authorised. This was of course reflecting some of the things that Mr Gerrard had already been saying about JD though not directly to ENRC. I am quite sure that he was keen to plant the seed of doubt in the minds of the SFO at an early stage, because, whether there was anything in the point or not, he wanted to ensure that he would have control over the engagement with the SFO. After all, as this was meant to be nothing more than an introductory conversation, to get some idea of what the SFO was really interested in, it is very hard to see why he needed to mention JD at all. What he said about them was particularly damaging to his client's interests if JD were later to attend SFO meetings (as indeed they did, as Mr Gerrard must have known was likely or possible). It was also plainly confidential, if not privileged, information that (if true) they were too close on the basis that he was suggesting that he had already so advised, as ENRC's lawyer. Accordingly, this was a serious and reckless breach of duty on his part.

524. There is a telling reflection of this in the recorded January 2012 telephone conversation between Mr Gerrard and Mr Findlay. Mr Gerrard at one point says that the SFO is:

"…not happy with Jones Day.
CF: Why..is this incompetence or...?
NG: No no, I think they..they think they're too close to the company.
CF: Which is probably true.
NG: Which is true. Er I assume…"

525. It was, however, Mr Gerrard who had planted that seed of doubt in Mr Alderman's mind rather than the other way round.

526. So far as Mr Alderman is concerned, he must have appreciated that Mr Gerrard could not possibly have been authorised to say this about other lawyers involved with ENRC.

527. The next sentence complained of, about going offshore, is also damaging. The implication is that at some point, the operations and/or assets of ENRC would or might move out of the jurisdiction. For his part, Mr Gerrard "doubted" that he made this statement but I see no reason why Mr Alderman would have noted it if he had not. I reject the suggestion that it was a comment that the latter made to Mr Gerrard.

528. Both the SFO and Dechert say that, even assuming Mr Gerrard had said this, it could not possibly have been, or be presumed to have been, a statement plainly against ENRC's interests and thus unauthorised. That is because there had been reports in the press about such a move to a "lighter touch" regime; see, for example, the article in *The Times* on 8 June. Dechert adds (as Mr Gerrard said in evidence) that it would have been positively sensible to refer to this because it was "out there" and should be confronted. I do not accept these points. The fact that something is reported by the press is one thing; for the SFO to be told by the solicitor acting for the company, who can presumably be taken to have inside knowledge, is quite another. As will be seen, this point about press coverage recurs in other instances of alleged breaches of duty and my observation here applies there, too. Second, the fact that information about some aspect of ENRC's activities is "out there" does not mean that it is necessary to refer to it especially at what was, in fact, the first authorised substantive meeting.

529. In addition, the remark should not be seen in a vacuum. It needs to be seen in the context of the other remarks about "DOJ involvement" and the "big problem" both of which, in my view were designed to arouse the interest of the SFO (see below).

530. I consider that Mr Gerrard was clearly in breach of duty by making this remark for which there was no authority. I also consider that he made it in order to pique further the SFO's interest and it was thus made in bad faith. Finally, in this respect, these were breaches which were knowingly or recklessly committed by Mr Gerrard. Even if he had not pre-planned the remarks in advance, and simply got carried away, this makes no difference because he must still have been aware of the breaches.

531. As for the SFO's breach of duty, I have already rejected a point based on existing coverage in the press. It is also said that because Mr Gerrard was instructed by the AC, as he had said, Mr Alderman could (and did) assume that everything said by him purportedly on behalf of his clients was authorised. However, (a) that is not necessarily an answer where the nature of the statement appears plainly contrary to the client's interests and where, if it had been authorised, one would have expected the statement to make that clear, (b) whatever the

reason, there is no evidence from Mr Alderman (or Mr McCarthy) as to what they thought and (c) on the basis of DC1, Mr Alderman knew that Mr Gerrard was the sort of person who was capable of going behind his client's back in a serious way.

532. Especially when taken with the other statements (see below) I consider that Mr Alderman knew that this statement was not authorised and that he should not be recording it (for future possible use) or engaging with Mr Gerrard about it and he was therefore in reckless breach of the Independence Duty at the very least.

533. One then turns to the reference to the DOJ and the US citizens who were also directors of ENRC. First, it appears that this was untrue. Second, I have little doubt that Mr Gerrard, again, said it to "up the ante" and make the SFO think that if the DOJ were involved, the SFO should be, too. Mr Gerrard accepted that he made the statement but could not remember who brought the subject up. However, in the context, I am quite sure that he raised it. This is a further breach of duty on the part of Mr Gerrard not least because what he said appeared to be untrue.

534. As for Mr Alderman, I think that he, too, must have been aware that Mr Gerrard could have had no authority to say this. It was imparting information which, as far as Mr Alderman was aware, must have been new. Mr Alderman could not already have known about it since it was false. On the face of it, it is simply volunteering further damaging information about ENRC. So this is a further breach of duty.

535. I should add that the fact that the SFO and DOJ may liaise in their work in appropriate circumstances or that AF had separately advised ENRC to engage with the DOJ does not in any way justify Mr Gerrard telling a story as he did here with the only conceivable motive being to arouse the SFO's interest.

536. Finally, there are the references to "very Russian culture" and a "big problem". I, of course, accept that the role (and criticism of) the Founders in ENRC was well known. But again, that is not the point. This is ENRC's own lawyer telling the SFO effectively that those running ENRC still failed to understand that there were serious problems about its governance and operations, the implication being that they would continue as before. It is telling that while Mr Gerrard accepted that he made the statements, when asked by me about the reference to a "big problem" he said that he could not explain it. In my judgment, the remark was designed to interest the SFO in engaging with ENRC so as to make it understand that it had a real problem. That might have been a useful tip or piece of advice for the SFO, but it is very hard

to see how it could legitimately come from its own lawyer. Dechert suggests that it must have been implicit in Mr Gerrard's instructions from the AC that he should communicate the fact that ENRC (now) accepted that it had to address a big problem i.e. to show the SFO that it was sincere. However, that is not what he said; he said there was a culture which did not understand that there was a big problem.

537. Once more, there is plainly a breach of duty on the part of Mr Gerrard. And again, it is hard to see how Mr Alderman could have thought Mr Gerrard was authorised to make those remarks; I find that he knew they were unauthorised or was at least recklessly indifferent to that possibility. So he was in breach of duty, too.

538. I should add that according to Mr Ehrensberger, Mr Gerrard did not report back to ENRC any of the remarks in question. Mr Gerrard himself said that he probably did not report back the "big problem" remark. Moreover, none of these remarks are consistent with the aim of the meeting being (as ENRC saw it) to get an indication of the SFO's concerns.

539. In relation to all of these matters, there may be a question as to what, if anything, the SFO actually did with this information. That is a matter of causation and loss - and possibly an issue going to declaratory relief. But in my view, the taking and recording of the information is sufficient to entail a breach of duty for the purpose of misfeasance.

540. I now turn to the second element of DC4 which is Mr Gerrard's note. Although Mr Gerrard said that he took the note in the course of the meeting, I think it more likely that it was done afterwards. This is because he also said in evidence that it was his "takeaway" from the meeting - in other words what he understood was being communicated to him by the SFO. I think that this note was more of an aide memoire for Mr Gerrard in terms of what he would report back to, or tell ENRC.

541. As for the reference to "chances of a raid high", on Day 40 and following earlier evidence given by the SFO witnesses, it was suggested that ENRC be permitted to amend its case to allege that, while ENRC had originally not admitted the truth of Mr Gerrard's note as a record of the meeting the true position was as follows: (a) Mr Alderman had said those words but purely as a bluff, but with the intention that Mr Gerrard would note the remarks, even though the latter knew they were a bluff, (b) while Mr Gerrard knew they were a bluff the fact of Mr Alderman saying them enabled Mr Gerrard to say that he had made a genuine note and (c) then later to scare the clients into further action (leading to more fees).

542. For a variety of reasons, not least the highly speculative nature of this proposed amendment, I refused it on Day 40.

543. By the time of written closings, ENRC had reverted to the position that Mr Alderman had not in fact said these words, not least because they could not have been true at the time. Mr Gould and Mr Thompson had both said in evidence that there was no high risk of a raid then and if there had been, it would have been odd for Mr Alderman to announce that fact. Even Mr Gerrard at one point accepted that the SFO were not that far along. In my judgment, this was part of the context for Mr Gerrard to ramp up the threat of a raid falsely, again to increase the scope of his likely work or at least the present threat from the SFO.

544. All the breaches of duty identified here by Mr Gerrard and the SFO were at least reckless.

545. The postscript to DC4 is the fact that Mr Gerrard met Mr McCarthy the following evening for a meal at an Indian restaurant in Bermondsey. He claimed expenses for it from Dechert at the time although ENRC did not know about it. ENRC says that it is a safe inference that Mr Gerrard will have besmirched ENRC on that occasion. I do not regard that as a safe inference. I think Mr Gerrard used the occasion as an excuse to get to know Mr McCarthy better and probably to ingratiate himself with him and the SFO. Immediately following a formal meeting with the SFO and ahead of others, it was a highly inappropriate thing to do. But that is as far as it goes on the evidence I have before me.

DC5: Telephone call between Mr Gerrard and Mr McCarthy on 30 September (P)

546. On 30 September, Mr Gerrard spoke to Mr McCarthy. There is no evidence that he was asked to make the call and he took no note. Mr McCarthy did, and it reads as follows:

> "Friday 30/9/11—11.30am
> Client knows he came to see SFO!
> Told them it was serious/concerns.
> Various factions in company.
> Aware of SAR's. Dan Gertler? Yes.
> Shaun Richard—Jones Day/Herbert Smith acting? Friction between the two.
> Neil—Audit Committee—proposes to play it low key. (may not want to do the business review).
> I believe it ought to be for Audit Committee. Independent law firm required. Agrees.
> Ask Neil to explain his areas of concern what does he want to express."

547. The obvious inference from the second line is that Mr McCarthy (at least) had thought that what had been said at DC4 had not been, or might not have been, authorised by ENRC although the meeting itself was, as we know. That would fit with the SFO's reference to it as "private". I do not accept the SFO's suggestion that this remark meant something entirely different - see paragraph 7(1) of Appendix S to its Closing. Those are unrealistic interpretations. The SFO says that I should give it the benefit of the doubt since Mr

McCarthy was not called. That is not an answer since the SFO could, in the event, have called him. Anyway, the meaning remains clear.

548. A further suggestion is that if there had been any doubt in the mind of Mr Alderman (or Mr McCarthy) about whether information passed to them in DC4 was authorised, this statement would reassure them they were authorised. I do not accept that. Mr Alderman was quite capable of understanding the difference between Mr Gerrard attending a meeting with the authority of his client and "speaking out of turn" as it were. I do not think that anything said by Mr Gerrard in DC5 removed any prior breach of duty by the SFO, or its effect.

549. As for "told them it was serious/concerns", I agree that this could be innocuous. It could be Mr Gerrard doing no more than passing on to his client the fact that the SFO had said that the matter was serious or that it had concerns, so doing little more than conveying a message. As such, it might not be privileged information or at any rate, depending on what he told his clients, the client was impliedly authorising him to let the SFO know that he had told them. This could be so, even though there was no evidence of him noting the SFO's concerns in terms, in contrast to his reference to the high chance of a raid.

550. But in my view, the expression reads as something else. It reads as Mr Gerrard telling the SFO that he thinks the situation is serious and he and/or the SFO have concerns. If so, that is plainly a privileged communication. It is an example of a trend in his dealings with the SFO where Mr Gerrard seems not so much to be acting for ENRC and "against" the SFO (albeit within the confines, initially, of an SR-related process) but rather as some kind of middleman or intermediary between the two. I consider that Mr Gerrard was clearly in breach of duty in making this statement. The fact that at the subsequent OM1 on 3 October, Mr Ehrensberger says that ENRC took the SFO Letter seriously, does not alter the position.

551. Equally, I consider that Mr Gerrard's remarks about factions within ENRC and friction between lawyers was clearly not in his client's best interest because it simply undermined ENRC in the eyes of the SFO and suggested that it was a split company. This was more influential, as a piece of information, than a press article or even a well-publicised resignation.

552. I am less clear about the two lines referring to the AC. I think the first line is recording what Mr McCarthy understood Mr Gerrard was telling him about what the AC was thinking. The second line is not, in my view, recording what Mr Gerrard thinks should be done, rather it is

Mr McCarthy's view of what should be done. Although it is perhaps innocuous, I do not agree that ENRC must have authorised, or did, authorise Mr Gerrard to say these things about the AC's thinking. That is especially so when ENRC did not know that he was going to be speaking to Mr McCarthy at this point. To that extent, Mr Gerrard was acting in breach of duty.

553. However, in relation to the references to the AC, I do not think that they were obviously unauthorised and/or against the client's best interests as perceived by Mr McCarthy, or if it was known, that this was likely to damage ENRC's interests. Accordingly in this particular respect I do not see any breach of duty on the part of Mr McCarthy.

554. However, on the statements about "serious/concerns", factions and friction, I think that Mr McCarthy must have known that the client would not have authorised this especially when they are taken together. Of course, Mr McCarthy is not the subject of any alleged breach of duty and Mr Alderman was not present at the meeting. However, ENRC says that Mr McCarthy must have informed Mr Alderman of the call and the contents of the note and as such the latter was in breach of duty in receiving and retaining that information (see paragraph 559.4 of its Closing, and as acknowledged by the SFO in oral closing at Day 46/105-106). Due to the absence of Mr McCarthy and any express document, there is no direct evidence on this. However, it is a fair inference, and I accept, that Mr Alderman did learn of this call and its contents. He must have appreciated (to the extent I have found Mr McCarthy did) that Mr Gerrard was again speaking without authority and/or against his client's interests, or at least was reckless as to this.

555. As will be obvious from the facts here, all of the breaches of duty found in relation to Mr Gerrard were at least reckless.

556. For the avoidance of doubt, I should add that in relation to DC5, DC6 and DC7, the fact (as I have already acknowledged) that ENRC makes no positive claim against the SFO through Mr McCarthy himself, as it were, does not affect its ability to make the claim against Mr Alderman on the basis of information received from Mr McCarthy (see paragraphs 217-218 above). Nor does it affect my finding that Mr Alderman's state of mind as to the relevant information was the same as Mr McCarthy's (see paragraphs 554, 575 and 582 above and below). Further, and as already noted, the SFO could have called Mr McCarthy if it wished, but did not do so.

OM1

557. It is necessary here to interpose the fact of the first "open" meeting between the SFO, ENRC and its lawyers. It took place at the SFO's offices, then at Elm House, on 3 October 2011. Present were Mr McCarthy, Mr Alderman, Mr Ehrensberger, Mr Gerrard and Mr Richards. For present purposes it is sufficient to refer to the note of the meeting by Mr McCarthy. I set out the material parts of that note as follows:

> "BE stated that ENRC had taken the letter from SFO very seriously and that the Board were keen to ensure that as a Company they are fully compliant and that governance is properly applied across the group. The tone from the top is very serious. They discussed the issues at the Board meeting last week, which was also raised with the Audit Committee…
>
> BE made it plain that he had only accepted the position if he could be sure that he had the full support of the board and that compliance matters were transparent…
>
> Sion Richards (SR) stated that ENRC had asked Jones Day to undertake a full review of the company. They had been asked to focus on BA 2010…
>
> The SFO invited Neil Gerrard to explain his role (NG). NG confirmed that he was appointed by the Audit Committee as part of their investigative policy. He was initially engaged following a whistleblower (anonymous) covering a number of areas.
>
> A forensic analysis is taking place. They were reviewing a number of emails and DPA issues in Kazakhstan. They had been undertaking interviews and NG was looking to close enquiries in November. He will report to the company around his findings and the company were concerned about what exactly the SFO were worried about and where its focus was centred…
>
> The SFO made it clear that if the company were to make a self disclosure it would be able to manage its discussion with the US Department of Justice…"

558. ENRC contends that there were discrepancies between how matters, or individuals or firms, were described here, as opposed to how they had been described in (as I have found them)DC4 and DC5. ENRC says this, in part because Dechert and the SFO had contended that broadly speaking, what was said earlier corresponded with what was now said at OM1. The SFO makes some general points here. First, it said that the notes taken of DC4 and DC5 (but later ones as well) were often very brief and might not give the full picture, which only emerged at the OMs. I see that but I do not think one can generalise. There may be a clear discrepancy which cannot be explained away like that. Secondly, the SFO submitted that matters referred to at a DC might later be updated at an OM (or vice versa). That is possible, but again, it is difficult to generalise.

559. The first alleged discrepancy here concerns the role of JD, presented at OM1 as the firm doing a "full review of the company"; compare the previous references in DC4 and DC5 to JD being "too close" and "friction". I think there is a tension here. The SFO says that the difference is explicable because JD is being asked to do something different here, namely a review in relation to ENRC's governance etc, not its past dealings in Africa. However,

looked at objectively and in particular from the perspective of the SFO, it looks odd. And the review going forwards would include Africa anyway.

560. The second alleged discrepancy concerns DOJ involvement and the previous reference to it in DC4. I do not think there is anything in this, because the SFO said at the meeting that it could manage ENRC's discussions with the DOJ if it engaged in self-disclosure. That assumes that there was or might be DOJ involvement.

561. Next, I think there is a tension between Mr Gerrard's references in DC4 and DC5 to his advising ENRC that he had serious concerns and that it needed to understand the "big problem", and the statement at OM1 that, while there were active investigations following WB1, it had not yet been determined whether there was any substance to it (though this was in fact true). Equally, there is a tension between Mr Ehrensberger's reference to the "tone from the top", with ENRC as a whole taking all of this very seriously at Board level and at the AC, along with him saying that he only accepted the position of General Counsel if he had the full support of the Board and with transparency in compliance matters (suggesting that this was indeed so), all compared with what Mr Gerrard had said previously.

562. Finally, it is said that it was a "charade" for Mr Gerrard to be asked to explain his formal role to the SFO when in effect they already knew what it was. That might be true if both DC4 and DC5 were unauthorised meetings. But as a meeting, DC4 was authorised expressly by ENRC. It could therefore be expected that Mr Gerrard would at least say that he was acting for ENRC. Given that, and that at the forthcoming OM1, the SFO would naturally want a full description of his role, I do not see this as a meaningful discrepancy.

563. The discrepancies which I have found indicate the significance of Mr Gerrard's prior statements to the SFO in terms of them being in breach of duty, because it shows how he was saying something different in a "public" forum. So it is additional evidence against him.

564. As for the SFO, I do not consider that there was a separate breach of duty in it not mentioning the earlier contacts or in not correcting the impression they had previously been given, assuming what was said at OM1 was correct. The SFO was not acting for ENRC, Mr Gerrard was.

565. However, on the basis of OM1, I consider that Mr McCarthy and Mr Alderman must have had a heightened sense (going forwards) that Mr Gerrard was someone who indeed might say things to them which he was not authorised to say and which were not in his client's best interests.

DC6: Telephone call between Mr McCarthy and Mr Gerrard on 7 October 2011 (P)

566. On 6 October, Mr Ehrensberger wrote to Mr McCarthy and Mr Alderman to say that he would discuss the matters raised at OM1 with the Board and senior management at ENRC and its advisers, and would revert to the SFO "shortly". Mr Ehrensberger also authorised Mr Gerrard to contact the SFO to find out how they thought the meeting had gone.

567. On 7 October, there was a telephone call between Mr Gerrard and Mr McCarthy. Following that call and on the same day, Mr McCarthy sent an email to Mr Alderman as follows:

> "I have just spoken to Neil G and he has confirmed that our tactics worked and the main Board are to meet early next week and company will make a voluntary disclosure to us next week. The voluntary disclosure will come through Neil G acting independently of Jones Day (who were originally asked to do the compliance review as explained when we met them) on behalf of the audit committee and main Board.
> A full forensic audit of the Books and records will be undertaken. Neil G has said that he would like to talk about the work going forward and its structure, after next week, particularly once he has a clearer picture. He indicated that there were lots of red flags and 'lots to tell'"

568. Mr Alderman's response was "excellent" and then a few minutes later, he emailed:

> "But don't forget the public statement of commitment by the Board."

569. Mr Gerrard's only written communication to ENRC about the telephone call was his email to say that the meeting "was a good discussion and achieved our purpose." He then briefed Mr Ehrensberger about it the following Monday. Neither he nor Mr Ehrensberger could recall exactly what he said, although he accepted that when reporting to Mr Ehrensberger he might not have used the language actually used in his call with Mr McCarthy (as recounted by Mr McCarthy in his email). I am sure that he did not.

570. On 10 October, Mr Gerrard also told JD that he had discussed with Mr Ehrensberger a call he had had with Mr McCarthy and that (I infer) the SFO were comfortable with the meeting. Mr Ehrensberger wanted to emphasise that he wished to do the right thing and they were happy with that. Mr Gerrard may well have made that last point to the SFO which, by itself, is innocuous enough.

571. As to the actual content of Mr McCarthy's email, I refer first to the point about "our tactics worked". I agree that this was probably a reference by Mr McCarthy to the SFO's tactic of sending the SFO Letter, saying what it did at OM1 and so on, in order to get ENRC to engage with it. Confirmation by Mr Gerrard of the SFO's tactics does not seem to me to be a breach of duty on his part, and it was not unlawful for the SFO to record that.

572. As for the references to a voluntary disclosure "next week" and the disclosure coming through Mr Gerrard and the audit of the books, Mr Ehrensberger said that these remarks were

not authorised and indeed formal decisions in that regard had not yet been taken. It may be that not much turns on this (and indeed a more detailed picture was presented at DC7) but Mr Gerrard was clearly going further than instructed and he must have known that. Mr Gerrard's response to this in cross-examination was to invoke the notion of being entitled to "manage the SFO as best I could". That does not assist, in my view. Here, Mr Gerrard was telling the SFO that the Board was to meet and that there would be voluntary disclosure the following week.

573. As for reference to red flags, it is said that this was innocuous, since Mr Richards had already referred to them (without objection from Mr Ehrensberger) in OM1. That is true, but context is everything. To say that there were lots of red flags and also "lots to tell" implies that Mr Gerrard had found matters of serious concern which might not be the same as or limited to the matters mentioned at OM1, otherwise why say this? It is rather like a conspiratorial (in a non-legal sense) whisper. It was not in ENRC's best interests to say this sort of thing and Mr Gerrard knew it.

574. Accordingly, Mr Gerrard was clearly in breach of duty in respect of DC6.

575. As for the SFO, Mr McCarthy (and Mr Alderman) could not be supposed clearly to know that Mr Gerrard had no authority to provide the information about disclosure and the Board meeting or that it was necessarily inaccurate, or being reckless as to that fact. But as to the references to red flags and "lots to tell", I do think that Mr McCarthy could not possibly have seen Mr Gerrard as being authorised to say this and the same goes for Mr Alderman's receipt of the information. Accordingly, there was a relevant breach of duty on the part of the SFO here.

576. Again, all the relevant breaches of duty here were at least reckless.

DC 7: Telephone call between Mr McCarthy and Mr Gerrard on 21 October (P)

577. There are no notes available of this call. However, Mr McCarthy later emailed Mr Alderman about it as follows:

> "I have just spoken to NG on telephone.
> He has confirmed that our meeting truly shook the company. They have an extraordinary Board meeting on Tuesday and will in his view agree to enter the Self Disclosure process. NG stated that they will be writing to us on Wednesday next week to confirm formally.
>
> On a separate matter NG raised a 'hypothetical' issue concerning a large multinational, who he said may have approached him, that might be upset with the behaviour of a 'white collar' law firm in dealing with SFO enquiries. The hypothetical company were being advised to prevaricate rather than assist. I told NG that he should seek to speak with you personally on a hypothetical basis to discuss matters informally, (certainly before the 26th October)."

578. I have dealt with the second paragraph (relating to the Alstom matter) in paragraphs 459-465 above, and it is not relevant here.

579. The reference to the Board meeting and Mr Gerrard's opinion that they would enter the SR process was inappropriate since he was there to represent his client not to give his own view on what the client might do.

580. But the key phrase is where he said that it "truly shook the company". There is no basis to assume (or for Mr Gerrard to assume) that he could relay this to the SFO even if it were true, indeed, especially if it were true. It gave the impression that the company was very worried about the SFO's interest in it and what the SFO said it wanted, at OM1. Even if the phrase suggested that ENRC would now start to play ball, it is highly prejudicial in my view, and clearly was not in its best interests.

581. In making those references therefore, Mr Gerrard was again in knowing or reckless breach of duty.

582. As for the SFO here, Mr McCarthy (and Mr Alderman) must have appreciated that the first statement made by Mr Gerrard was not authorised, especially as it included his assessment that the company was "shaken". As for the second, again, it was his opinion as to what the company would do. Accordingly, I consider that there was, again, a knowing or reckless breach of the Independence Duty on the part of the SFO in receiving that information.

DC7A: Mr Gerrard's telephone call with Mr Alderman on 9 November

583. On 9 November, Mr Ehrensberger emailed a letter to Mr McCarthy and Mr Alderman as follows:

> "I refer to my letter of 5/6 October 2011 and to the subsequent discussion between Mr McCarthy and Mr Gerrard of Dechert LLP.
> As Mr Gerrard has explained, I have discussed the matters raised in our recent meeting with ENRC's Executive Committee. I also met yesterday with ENRC's Board of Directors, to seek their approval of a proposal to a) conduct certain further reviews of operations and b) to engage with the SFO regarding the results of those reviews. Although the Board meeting did take slightly longer to organise than originally envisaged, I am pleased to confirm that the ENRC Board members were entirely supportive of my proposal.
> I would therefore be grateful if you could let me know any suggested dates from 10 November when you would both be available for our next meeting.
> In the meantime, if there is anything further you wish to discuss, please contact me directly and I will make myself available."

("the 9 November Letter")

584. Two hours earlier, Mr Gerrard had called Mr Alderman, whose note said: "9.11 N.G Letter coming". That much was accurate and by itself simply indicates that a solicitor had called to say that a letter from the client was on its way. That is not necessarily unauthorised nor is it

prejudicial. In fact, Mr Ehrensberger accepted that he may have authorised Mr Gerrard to contact Mr Alderman anyway and Mr Gerrard said the purpose was simply to pass on the news of the forthcoming letter.

585. However, ENRC says that the call lasted 7m 46s and so Mr Gerrard could not just have been announcing the arrival of the letter. I agree, but to say that there must have been a conversation in which Mr Gerrard was bound to have been denigrating his client further is just speculation. Moreover, since Mr Alderman made a note, one would have expected it to refer to other matters discussed, if they were material.

586. In my view, no claim is made out against Mr Gerrard or the SFO here.

DC8: Telephone call between Mr Thompson and Mr Gerrard on the morning of 30 November

587. The next open meeting (OM2) was scheduled to take place at 3.30pm on 30 November. In the morning, Mr Thompson returned Mr Gerrard's call.

588. Mr Thompson's manuscript note of the call said this:

> "Update from NG prior to meeting 12:55 call
> Do want to self report
> Tone from the top message—bit dilatory in doing this—slow to pull their finger out
> Need to do it properly if we go down this route
> → Need to be full + frank on all issues
> Emphasis on Africa but other jurisdictions which they should come clean on all issues (tho NG does not know this officially and may be kept away from it)
> Would resign if this continues as he does not wish to get drawn into a compromised position
> → Need to make the position clear to the company that full + frank disclosure is required and consequences of not doing so
> (contemporaneous note following me returning call of Neil Gerrard to Keith McCarthy)"

589. He later made a formal file note. It was more or less the same, although it did not refer to Mr Gerrard not knowing "officially" about problems in other jurisdictions and that he might be kept away from it. Ms von Dadelszen also made a note of what Mr Thompson told her and Mr Alderman following the call, at 3 pm the same day, i.e. just before the meeting. Although Mr Gerrard was cross-examined on the basis of the file note and others on the basis of the original manuscript note, I do not think that anything turns on this; nor do I accept that the file note is a better record than Mr Thompson's immediate original note.

590. The underlying message from Mr Gerrard was that ENRC was being slow in getting out the "tone from the top" message although it wanted to do the SR. But there was a question-mark over whether ENRC was being full and frank which was threatening to compromise Mr Gerrard's position as their lawyer. Therefore, he needed the SFO's assistance in giving a very clear message to ENRC about the importance of being full and frank. I think the words "if this continues" were not simply noted in error. They suggest that there had already been a

lack of full and frankness, as it were. And the reference to "may be kept away" suggests that Mr Gerrard would not be given proper access to relevant information.

591. Mr Gerrard did not accept that he said all of these things but here, I prefer Mr Thompson's note. After all, Mr Gerrard made no note of his own.

592. What Mr Gerrard said was clearly against ENRC's interests because he said he felt he was being professionally compromised. He could not possibly have had authority to say this. The fact that Mr Ehrensberger had said (at OM1) that effectively, he could not work at ENRC unless it was open and transparent does not affect the significance of what Mr Gerrard said here or his authority to say it. It is one thing for a Board member or executive officer to say something like what Mr Ehrensberger did as an assurance; it is quite another when a solicitor is saying that he was or could be professionally embarrassed.

593. I can understand that Mr Gerrard's motive here may have been to get the SFO to assist him in retaining his professional position by sending the appropriate message. But that does not change the character, objectively, of what he said. And of course, there was always the risk that the SFO might thereafter take with a pinch of salt the assurances which ENRC gave. Mr Gerrard did not report this conversation to ENRC at all. In my view, that was for the obvious reason that he could not do so without incurring the client's ire to say the least.

594. This is of course the first DC where the relevant officer has actually given evidence in the trial i.e. Mr Thompson. It was the first time that he had spoken to Mr Gerrard.

595. Mr Thompson was asked in cross-examination about why his later file note, or what is recorded he told Ms von Dadelszen and Mr Alderman, did not contain the information recorded in the original manuscript note. He said perhaps it was because he thought they were not important (like the references to Mr Gerrard not knowing "officially"). I do think, however, that there was an element of sanitisation. So, the "not knowing officially" phrase becomes "emerging evidence" and the resigning if "this continues" becomes "if he felt the company was compromising the process". And there is no reference to being kept out of the further investigations.

596. Mr Thompson maintained consistently in cross-examination that he did not think at the time that Mr Gerrard was clearly acting against his client's best interests or was not authorised to say what he said. Mr Thompson saw the overall tone of what Mr Gerrard said as "help me to help ENRC" and was, in that sense, innocuous. He said that he now agreed that with

hindsight, Mr Gerrard was unlikely to have had his client's authority to say what he did but he did not interpret it like that at the time.

597. I am afraid that I think Mr Thompson's account now, of what he thought then, is not accurate. Mr Thompson is clearly highly intelligent and he was also experienced. If he is told something by a solicitor for a party now engaging with the SFO that he does not know "officially", it is impossible to see how he could have thought that the solicitor was authorised to say it at the time. In this regard, I do not accept Mr Thompson's attempts at explaining away the use of the word "officially" to which I was referred (Day 37/147 and 163). Indeed Mr Thompson did accept that what Mr Gerrard did not know officially, he must have found out unofficially, and if so, his client did not know that he knew. When Mr Thompson was then asked if so, how could his client have authorised him to tell Mr Thompson, the latter said that he may not have known the particular point but might have been kept away from it. He recalled Mr Gerrard meaning that he might not be tasked with investigating the full scope (See Day 37/163-164). I do not consider that to be a persuasive answer.

598. Nor is there anything in the point that the reference to what Mr Gerrard knew "unofficially" is unimportant since there had been previous references to problems in other jurisdictions. First, in context, this must be a reference to jurisdictions other than Africa and Kazakhstan both of which were already being canvassed with the SFO. Second, the point is that Mr Gerrard said that he was being "kept away" from these matters and that "if this continues" he would resign.

599. As for Mr Gerrard's thoughts about his own professional position being compromised, it is equally impossible to see how Mr Thompson could have thought this was authorised. Mr Gerrard, as it were, was putting himself apart from his own client.

600. In my judgment, Mr Thompson did know that Mr Gerrard was not authorised to say what he did or, at best, he strongly suspected he was not authorised but chose not to consider it further. He was happy, at the time, to receive this intelligence on ENRC. Whether, by itself, it would prove useful to him, and in particular whether it could actually be used against ENRC in any investigation or proceedings, is another matter.

601. On that basis, there was a knowing or reckless breach of duty on the part of the SFO as well as Mr Gerrard.

OM2: 30 November

602. At this meeting were Mr Alderman, Mr Thompson, Ms von Dadelszen, Mr Gerrard, Mr Richards, and Mr Ehrensberger. For present purposes I refer to Ms von Dadelszen's file note. The following elements are significant for present purposes:

> "…BE took those messages back to both the executive committee and the board, both of whom are fully committed to the process. There is a newly appointed senior independent director — Mehmet Dalman — who has taken responsibility for this area…
>
> NG said that ENRC have literally an army of advisors on bribery act systems and procedures. The tests that have been undertaken on those systems have raised red flags. The company are keen to tackle the issue and be full and frank…
>
> BE: the company are ready to deal with this. It has already started. It wants to get procedures right. That message comes from the CEO and the board…
>
> NG said the specific work being done in Kazakhstan concerned an allegation from a whistleblower regarding SSGPO (a subsidiary). A large number of people are alleged to be involved. It is a corruption and fraud allegation. NG has not seen any substantive evidence confirming the allegations yet…"

603. In cross-examination, Mr Thompson accepted that he could see there were discrepancies between what was said at this meeting and what he had been told in DC8. But he did not think that for Mr Alderman to express his satisfaction with ENRC, given what he knew, was a charade. Equally, he did not accept that Mr Gerrard was earlier undermining the message now being given by the client, when he had said a short while earlier that he may have to resign. I found this unrealistic. I appreciate that Mr Thompson said very little if anything at the meeting, unsurprisingly because Mr Alderman was there and took the lead. Mr Thompson was also new to the ENRC case. But I do not think that this made any difference to what he knew or suspected. But if (contrary to what I have found above) Mr Thompson had not already appreciated that Mr Gerrard had been speaking without authority at DC8, he must have appreciated it by the end of OM2.

The December Article

604. This appeared on 9 December. I deal with it in detail at paragraphs 1381-1405 below.

DC9: Telephone call between Mr Gerrard and Ms von Dadelszen on 13 December (P)

605. On 12 December, Ms von Dadelszen called Mr Gerrard and left a message for him to call her. He did so on 13 December. Her note of the conversation says this:

> "Spk to Neil 16:39 13/12/11 …
> good opportunity for company
> appetite in SFO to see company improve re corporate compliance
> Split in co to co-op or not
> Jones Day force for good but they are involved in deals
> Shouldn't be economical
> Client put more pressure re scoping—Jones Day were involved in deals
> Audit committee—odd at ENRC
> Weird situation

Either one or both to meet
[?]—quiet meeting
falsification + destruction of docs
Beat - mergers + acquisitions"

606. She said in evidence that she would have discussed the information she later noted with Mr Thompson, and as someone clearly junior to him, that seems likely. For his part, Mr Thompson was not sure if she told him about the call but thought it probable. He did not positively deny it, and I proceed on the basis that she did. Indeed, the follow-up meeting being DC10 (the "quiet" meeting) only makes sense if Mr Thompson knew that she had had a conversation with Mr Gerrard. Moreover, Mr Thompson specifically agreed that Ms von Dadelszen would have told him about the reference to JD and that she would not have held anything back from him. He also said that the call to Ms von Dadelszen probably should have been in his policy and event log although in the event it was not. All of this is important because, as already noted, ENRC makes no claim against Ms von Dadelszen, only Mr Thompson.

607. So far as Mr Gerrard is concerned, I consider that he was plainly saying things which were not in his client's best interests and for which there could not have been any authority; certainly, when those things are taken together. I say that, notwithstanding the facts of the December Article and Mr Ehrensberger's conversation with Mr Thompson the previous day (see paragraph 1387 below).

608. In particular, for ENRC's solicitor to say there was a split over the question of co-operation was detrimental to its interests. So is making (or reinforcing) the point that JD had been involved in the deals (in fact there was only one where they were clearly involved - Chambishi). The reference to "Shouldn't be economical" I think is to being "economical with the truth" rather than the scope of ENRC's investigation being economical. As such, it is not so significant, since the need for frankness had been previously emphasised. The next point, about client pressure on scope, does refer to the investigation. Then one has the reference to the "odd" AC and a "weird" situation. As to references to falsification of documents, while that could have been a reference to those parts of the December Article which refer to this, the article had already been discussed in the previous days. Mr Gerrard sought to defend the reference here by saying that what he said was true: there <u>had</u> been falsity and destruction of documents. Quite so, but that does not mean he had authority to refer to it, indeed the reverse in fact. The reference to "Beat and mergers" suggests that it was Mr Ehrensberger's personal involvement in some of them which implied a question mark over his independence. At one

point, Ms von Dadelszen thought that it might have been a reference to Mr Ehrensberger not being an M&A specialist but I do not think this is right.

609. As for the SFO, although not herself a target of the claim, Ms von Dadelszen accepted that the references to JD were plainly against the client's interests and equally so if Mr Gerrard was trying to suggest (as I find he was) that the client was trying to limit the scope of the investigation; she also accepted that it was unusual to use phrases here such as "odd", "weird" and "split". Finally, it did not appear to be in the client's interests to refer to the falsification of documents as it could prompt a raid. She also accepted, realistically, that part of what was going on here was Mr Gerrard seeking to improve his position with the SFO. Finally, the reference to a "quiet meeting" clearly suggested a meeting between the SFO and Mr Gerrard alone.

610. It is said that the cross-examination of Ms von Dadelszen was "context-free" in the sense that it did not make reference back to what had been said in the December Article which, in re-examination, she said she would have read or the conversation she had had the previous day. Quite so, but that takes the matter little further. She was not asked in re-examination about the context for the reference in her note to falsification. I am not prepared to infer that her note should be read as a reference to Mr Gerrard simply speaking about the December Article.

611. For his part, Mr Thompson did not accept that, at the time, he thought there was anything said which was plainly against ENRC's interests although he accepted with hindsight that it could be said that Mr Gerrard was seeking to disparage Mr Ehrensberger. As for the disparaging of JD, Mr Thompson said that the SFO had already concluded that they were conflicted, and in that sense, what Mr Gerrard said was not new. But in my judgment, it is not simply about whether the information or communication was new. It is also about who was saying it. See paragraph 528 above, in the context of knowledge drawn from the press. Nor is it an answer to say that the references to falsification and destruction of documents were not plainly unauthorised, in the eyes of Mr Thompson, simply because of the December Article. Again, it all depends who is saying it. The same goes for the references to the "odd" AC, the "weird situation" and the client putting on more pressure about scoping. It is also very hard to see how Mr Gerrard could, in the eyes of Mr Thompson, have been authorised by his client to say that it was split on the question of co-operation. Finally, to the extent that Ms von Dadelszen accepted that there were matters referred to which were plainly against ENRC's interests (see paragraph 609 above) that is itself some evidence of what Mr Thompson must

have appreciated at the time, he being more experienced than her and having had more senior roles at the time. In my judgment, these were all matters which, at the time, Mr Thompson knew or suspected Mr Gerrard could not have been authorised to say. I do not accept that Mr Thompson only realised now that what Mr Gerrard said at the time was clearly against his client's interests (to the extent that he conceded this much).

612. I view all of this, of course, in the light of what I have already found in relation to DC8 and OM2. This was really more of the same. I accept that Mr Thompson may not have given credence to everything which Mr Gerrard said and indeed he accepted that Mr Gerrard was prone to making grandiose statements. But the information communicated here was not so much overstatement (in the sense of boasts, for example) but information that simply damaged ENRC's standing in the eyes of the SFO. As with the earlier DC4, ultimately it might go no further than being useful background intelligence but that does not mean that Mr Gerrard was not plainly unauthorised when he said it.

613. Further, even if Mr Gerrard was seen by Mr Thompson as trying to show that the SFO could trust him in this engagement (because he was, in effect, prepared to share "secrets" with the SFO) and so this was to the ultimate benefit of ENRC, that does not affect his authority or how Mr Thompson must have viewed it at the time.

614. ENRC put the case in respect of Mr Thompson's motives in acting as he did here as being to get the necessary material to achieve a speedy settlement. I would not go that far. First, I am far from clear that the SFO actually "banked" this information for a possible settlement. Second, it was not likely to be speedy. Third, the initiative for making these remarks came from Mr Gerrard as was always the case, not the SFO calling him in. However, I do not need to accept ENRC's thesis here in order to find Mr Thompson was knowingly or recklessly taking the information from Mr Gerrard.

615. Accordingly, I find that there was at least a reckless breach by the SFO as well as by Mr Gerrard.

616. I should add that the SFO contended that quite apart from the substance of what Mr Gerrard said to Ms von Dadelszen (which it has fully addressed) there was no pleaded cause of action in relation to Mr Thompson on the basis of her note being communicated to him. I do not think there is anything in this point. The 2009 POC makes claims against the SFO in relation to DC9 and of the three individuals pleaded (Mr Alderman, Mr Gould and Mr Thompson) here, it could only be Mr Thompson. More importantly, Mr Thompson was fully cross-

examined not only about Ms von Dadelszen relaying the call to him (see above) but also about the substance of what Mr Gerrard had said, as contained in her note. See Day 37/197-206. See also paragraph 561.3 of ENRC's Closing. So there was and is no reason for me not to deal with DC9 on the basis of Ms von Dadelszen's note as against Mr Thompson. In that context, it was proper for Ms von Dadelszen herself to be asked about her reaction to what the note said and Mr Thompson in turn to be asked to comment on it.

DC10: Meeting at Crowne Plaza Hotel between Mr Gerrard and Mr Thompson on 19 December (P)

617. This was the "quiet meeting" heralded at DC9. There was a question as to why the Crowne Plaza was chosen as a venue. It was suggested that Mr Thompson had given false evidence in the Privilege Proceedings because he said there that it had been chosen as being halfway between Mr Gerrard's offices and his own, when in fact it was much nearer to the Dechert offices. I do not think that much turns on this geographical question. The suggestion of a meeting outside of their offices came from Mr Gerrard. I suspect this was because he preferred to have it away from Dechert's offices in order to be less visible and Mr Thompson was quite happy to go along with that. Mr Thompson accepted in cross-examination that it was chosen by Mr Gerrard as a venue for a quiet meeting where he could talk in private.

618. The meeting took 1½ hours. Mr Thompson's own note is less than one page of manuscript. He told Ms von Dadelszen of the meeting and she made a note of what he said was discussed. It was on 1½ pages of manuscript but more importantly referred to significant matters which were not included in Mr Thompson's own note. Her note, which is the better one to work from, is as follows:

> "[…]
> Attritional battle to persuade [the] board that this is right way to go.
> Change their mind regularly
> Described key findings […]
>
> Provided [with] backdated paperwork
> Obstructed […]
> President of that company at heart of it
>
> Russian trading system—started again. Supposed to have been sorted out in 2007. 24% of sales are missing. Russian office operates intermediaries for insiders to skim profits.
> African issue—Camec, CAMROSE, Rautenbach…
> UN sanction breaches in there.
> Not going to be wrapped up quickly […]
> Timeframes? No comment
> Nothing about commitment to anti-corruption…. "

619. Mr Gerrard did not report this meeting to ENRC. It was unauthorised. He suggested it was in fact the scoping meeting mooted at the end of OM2, but that was clearly wrong. The scoping

meeting came the following day, being OM3. Dechert also suggested that it was a simple pre-meeting to assess the SFO's concerns and expectations but that is clearly not correct either. It was all about Mr Gerrard telling things to Mr Thompson.

620. In my judgment, there was a clear breach of duty by Mr Gerrard. As noted by Ms von Dadelszen, what Mr Gerrard said was highly damaging to ENRC's interests.

621. In evidence, Mr Thompson said that his note was short because there was not a lot of factual content, but that is not very realistic if one looks at Ms von Dadelszen's note. He could not explain why there was content in her note which was not in his own. That said, I do not accept the suggestion that Mr Thompson deliberately kept out of his own note material which he knew Mr Gerrard should not have told him. If that was his motive, he would not have relayed that information to Ms von Dadelszen who (as he would have expected) noted it. Indeed, Ms von Dadelszen thought that they were probably face-to-face when Mr Thompson relayed the conversation to her, in which case, he would have seen her take the note.

622. Mr Thompson (again) made the general remark that in hindsight he was a little naïve in his dealings with Mr Gerrard, and would now accept this in relation to not spotting that some of his assertions were probably "over the line". However, I think this is more of the same from DC9 so far as Mr Thompson is concerned. The fact that it was indeed a "quiet" meeting (wherever it was) suggested that Mr Gerrard wanted to say things relating to ENRC that he might not say with them present.

623. I agree that some of what Mr Gerrard said was reflected in the December Article. But, as already stated, that does not mean that when said by the solicitor, it has no value and can be disregarded. Also, statements about an attritional battle are very different from Mr Ehrensberger's assurances at OM1 that the tone from the top is serious. The SFO submits that such references are nonetheless not significant since they do not differ from what Mr Ehrensberger had told Mr Thompson on 12 December following publication of the December Article. I do not agree. It is true that Mr Ehrensberger said there that he had got the Board to agree to self-report and thought that someone may not have agreed and tried to obstruct it by going public. But he went on to say that they were determined to eliminate the leaks and he still had full support for providing ENRC's investigative findings and putting adequate procedures in place. Mr Gerrard's later references to an attritional battle and the board changing its mind regularly are not consistent with that.

624. Equally, when coming from Mr Gerrard, I think that the reference to "UN sanction breaches in there" was plainly damaging to ENRC in Mr Thompson's eyes, irrespective of what prior intelligence the SFO had. Again, this was now coming from its solicitor. Mr Thompson's take on it, in evidence, was that "it wasn't a sort of active, sort of live problem". But if that is right, I cannot see why Mr Gerrard mentioned it.

625. I do agree that at OM3, on the following day, sanctions were discussed. Indeed, Ms von Dadelszen had put them on her discussion list following DC10 - see paragraph 1253 below. At that point, it can be said that this issue was now public as it were. But it does not affect the nature of what Mr Gerrard had said the day before, in my view, or how Mr Thompson must have viewed it then.

626. So here again, I consider that there was a knowing or reckless breach of duty in Mr Thompson taking this information from Mr Gerrard and by Mr Gerrard in communicating it.

627. However, as for the references to time-frames or no commitment to anti-corruption, I do not think that they add very much. Anyway, Mr Thompson and Ms von Dadelszen both saw this as referring to Mr Gerrard not having said anything about anti-corruption. I do not see any breach of duty in this respect.

DC11: Telephone call between Mr Alderman and Mr Gerrard on 19 December

628. This followed the Crowne Plaza meeting and it was Mr Alderman who called Mr Gerrard. Mr Alderman's note says as follows:

> "Neil Gerrard
> Co knows it is not SFO briefing press
> Confidential—Audit Committee to be more involved
> in what is happening
> Issues—Africa—3 [areas]
> red flags re books + records—Africa
> v odd lge consultancy with no paper
> Kazakh inv [1] docs etc
> Russian issues"

629. Mr Gerrard may well be correct in saying that the reason for the call was for Mr Alderman to obtain a "heads up" as to what would be discussed at the OM the following day. But what followed was clearly without ENRC's authority in my view, which is reflected in Mr Alderman's reference to "confidential". I think this must mean Mr Gerrard telling him things "off the record" as it were. Indeed, it is odd, in my judgment, to say that Mr Alderman really needed a "heads up" since the SFO would hear what ENRC had to say (and disclose) the following day. Mr Thompson himself thought it very odd for Mr Alderman to be directly involved like this and especially without informing the Case Team.

630. In my judgment, Mr Gerrard was again acting in breach of authority as indicated by the use of the word "Confidential". So far as Mr Alderman was concerned, he must have known that, too. That said, I consider these to be relatively minor breaches of duty given what came out the following day.

OM3: 20-21 December 2011

631. OM3 occurred on 20 and 21 December. Some time was spent on explaining changes to ENRC's internal reporting structure in relation to the investigation. FRA had done a books and records review on Camrose revealing some "bizarre" payments. The different elements of the Africa investigation were identified and Mr Gerrard said that he would have something "within a month or two" i.e. by February 2012. Mr Gould said that there should be a presentation to the SFO by the end of February 2012 and Mr Gerrard agreed, saying it would deal with the investigation review plan, milestones and a timetable going forward. On that footing, there would not necessarily be a definitive report in the sense of wrongdoing for the purpose of SR and a civil recovery. But there would be some sort of report. A possible resurgence of the RTS and the Education Allegation (see paragraphs 959-960 below) were also mentioned. On 21 December, mention was made of a forthcoming SAR report in relation to the imminent plan to buy out Mr Gertler.

OM4: 5 March 2012

632. OM4 was on 5 March 2012. Some of the information provided (for example in respect of WB1 and the Education Allegation) had been largely mentioned before. There was more detail about what the Kazakhstan investigation revealed. Details of the investigative work in Africa, especially by FRA, were given in particular relating to Camec, Camrose and sanctions. The next steps in that process were also established.

633. At paragraph 105 of his WS, Mr Thompson commented that this was essentially an update meeting and importantly, in paragraph 106 he said this:

> "This was an aspect of Mr Gerrard's presentations that became frustrating over the course of the meetings. There was a lot of talk of "*red flags*" and presentations that hinted at wrongdoing but lacked specificity. In order to reach a civil settlement, we needed to know details that could provide a proper foundation for one; in other words, there had to be a tenable argument that money had flowed into ENRC that was derived from crime. The last line of my note of the 5 March, 2012 meeting says "*formal report/presentation by early June."* I think that at this stage we were hopeful that that report would be able to ground a civil settlement."

634. That is a reference back to the essential nature of the SR and the fact that any possible civil recovery had to be grounded in the SR of proceeds of a crime.

DC12: meeting between Mr Gerrard and Mr Thompson at the Yorkshire Grey Pub on 14 March 2012

635. On this occasion, Mr Gerrard and Mr Thompson met at the Yorkshire Grey Pub in Theobalds Road. This was not an appropriate place for a meeting which was clearly more than social. Mr Thompson accepted in hindsight that he should not have met Mr Gerrard there. In my view, he knew that at the time or shortly after, which is why none of his notes refer to the location even though he denied that was the case and even though on some other occasions, the venue had not been mentioned. Dechert suggested that the pub was a good idea because it would enable Mr Gerrard to get the SFO to "open up" more in an informal setting. I reject that suggestion. First, at least according to Mr Thompson, they were originally going to meet at Dechert's offices earlier in the day. Second, as it so happens, very few meetings were in locations outside their offices. Third, if that was the motive, it was amateurish in the extreme. Fourth, in the meeting, it was Mr Gerrard giving information to the SFO not the other way round. The meeting itself was not authorised by ENRC.

636. Mr Thompson's note reads:

> "MT also confirmed that the information provided on the issue of possible sanctions breaches in the DRC had been helpful. MT and NG discussed further issues:
> • Involvement of Salans and Philip Enoch (a Salans partner) in relation to the acquisition of Camec.
> • The due diligence process adopted by ENRC in respect of the acquisitions of Camec and CAMROSE, including the existence of internal audit reports which spelled out some of the risks.
> • The need for NG's team to access the e-mail servers in London and Zurich in order to complete the investigation.
> …
> • Recent concerns found by NG in respect of an expensive excavator purchased by an ENRC company which appears to have already been owned and was also in a non-operative condition."

637. Reference to the due diligence process, including the existence of internal reports, could not have been authorised. I agree with ENRC that this was a particularly egregious breach of duty on the part of Mr Gerrard as only the day before, in the SIC meeting he had said:

> "SFO worry that the board are wilfully blind. They haven't seen… Fortunately not seen Pine + Crete [ie the HS reports on Camec and Camrose] or Audit reports [ie reports on those transactions produced by IA]. If they did we have a problem."

638. ENRC refers to what was contained in various draft speaking notes for the SIC meeting and an inference therefrom that Mr Gerrard was positively prohibited from referring to internal reports. But it does not need to go that far; Mr Gerrard was plainly opining at that meeting that it would be counter-productive if the SFO were alerted to them.

639. I reject Mr Gerrard's evidence that it never occurred to him at the time that any of his statements were contrary to ENRC's interests. Indeed, and as with a number of the meetings,

on analysis, if all that Mr Gerrard said was innocuous and/or had already been said, it is very unclear why he wanted to meet an SFO representative at all.

640. As for Mr Thompson, the key point of the information said to have been plainly against ENRC's interests is that concerning the internal reports. Mr Thompson's evidence was that he did not suspect any impropriety and just thought that Mr Gerrard was trying to show that there was a thorough investigation, and ENRC was being transparent. He, of course, did not know what the reports contained or what Mr Gerrard had opined about them the day before.

641. Given the informal setting and the fairly brief nature of the conversation, I cannot reject Mr Thompson's evidence here. After all, the question of due diligence in relation to Africa had been raised at OM4 in the slide presentation. So, I do not find that Mr Thompson knew or suspected breach of duty on the part of Mr Gerrard here. Mr Gerrard's breach was of course knowing or reckless.

DC13: Call between Mr Gerrard and Mr Gould on 9 May 2012

642. This call took place the evening before OM5.

643. There is no note of the call itself but Mr Gerrard had prepared a speaking note. It reads thus:

> "… (1) What to review?—All African acquisitions or just Camrose and one other.
> (2) Can you emphasise your main concerns i.e., have the purchase and loans been corrupt payments vs SOCA reports +other info—NGO papers etc
> (3) The client is doubting the extent/thoroughness needed
> → Take clients instructions
> → Independently verify via - emails
> - advisers
> - consultants
> - documents etc
> (NB) There is a very real reluctance to allow us to look at - London servers
> - African servers
> - review internal docs
> I think the Chairman understands but probably needs some help re
> – how serious you view this…
> – whats going to be reqd to settle
> (4) Endemic fraud & commercial corruption in Kaz
> + Education issue → corruption → red flag."

644. In his WS, Mr Gerrard says that he had spoken with Mr Dalman and then made brief notes for discussion. But it was a short call with Mr Dalman and in evidence he could not recall if he had then reported back to ENRC after his call with Mr Gould. It was not put to Mr Dalman that he had heard back from Mr Gerrard. It is true that at the SIC meeting itself earlier that day, and according to Ms Coppens' file note, Mr Gerrard had said there was a need to get clarity from the SFO about the extent of its concerns over the Africa transactions.

645. However, even on the assumption that Mr Gerrard had implied authority to ask that question of the SFO, I cannot see how item (3), down to the reference to the Chairman, once communicated, could begin to serve that purpose. Again, Mr Gerrard is volunteering information. This was obviously detrimental to the client's interests and Mr Gerrard was clearly in breach of duty. The part of (3) dealing with the Chairman could be regarded as part of a brief to get clarity from the SFO and I would not say that Mr Gerrard was in breach of duty there. Item (4) was not put to Mr Gerrard and so I disregard it.

646. As for Mr Gould, he accepted that Mr Gerrard's duty was not to reveal ENRC's own doubts about the thoroughness required of the investigation and that Mr Gerrard was talking about privileged information which should not have been imparted to Mr Gould. There is no reason to suppose that Mr Gould did not understand this at the time. I do not accept that the client's reluctance to permit access to the servers could legitimately be disclosed to Mr Gould on the basis that it did, or might, explain the delay in progress of the internal investigation.

647. Moreover, the significance of the reference to the client not giving full support was in contrast to what Mr Dalman said in OM5 the following day, which was that there would be full support. That was not what the SFO had been told the day before. The fact that, as a result of OM5, there would be renewed attempts by Mr Dalman to get that support, does not alter the position.

648. Accordingly, I find a knowing or reckless breach of duty here on Mr Gould's part. This does not extend to item (4) which was not put to him.

DC14: Contact between Mr Gerrard and Mr Gould and Mr Thompson early May 2012 (P)

649. At OM5 on 10 May, Mr Thompson stated that it was the SFO's perception that *"progress had been slow and that nothing substantive had been reported yet"* and Mr Gould stated that the approach of JD and Mr Ehrensberger had been defensive and that they were too close to some of the transactions about which there were concerns (as recorded in Mr Thompson's note of OM5).

650. ENRC alleges that both of these statements had been pre-agreed, wrongly, with Mr Gerrard in early May including, so far as Mr Gould was concerned, during DC13. It was in this context that the motive for doing so was alleged to be to further Mr Gerrard's aim to expand the scope of his retainer; however, as already noted, that motive was not put to either of them.

651. As to the existence of any pre-agreement, Mr Gould accepted that on a "couple of occasions" he had followed suggestions made by Mr Gerrard prior to an OM as to what he should say at

the OM. As for Mr Thompson, he accepted that his comment about a lack of progress may have been partly prompted by earlier conversations with Mr Gerrard, although he did not recall a particular "pre-agreement" for OM5.

652. As to the content of what Mr Thompson actually said, ENRC says it was clearly false because it was not as if any deadline suggested or contemplated in OM4 had been missed. On the other hand, there would have been a basis for saying there had been a lack of progress on what he had been told by Mr Gerrard - or Mr Gould relaying what Mr Gerrard had said. He thought it was in any event important to emphasise to Mr Dalman where the SFO stood.

653. As for the content of what Mr Gould actually said, he agreed that his view of Mr Ehrensberger being defensive had come from discussions with Mr Thompson and he knew the latter had spoken to Mr Gerrard sometimes. As for JD being "too close", he said that if they had been involved as legal advisers in relation to suspect transactions, he would himself have regarded them as being too close. However, he also accepted that what he said in OM5 was due, at least in part, to what Mr Gerrard had been saying to him privately.

654. In my judgment, the above is certainly some evidence of what Mr Thompson and Mr Gould had previously been told by Mr Gerrard in previous DCs. However, I have more difficulty in concluding that what they said in OM5 was the product of some specific pre-agreement, which is what is alleged, especially as what they said was not manifestly false. Indeed, had it been, one would have expected Mr Dalman to have reacted with some surprise in OM5 which it seems he did not. And all the more so once the suggested motive for the "pre-agreement" has fallen out of ENRC's case.

655. Overall, I am not satisfied that there were the pre-agreements as alleged and that being so, there is no breach of duty by Mr Gerrard, Mr Thompson or Mr Gould here.

OM5: 10 May 2012

656. This was the SFO's first meeting with Mr Dalman, noted above. I have dealt with the alleged pre-agreements in paragraphs 649-655 above. Mr Thompson took the view that the purpose of the meeting was to meet Mr Dalman and get assurances from him. There was little by way of concrete new information. At paragraph 137 of his WS, Mr Thompson said that his view at that point was much as it had been in relation to OM4.

THE DEPEL INTERVIEW

Introduction

657. I have already made reference to the Depel Interview above in the context of the claim against Mr Gerrard. ENRC first became aware of its existence following the SFO's disclosure on 30 October 2020.

658. I now deal with it in the context of the misfeasance claim made against the SFO.

659. Mr Depel was interviewed by Mr Thompson and Mr Elton on 16 May 2012 from 1:25pm until 4:30pm with a short break while tapes were being changed. The transcript of Tape 1 is at J8/288 and the transcript of Tape 2 is at J8/376.

660. ENRC's pleaded case here is as follows:

> "12.12A On **16 May 2012**, the SFO (through Mr Thompson) issued Mr Depel with a notice, pursuant to s. 2A of the 1987 Act, requiring Mr Depel to attend an interview and to answer questions or otherwise furnish information and to produce documents, save for any information or documents protected by legal professional privilege. Shortly thereafter, the SFO (through Mr Thompson) interviewed Mr Depel over a period of about three hours (the "**Depel Interview**"). ENRC had no knowledge of the Depel Interview and had not authorised the disclosure by Mr Depel of material which was privileged to ENRC.
>
> 12.12B At the start of the Depel Interview, Mr Depel identified himself as a dual-qualified lawyer (US/English), who was ENRC's Global Head of Compliance, with responsibility for ensuring ENRC's compliance with laws in all of the jurisdictions in which it conducted business. Mr Depel further explained that he reported to ENRC's General Counsel. From at least this point, the SFO (through Mr Thompson) knew that Mr Depel was an in-house lawyer at ENRC and that ENRC's LPP should be protected. Alternatively, the SFO (through Mr Thompson) was subjectively reckless as to the need to protect ENRC's LPP.
>
> 12.12C During the Depel Interview, the SFO (through Mr Thompson), acting with at least subjective recklessness: **(1)** induced, encouraged, or procured Mr Depel to disclose material protected by ENRC's LPP; and/or **(2)** failed to stop Mr Depel from disclosing substantial amounts of such material. In particular:
>
> 12.12C.1 Mr Thompson repeatedly made inquiries of the circumstances and scope of Dechert's instructions and investigation. For example, Mr Thompson asked: **(1)** (in relation to the period December 2010 to January 2011) *"What was the scope of* [Mr Gerrard's] *work at that stage?"* [10]; **(2)** *"Why do you think Neil hasn't been able to … report these things to us more formally …*" [16]; and **(3)** "*Would this have been brought to Neil Gerrard's attention*" [34].
>
> 12.12C.2 Further, Mr Thompson sought to elicit material protected by ENRC's LPP about the work carried out by various other firms of solicitors acting for ENRC, including Jones Day, Herbert Smith and Peters & Peters. For example, Mr Thompson said: **(1)** "*… so what about … corporate advisers then … Jones Day as current corporate lawyers, preceded by Herbert Smith … and then obviously Decherts in … Neil's team*" [26]; **(2)** "*… what else have Jones Day done?*" [27]; **(3)** "*Do you know who commissioned* [the Peters & Peters Report]" [44]; and **(4)** "*What were they* [sc. Peters & Peters] *doing a report on?*" [39].
>
> 12.12C.3 In response to Mr Thompson's questions, Mr Depel repeatedly referred to material protected by ENRC's LPP, including in relation to:
>
> (1) the independence of ENRC's directors [7];

(2) the integrity of the Chairman of ENRC's audit committee [8] [24] and ENRC's head of internal audit [25];
(3) the circumstances in which Mr Gerrard was retained, the scope of Mr Gerrard's work (and how it changed over time) [35], the manner in which Mr Gerrard had conducted that work, certain advice provided by Mr Gerrard [32], and (alleged) difficulties Mr Gerrard had encountered [8]-[10], [12], [26];
(4) the manner of production and/or the content of confidential reports produced by Mr Depel for ENRC (in particular its audit committee) [9] [25] [32] [47] [62] and ENRC's reaction to them [19] [32] [67];
(5) whether allegations contained in the 2010 Whistle-Blowing Email had been substantiated [11] [15] [16] [20];
(6) how seriously ENRC took its obligations to comply with the Bribery Act [20] [77];
(7) Mr Depel's own advice to ENRC in relation to its compliance with statutory telecommunications and data protection provisions [22];
(8) the types and general content of "*relevant material and evidence*" that would be found at ENRC's London offices [24];
(9) the advice that Jones Day had given in relation to ENRC's engagement with the SFO (and Dechert's advice as to its correctness) [27] and in relation to at least one corporate transaction [72];
(10) the existence [27], approximate date [28], significance [27] and certain of the contents of the Herbert Smith Report;
(11) the existence [44], contents [44], and action taken by ENRC upon receipt of the Peters & Peters Report [44];
(12) Mr Depel's own advice to ENRC in relation to its compliance procedures [55]; and
(13) the way in which Dechert, Jones Day and Mr Depel drafted ENRC's investigations policy [58]; and
(14) Mr Depel's own advice to ENRC on allegedly improper related party transactions [30] [57] [80]; and
(15) Mr Depel's own advice to ENRC in relation to sanctions issues [32] [35]; and
(16) allegedly fraudulent insurance programmes [71]…

40.1A In the Depel Interview, the SFO (through at least Mr Thompson) induced, encouraged or procured Mr Depel to disclose material protected by ENRC's LPP (and/or failed to stop him from doing so and instead recorded the same for subsequent use): see paragraphs 12.12B, 12.12C and 12.12E above. The SFO subsequently used such material in its investigation into ENRC. Accordingly, the SFO breached the LPP and Independence Duties…"

661. The SFO contends first, that none of the relevant information passed to Mr Thompson by Mr Depel in the Depel Interview was, or was by then, privileged. Second, even if it was, Mr Thompson did not know that it was nor was he reckless as to that fact.

662. Mr Thompson was cross-examined for much of the afternoon of Day 38 on the Depel Interview. He was not taken to every passage relied upon by ENRC. That is understandable given the time constraints.

663. Apart from other submissions made by the parties on this issue, Appendix 8B to ENRC's Closing contains, in tabular form, almost 20 pages of excerpts from the interview which it says amounts to or contains privileged information. For its part, the SFO, at Appendix J to its Closing, sets out its response over 25 pages, dealing not only with the question as to whether

the information was privileged but whether Mr Thompson was at fault in the misfeasance sense.

My Approach

664. The table below is a truncated version of ENRC's Appendix 8B to its Closing:

Item No. Page No.	**T/S Ref**	**Extract (ENRC's emphases added)**
1. **Tape 1 8**	170:24 – 172:18	CD: "…I am very strongly of the view that the Chairman of the audit committee is corrupt and complicit with what goes on in the company" MT: "Who is the Chairman of the audit Committee?" CD: "A guy called Gerhard AMMAN" MT: "And why do you say that he is corrupt?" CD: "He spends most of his time trying to shut down, stifle, or impede what would otherwise be normal investigations that have either come to our attention through our own efforts or through whistle-blowing reports. This is something that if you can get out of the lawyer client privilege, Neil GERRARD could attest to and it has caused us no end of grief, he's probably been on the verge of walking out several times"
2. **8-9**	172:5 – 173:4	MT: "So was Neil, how did Neil Gerrard come to be retained?" CD: "I hired him" MT: "Talk us through that then"
3. **9**	172:19 – 174:11	CD: "Alright, in the very first audit committee I attended I did the report, fairly, well I think fairly well structured and detailed … which would be a fairly lengthy report, which was vetted by the CEO, who took objection to it. After a long and spirited discussion with him and the GC who at that time was Randall BARKER now with BHP BILLITON. We finally agreed to the report being issued more in sort of power point, bullet point form which he signed off on and Randall signed off on. I have copies of the original and every iteration in between and the bullet points but all you will see in the audit committee file kept by the company secretary is the power point presentation. At the end of it, I went through the top five risks that I saw, from a compliance perspective, one of which was that there is, an opaqueness around Kazakhstan as opposed to any other place within the business and people's reluctance to talk about it. At which point the CEO, leaned over the table, like from me to you (4-5 feet), quite aggressively and said, 'what the fuck do you know about anything, what the fuck do you know about Kazakhstan, you don't fucking speak Russian, you haven't fucking been there', blah, blah, blah. At which point Ken OLISSA stood up and said 'Felix you can sit down now you have just proven his point'"
4. **10**	175:8 – 176:18	MT: "Yeah, I'm, indeed and also we can go back to the hiring of Neil GERRARD and that as well" CD: "So at that point after I had my dressing down within some 3 or 4 weeks later we received a major whistle-blowing claim which we titled the project, these guys have a real penchant for having project names that are super sleuth, so this one was "Maria", not sure why but it was and I looked around and went through the whole process of getting various competing bids and stuff but actually there was only one guy in my mind to do the job, I didn't know them, but he came well recommended and I thought we needed someone that was less of a lawyer and more of a person who had been around the houses a few times. … And so he was hired and officially retained or unofficially retained, before Christmas, officially retained, when the audit committee agreed it, they were always going to, end of December early January."
5. **10-12**	177:19 – 179:15	MT: "I just getting it clear in my own mind. What was the scope of his work at that stage" CD: "Well, to deal with the fairly detailed whistle-blowing claim against a business in Kazakhstan called SSGPO, which is the iron ore business. SSGPO is the most brazen of all the Kazak businesses for the things that it does." MT: "And what were the whistleblowers allegations" CD: [sets out summary of allegations then states] "All of which has been proven…" […] MT: "Okay, well rolling forward then with Neil GERRARD's appointment"

Item No. Page No.	**T/S Ref**	**Extract (ENRC's emphases added)**
6. **14-15**	179:23 – 181:1	MT: "Just to go back to SSGPO, the conduct Neil GERRARD was investigating and the whistle-blowing you referred to, can you give us a bit more of what was actually involved and the sort of scale of it" CD: "Well the allegations were that any number of people and there was about 5 or 6 that were named specifically, were taking between 30 and 100,000 dollars a month out of the business" MT: "And how were they…" CD: "And that's just what the whistleblower, blowers believed" MT: "Right" CD: "Through these dummy companies or real companies providing overly expensive goods and services, or supposedly providing them but not providing them. There's a whole issue whether there was a farm. Who owns a farm and what that farm provides. … All of that stuff we were told unequivocally by Gerhard AMMANN and Felix VULIS that this is all just bullshit, and it was all just petty small people just making trouble, it's all been proven." MT: "I mean just so that you know where we are coming from, some of these things that you have mentioned have been indicated to us by Neil, um, in formal meetings to us, but they have not been formally concluded upon for the purposes of, you know the company saying that this is what we've got. It's we've looked into this and there maybe something. I think it's been reported in the press about a scholarship for police officers."
7. **16**	181:7 – 182:3	MT: "So what you are saying is, that a lot of the, as far as you are concerned, a lot of the whistleblowers allegations were substantiated." CD: "Every single one." […] MT: "Why do you think, Neil hasn't been able to sort of report these things to us more formally. Why has that not been put on the table yet, if you think, from your view that the initial allegations have been substantiated."
8. **19**	185:13 – 188:1	MT: "… I mean I can guess the answer but how were your reports received" CD: "Badly, so November was a substantial negotiation over the format of the report. January was a re-writing of the report, just cut anything out might be considered inflammatory, which actually didn't have inflammatory language, it was just that the CEO took personally criticism of Kazakhstan for some reason, but it still said what it needed to say. April or March I refused to re-write the report and the General Council did; wrote it. May, I refused to negotiate over the report at all and the report itself was omitted from the audit committee pack and only the appendices which showed our progress in terms of adequate procedures were put in. Every other audit committee after that, I was not asked to write anything until January [2012]"
9. **22**	188:2 – 189:6	CD: "…everybody thinks Paul JUDGE is the leak in the newspaper and I don't know why, I mean I'm not involved in that but there was a witch hunt between June and July about who was leaking to the papers. Everybody, everybody in that London office was suspected and I can tell you they violated the interception of telecommunications Act, they violated data protection, they violated everything in order to find this out. I raised all of this, um, um they fucking hate me because it's all in writing. Get every email I have sent, sent and received and I don't take their crap either."
10. **25**	190:25 – 192:4	CD: "…you don't have to look any further than my reports to the audit committee to find willful blindness, right and then look and see, how, how much was not done that should have been done in respect of internal audit reports. Now I say all this about his function, I know most of these guys and they are good guys. Aric KOWALEWSKI who is head of Internal audit is as corrupt as a summer day in the artic is long. And he did a faustian deal to get himself out of Kazakhstan and into London, he now lives here with his family, so if you put that mother fucker behind bars I won't care a bit"

Item No. Page No.	T/S Ref	Extract (ENRC's emphases added)
11. **25-27**	192:5 – 195:21	CD: "...Of course they are Kazakh's [sic] and Russians and old school and they do things the way they have always done them, whatever, but when you get the likes of the people who are supposed to be the guardians, like Head of Internal Audit, like the chair of the audit committee, like the CEO, like PwC. You want a blind eye look at PwC. Then like Jones Day." MT: "We'll come back to them because I have got some questions about that." […] MT: "Okay, so what about our, um corporate advisers then, I mean obviously the ones that crossed our radar to some extent are PwC as auditors, Jones Day as current corporate lawyers, preceded by Herbert Smith at some level and then obviously Decherts in the, Neil's team" […] CD: "Jones Day I had initially no problems with, um, but I have grown more and more suspicious of them as time has gone on" […] CD: "The meetings we would have internally after they have met with you. Jones Day ah, think that you are completely toothless and ball less and nothing's going to happen and that's the advice they give them" MT: "Right" CD: "And I think that's the wrong advice and Neil thinks that the wrong advice, but our guys are like, are like what Julius Caesar said in the conquest of Gaul, he said it is the most common failing of mankind to readily believe what he most wishes to have happen"
12. **27-28**	195:22 – 200:4	MT: "So other than not rating us very highly um, what else have Jones Day done" CD: "Jones Day, they did the IPO. … And you need to look back at the IPO prospectus you need to look at the bottom of page 16 under the risk factors and you need to find out about this thing called the Russian Trading Structure" MT: "I know something about that" CD: "You need to read about the Russian Trading Structure and if you can get your hands on the report that Herbert Smith did pre IPO on the Russian Trading Structure, much will be revealed. The Russian Trading Structure in my view underpins everything that happens at this company, because that was the way which the three founders siphoned of between 3 and 5 hundred million dollars a year, every year, year in and year out, stealing from their own country and their other shareholders" MT: "The Herbert Smith report was quite a while ago wasn't it" CD: "2007…If you can get your hands on that that would be worth a read" MT: "Will that report not be privileged, ultimately?" CD: "I'm sure it will be" MT: "That always gives us some difficulty" CD: "I'm sure it will" MT: "But obviously the company would want to co-operate fully with us" CD: "I'm sure they would" MT: "Right"
13. **34**	200:5 – 201:16	MT: "Would this have been brought to Neil GERRARD's attention"
14. **35**	201:17 – 202:11	CD: "…also we were selling something I've been told, I can't, I don't have the documents to prove this alright so you have got to take this is as, you need to go on a fishing expedition for this. We were selling something called a baryte, which is basically drilling mud" MT: "How do you spell that" CD: "B.A.R.I.T.E maybe barites with an s, basically oil drilling mud, I didn't even knew we made barites, you won't see barites in our annual report, but we were selling it. Now that, that under any set of circumstances is as far as I am concerned violates the sanctions cos that supports the oil industry, from my layman's understanding of what that's about**.** Neil was given the job for one day and it was taken away from him, it was going to be folded into uh, other stuff he was doing, and then it was just taken away"
15. **39-40**	202:12 – 204:4	MT: "So remind me Corvette and G and G, how did they come up across your radar" CD: "I can't remember, I think maybe because they were mentioned in a report, an earlier report…I think it came up under, there was a 'Peters and Peters' report, you know 'Peters and Peters' the…" MT: "Uh huh, what were they doing a report on, they're normally,.." CD: "This is pre me but I did get to see the reports, ah, allegations of fraud and corruption from within the business at 'Aluminium of Kazakhstan', Kazakhstan Aluminium Smelters'. Run by a guy named IBRAGIMOV, but he is not related to the IBRAGIMOV who is the founder, it's hard to believe that but I

Item No. Page No.	**T/S Ref**	**Extract (ENRC's emphases added)**
		suppose if they say it is, it is. That, those reports were, they were blocked, well they didn't even say what they weren't allowed to see, what they weren't allowed to do, who they weren't allowed to talk to, those reports. Those would be interesting reports get your hands on." MT: "What year would that be" CD: "They were probably issued in early 2010"
16. **41** **Tape 2** **1**	204:11 –207:2	ENRC submits that the physical location of evidence was discussed. At the end of Disk 1 (15:09) (after the participants thought the tape had been stopped), the audio recording cuts Mr Depel off as he said "And I would like to direct you to where you will have the physical evidence…" **{J8/288/41}**. Then at the start of Disk 2 (15:23), Mr Thompson asked Mr Depel to confirm that "we have not discussed this matter any further whilst the tapes were being changed", which confirmation Mr Depel gave **{J8/376/1}**. ENRC submits that given (i) Mr Depel's statement about the physical location of evidence would be a matter of obvious interest to the SFO; (ii) this statement was made after the parties thought the tape had stopped; (iii) there was then a break of 14mins during which the tapes were changed; and (iv) there was no discussion about physical evidence recorded on Disk 2, it is to be inferred that Messrs Depel and Thompson discussed (at least) matters relating to the physical location of relevant evidence without such matters being recorded.
17. **2-3**	207:3 – 208:3	CD: "So we talked about the P&P Reports, and I don't think I mentioned this but that report made certain recommendations that I don't believe were ever followed through on by the CEO. I think there was a show of pretence of those recommendations being followed through but I don't think they were ever followed through on" […] MT: "Right. Do you know who commissioned that report on Peters & Peters?" CD: "Probably, the AC. It would have been before my time…"
18. **16**	208:4 – 209:7	CD: "…we had a whistleblowing policy and an investigations policy…And after Maria, SSGPO investigation started with Neil, by about February and March, I thought this is a shit show and we really got to have an investigations policy that works. I mean I'm not saying it didn't work but it had too many gaps and holes where people said oh it's not in the fucking policy so we don't have to do it right? So I put together a combined one that Neil also put significant input in…"
19. **{J8/376/16-17}**	209:15 – 210:7	CD: "…and then it went back and forth between Jones Day and Aric KOWALWESKI and myself and Neil. Every time we put something in which we thought centralized control and provided with all the actions that one would need to take in order to cover yourself off corporately, Jones Day and Aric would take them all out…"
20. **26**	215:2-19	CD: "…Herbert Smith did not really play ball. I think that they did an exceptionally professional job and although they tried to accomplish what they could accomplish for their client in a legal manner, they caveated the shit out of it, right? If you see their reports on Camec and CAMROSE, they have a laundry list of things that once acquired needs to be done, and you'd be hard-pressed to get a handful of those things that you could tick off, which is why basically as soon as um, as soon as Randall left; they didn't get shit canned but they got moved sideways…"
21. **29-30**	210:12 – 212:22	CD: "…You can't really … Section 2 Lawyers can't you? Because they can just say lawyer-client privilege the whole time" MT: "Well I'm here. What we're asking about relates to privileged information, it depends. They don't like it, it's true." CD: "Well if there's anything to talk to at Jones Day, it's a woman named Vica IRANI….And if you really wanted to get the low down, you'd find out the name of the woman partner at Orrick who was once a partner at Jones Day, who was pushed aside on the deal because of her reservations about it and has since left that firm. Substantial reservations about it…" MT: "Was it Camec deal that she had concerns for" CD: "No, the IPO"
22. **35-36**	215:24 – 216:16	CD: "…I think I can demonstrably show that I've been a pain in their ass all along and then trying to do what I think the Bribery Act requires. And lots of other laws but nobody is going to pay any attention to that. Nobody is going to read that detail. They're just going to say, hey we like you but man you're just toxic, dude." MT: "Well, we both know that whistle blowing is now an easy option for anybody... Do you have, documentary evidence of any of this with you?" CD: "Oh yeah, yeah, yeah, plenty of it. I also have documentary evidence of all the stuff I gave to PwC from November 2010 onwards. I have told Jones Day, PwC, Deloittes who are doing other pieces of work for us,

Item No. Page No.	T/S Ref	Extract (ENRC's emphases added)
		Decherts, the AC, the Executive Committee, and members of the board, including the Chairman." MT: "So you would maintain that you brought it to the attention of all those to whom it should have been reported."

665. The above extracts are limited to those passages in the Depel Interview on which Mr Thompson was cross-examined. I consider that these passages are sufficient examples of the points which ENRC wishes to take, albeit that both its and the SFO's Appendices have referred to other passages as well.

666. I have numbered each of the passages ("items") relied on by ENRC and the total is 22. The individual items do not deal with particular topics in sequence, partly due to a lack of planning for the interview by Mr Thompson and partly because of Mr Depel's discursive and unstructured answers and observations. What I have therefore done is to group passages ("items") together where appropriate by reference, broadly, to their subject matter as follows:

(1) Mr Gerrard's retainer: items 2, 4 - 7, 13 and 14;

(2) Mr Depel's view of the AC: items 1 and 11;

(3) Mr Depel's report to the AC: items 3, 8-10 and 22;

(4) Investigation Policy: items 18 and 19;

(5) Reports of JD, HS and PP: items 12, 15, 17, 20 and 21;

(6) Location of physical evidence: item 16.

667. I will in due course, consider those groups in that order. I will deal with whether the information was privileged and then with Mr Thompson's state of mind at the time.

668. At this stage, I should note that the interview was summarised by Mr Thompson in his memo to Mr Gould dated 22 May 2012 ("the Depel Interview Memo"). It consists of 10 pages. I refer below to those points which have some relevance to the passages relied upon by ENRC and put to Mr Thompson in cross-examination:

(1) Mr Depel was particularly vitriolic about Mr Ammann, saying he had consistently obstructed any attempts to reform the company (p2);

(2) Mr Depel said that Mr Gerrard and his team were appointed in connection with the investigation started in December 2010; the investigation had been systematically obstructed. Mr Gerrard had also been asked to look at another report with some

further allegations. Mr Gerrard had come close to abandoning his work due to a lack of genuine co-operation and obstruction placed in his way (p3-4);

(3) Mr Depel's view was that JD were totally conflicted and that the information at p16 of the IPO Prospectus was demonstrably untrue. He referred to Ms Irani at JD and the lawyer who had been "forced out"; JD had "much to hide" and had expressed the view that the SFO was "toothless" (p4-5);

(4) Mr Depel referred to the HS Report on RTS and the PP Report which looked at related party transactions; (p5).

669. At pp7-8 Mr Thompson set out the areas where the information provided by Mr Depel was consistent with other information held by the SFO including in relation to difficulties expressed by Mr Gerrard. Mr Thompson then set out at p8 points that might detract from Mr Depel's credibility. He concluded thus:

> "I have been involved in the meetings with ENRC since November 2011, and have reviewed all the intelligence and open source material we have. The interview of Mr Depel is a major development. Overall I regard the information he has provided as credible, as it is generally consistent with the other information available to the SFO.
>
> The choice for the SFO is now whether to continue with the self reporting process. If Mr Depel is even partly correct, in my view it is inconceivable that a civil settlement would be an appropriate outcome. It seems to me that the overarching question is whether ENRC should be allowed to continue to access the UK capital markets when in reality those controlling the company appear to regard the UK's listing and corporate governance rules with contempt. It will not be an easy case to investigate and prosecute, but I recommend that the Director now considers adopting the case as a criminal investigation."

Relevant Legal Principles

670. Since the status of the information as privileged is disputed, I set out a summary of the relevant legal principles, as follows:

(1) The communication said to be privileged must be between the client and a professionally qualified lawyer or someone acting under their direction; insofar as Mr Depel is said to be the lawyer making or receiving the communication, he passes that test since he is a solicitor here;

(2) The lawyer must be acting as such in the relevant communication;

(3) The communication itself must be confidential; without this element, privilege cannot arise at all; thus, if the client asks for and receives advice from the solicitor in a crowded train where everyone can hear, the inference must be that there was no intention to treat it as confidential; the same would obviously apply if the advice was published; it would be different if the advice was shown to a limited number of people in conditions of express or implied confidentiality. If the communication loses its

quality of confidentiality, then the privilege in it is lost; this is distinct from the concept of waiver which normally arises as between parties to litigation;

(4) I agree that all communications between solicitor and client in relation to a transaction where the solicitor has been retained to give advice are privileged even if one or more of them does not itself contain the advice; this is so provided that they directly relate to the performance of the solicitor's advisory role; ENRC calls this the Continuum Principle;

(5) Secondary evidence of the privileged communication will also be privileged (unless the underlying privilege has been lost or waived). Thus, the fact that the client has told others in the company or particular colleagues that the solicitor has advised X does not, without more, mean that the client intended to share it with the world. If necessary, the client could restrain any 3rd party from disseminating it further. In the context of this case, if, for example, Mr Depel had relayed to Mr Thompson the advice given by JD to the company or by Dechert to Mr Ammann that would remain privileged; ENRC refer to this as the Secondary Principle;

(6) Lawyers' working papers relating to or evidencing or partly evidencing or recording the legal advice are also privileged; ENRC calls this the LWP principle;

(7) The privilege also attaches to confidential facts learned by the lawyer as part of his retainer;

(8) The SFO has contended that if the privileged information is in truth merely an opinion, it cannot be privileged; that depends, in my view, on what the opinion is about. If it is a view of the law then that, of course, amounts to advice; it will remain privileged even if it is shown to be legally incorrect. However, if it is an opinion not about legal rights and obligations but about a thing or a person it will not be privileged; that is not because it is an opinion, but because there is no underlying legal fact or advice related information to attract the privilege in the first place;

(9) The SFO also suggests that if the information is trivial, then it may not attract the privilege; again, that depends on what is meant by trivial; if Mr Depel was disclosing the contents of legal advice, the fact that the matter advised upon was relatively insignificant can hardly prevent it from being privileged; that remains the case even if the SFO for example decided that it was a relatively worthless piece of information to learn.

671. An overarching issue here concerns the status of Mr Depel for the purpose of the Depel Interview claim against the SFO. As will be seen below, Mr Depel is alleged to have conveyed privileged information because it concerns or relates to advice which he gave ENRC or because he was relaying advice given by others. No particular problem arises with the latter provided that the underlying advice was itself privileged and that privilege had not been lost in the meantime. However, as to the former, the fact that he is a qualified lawyer does not necessarily entail that whatever he said to ENRC was itself privileged. It is always the case that it must be a communication from him containing or relating to advice that he gave *qua* lawyer. When a client retains a solicitor for the purpose of giving advice, it is almost axiomatic that when he then communicates with the client it is about the giving of that advice. But here, Mr Depel was not, strictly, even an in-house lawyer. He was Head of Compliance. Compliance is of course principally concerned with legal compliance and so if he is advising ENRC internally about what the relevant legislation is, or whether ENRC is complying with it, or what ENRC must do in order to comply with it, this will be privileged. That is so even if a non-legally-qualified compliance officer gives the same advice, provided he was giving it while acting under the direction of a lawyer. Thus, what Mr Depel said originally (which he is now reporting to the SFO) and the context in which he said it, has to be carefully considered since he could have had (and plainly did have) many interactions with others at ENRC that had nothing to do with the giving of legal advice. Moreover, and as the Depel Interview itself shows, Mr Depel was on any view an extremely garrulous individual who had views about many things at ENRC. It hardly follows that all of these views must be regarded as privileged just because he happens to be a lawyer.

672. Here I should add that on 14 March 2022, I was supplied by the SFO's solicitors with an email from Mr Depel to ENRC's solicitors dated 28 February, about a number of matters including the Depel Interview. I disregard this material. It was not evidence at the trial and in any event (as will be seen) it would not have affected the outcome.

Some General Points

673. It is first necessary to recall the position of Mr Thompson in relation to ENRC by this stage. He had been a party to or received information about DC8, DC9 and DC10 in 2011 and DC12 and DC14 in early May 2012. In respect of all of the DCs in 2011 Mr Thompson had (on my findings) received information from Mr Gerrard that he knew was unauthorised and/or against ENRC's best interests or was reckless as to those facts. In some respects (as

shown above) the information presented on those occasions was inconsistent with what he had been told in the OMs.

674. The above is of some significance for at least two reasons. First, it is relevant to the questions asked by Mr Thompson in the Depel Interview about the nature and scope of Mr Gerrard's role in relation to the investigation. Second, since I have already found that Mr Thompson acted, to put it loosely, in bad faith in relation to the DCs referred to above (although he said he did not), that is at least potentially relevant to the issue of whether he acted in bad faith on the question of privilege here, and his credibility.

675. For his part, Mr Thompson accepts that much of the information put to him in cross-examination as having been privileged was such, though he failed to appreciate this at the time. To be more specific, he denies that at the time he suspected that it was privileged but chose to proceed nonetheless. His own view as to what was in fact privileged is obviously not determinative.

676. As for the role of Mr Depel, Mr Thompson knew that he was in fact a lawyer. Indeed, in evidence he accepted that he was placed on "high alert" after Mr Depel explained at the beginning that he was a dual-qualified lawyer, thinking that maybe they should proceed with more caution. However, he says that he viewed him through his role of Head of Compliance at ENRC. He saw Mr Depel rather as a man of business who was providing information, and in some cases, opinions, in the course of the Depel Interview.

677. There were a few express references to privilege in the interview, particularly in the context of (a) the SFO being able to get hold of the HS and PP Reports and (b) in the context of future possible interviews with those whom Mr Thompson did see as ENRC's lawyers i.e. Mr Gerrard and JD. In relation to those matters Mr Thompson queried whether the client (i.e. ENRC) would waive privilege so that the relevant information could be provided. What that reveals, to my mind, is that, of course, as Mr Thompson accepted, he knew what privilege was about and he had read the SFO Handbook which deals with it. But he was looking at it in quite high level terms in what might be regarded as obvious cases, i.e. a solicitor's report, or a solicitor being questioned directly about his advice to a client as opposed to the somewhat more nuanced forms of privileged information at issue here. So those references to privilege do not therefore show, without more, that Mr Thompson knew or suspected that all the information provided in the Depel Interview said to be privileged, was privileged.

678. There can be no doubt that if Mr Thompson had given more thought in advance not only to his interviewee but also to what he wanted to ask him, he would have recognised that he was likely to stray into privileged areas. That is particularly true when he was taking the initiative and asking a number of questions about the scope of Mr Gerrard's instructions and why he may not have disclosed on behalf of ENRC certain items of wrongdoing which, according to Mr Depel had been clearly substantiated. That may have made him negligent but no more. It is to be noted that Mr Elton, also present at the interview, did not notice any privilege problem as the questions were being asked, otherwise he would surely have interjected. Nor did he suggest afterwards there was a problem. Likewise, nor did Mr Gould. Indeed, Mr Thompson's 10 page summary did not appear to have evoked any concern from anyone else at the SFO in relation to privilege.

679. Next, a point is taken by ENRC that the Depel Interview was never disclosed in the Privilege Proceedings, nor was it referred to by Mr Thompson in the WS he prepared for those proceedings. It clearly should have been because it was at least potentially relevant to the question there at issue, which concerned when litigation was in contemplation, Mr Thompson having recommended that a criminal investigation should now be started in the light of the Depel Interview. Mr Thompson did not really know why his WS did not refer to it although he thought the WS process was being driven by the lawyer at or acting on behalf of the SFO; that is probably correct. Perhaps, when signing off the WS Mr Thompson should have raised the matter of the Depel Interview but I do not see this as somehow supporting ENRC's case on misfeasance here. I do not accept that Mr Thompson sought to hide the existence of the interview or something of that kind because he knew in truth that it would expose him to criticism for seeking or receiving privileged information.

680. Mr Thompson was also asked about the significance of the interview; as just noted, he recommended that a criminal investigation be started, saying that the interview was a major development. Mr Thompson said that with hindsight, and as matters turned out this was not really the case. I think that here, there is an element of Mr Thompson now seeking to downplay the significance of the interview especially in the context of conceding that at least in some respects he had been seeking or receiving privileged information. That said, it obviously was not viewed as sufficient to start an investigation because there was no investigation at that stage.

A: Mr Gerrard's retainer and his role: items 2, 4-7, 13 and 14

681. By way of introduction, it is odd, at first glance that Mr Thompson seemed so interested in this topic as opposed to substantive facts about ENRC's activities which were of interest to the SFO. A related point concerned Mr Thompson's questions about why Mr Gerrard had not been able to impart more formally to the SFO or "put on the table" the information about ENRC which Mr Depel was now giving him. The use of the word "formal" is of some significance. It resonates with Mr Thompson's earlier reference to the last OM as a "set piece" meeting. It rather looks as if Mr Thompson was distinguishing between what the SFO had been told "officially" and other information from Mr Gerrard. Indeed, Mr Thompson was asked whether a hesitation in the transcript at one point was because he did not want to tell Mr Depel about his informal meetings with Mr Gerrard (i.e. the DCs) as opposed to the formal ones. Mr Thompson denied this and said it was a simple hesitation.

682. I think that what was going on here was that Mr Thompson was exploring with Mr Depel whether Mr Gerrard had been restricted in some way by ENRC from saying as much openly to the SFO as he could or might have wished. It also suggests that Mr Thompson regarded the information he obtained in the DCs as not something the SFO might use. That would certainly make sense if (as I have already found) much of the information given at the DCs Mr Thompson knew or suspected was unauthorised. Mr Thompson was obviously influenced by Mr Gerrard's particular comments about not knowing things "officially" and so on. And ultimately, given what Mr Depel was saying (in particular that all of WB1 was true) why Mr Gerrard "hadn't [yet] coughed a report to us" on those matters.

683. This approach on the part of Mr Thompson is supported by what was said at internal pages 3-4 of the Depel Interview Memorandum about difficulties experienced by Mr Gerrard as relayed by Mr Depel and then the reference at page 7 to what the SFO had already gleaned from Mr Gerrard about the investigation.

684. The reason why Mr Thompson asked these questions therefore was not so much to obtain further information on Mr Gerrard but rather to see what was really going on at ENRC.

Items 2 and 4-7

685. The fact of Mr Gerrard's retainer by ENRC and that he was tasked with investigating its operations could not itself possibly be privileged in relation to the SFO as this is what it had already been told at OM1 – OM4. Equally, it could not be privileged that the scope of his work included Kazakhstan and Africa as this had been referred to in the OMs as well.

686. However, insofar as the question would have required Mr Depel to go into more detail about the reasons for the instruction and information given to Mr Gerrard for the purpose of his retainer, that would be eliciting privileged matters.

687. Certainly, the information provided in items 5-7 must have been privileged because they go into the detail of the scope of Mr Gerrard's retainer in particular in relation to WB1. It is true, as Mr Thompson said on item 6, that some of these matters had been reported by Mr Gerrard on the basis not of a concluded view by ENRC but being matters they were looking at. Mr Thompson was obviously keen to see if Mr Gerrard was being hampered in any way if in fact the WB1 allegations had already been substantiated at least in the mind of Mr Depel. It is not surprising, in one sense, that Mr Thompson was asking these questions because Mr Gerrard had already said that his work was being hampered.

Items 13-14

688. Equally, with regard to these items, information about what was or was not brought to Mr Gerrard's attention or that he had been instructed on the barite issue for one day and then removed, goes to the nature and scope of his instructions. The information about the production of barite itself would not have been privileged if Mr Depel had limited himself to that topic. But the important thing was the instruction of Mr Gerrard.

Analysis

689. Accordingly, much if not all of the information conveyed in these items was privileged and for the most part it arose from Mr Thompson's questions.

690. All of that said, I do not conclude that Mr Thompson appreciated at the time that what he was doing was seeking privileged information or that he was getting privileged information, or that he was reckless as to those facts. To a lawyer, the details of a lawyer's instructions to advise may be regarded as fairly obvious examples of privileged information since it is ancillary to the task of giving the advice, itself privileged. But to someone in the position of Mr Thompson it may very well not be. After all, Mr Thompson was not afraid to talk of privileged matters where he perceived them to be in issue - see paragraphs 702 and 704 below. Equally, he did not balk when Mr Depel mentioned it. But here, for the purposes of assessing his state of mind, the distinction between what is plainly or obviously privileged and what is less obviously privileged is an important one.

691. After all, Mr Thompson was not actively seeking to discover what Mr Gerrard may have advised. It was all about whether his work on the investigation generally was being hampered.

692. In those circumstances, I find no misfeasance here.

B: AC: Item 1

693. The comments about Mr Ammann being corrupt were not privileged in my view. Mr Depel was expressing an opinion not on a legal matter but on the character and actions of Mr Ammann. I do not accept that these remarks were secondary evidence of legal advice previously given. Nor do I accept that this amounts to information learned by Mr Depel as part of his legal retainer. It was learned because of his employment at ENRC but not directly out of the giving of legal advice.

694. I think the same goes for the remark about Mr Gerrard, being probably on the verge of walking out. I agree that if Mr Gerrard had told ENRC (through Mr Depel or otherwise) that he was thinking of resigning because he was finding it impossible to give the legal advice he was asked to, that communication would itself be privileged and it would remain privileged if repeated now by Mr Depel. But in truth, it was Mr Depel just opining on Mr Gerrard's position and I do not consider that to be privileged.

C: Other Legal Advisers: items 11, 12, 15, 17, 20 and 21

Items 11 and 12: JD

695. Mr Thompson's query here was not about JD's advice but who ENRC's corporate advisers were. That itself cannot have been privileged. However Mr Depel then volunteered information as to JD's advice and what he and Mr Gerrard thought of it. That was privileged and Mr Thompson should not have said "Right" at that point but should have told Mr Depel not to tell him anything about lawyers' advice. But I do not think this was a deliberate encouragement to Mr Depel and I think, as Mr Thompson said, it was here an honest mistake and an immediate reaction to what Mr Depel was saying.

696. I do not think that Mr Depel's observations about Kazakhstan and Russia at the beginning of this item are privileged. While he obviously learned of these methods of operation while employed by ENRC, it does not follow that he did so in his advisory capacity. That is partly because I accept how Mr Thompson viewed Mr Depel at the time - not as a lawyer who was or had been giving advice- but also because the opinions ventured here were rather like his view of the AC and it was not immediately apparent that this was to do with legal advice.

Items 12 and 20: HS

697. The first point is that I do not accept that the fact that JD acted on the IPO is itself privileged. But the majority of this item in any event is about HS. As to that, in its written Closing, ENRC said that the HS Report was privileged, while the SFO said it was not. The SFO pointed to paragraph 60A.1 of the 2017 Particulars of Claim and to the fact that it was accepted as not privileged by Mr Pillow QC when cross-examining Mr Thompson. There may have been some confusion here since certainly, the issue of the RTS (the subject of the HS Report) had been made public in the IPO Prospectus at pages 16-17 and so it could not be said that the whole of the HS report was privileged. For present purposes, however, I shall assume that it was.

698. But even if so, the actual contents of the report (as opposed to its existence or subject-matter) were not mentioned.

699. Item 20 does disclose elements of what Mr Depel said HS had advised on Camec and Camrose and referred to their reports. This was not solicited by Mr Thompson but this would have been privileged information. He accepted that he should probably have stopped Mr Depel at this point (as with item 11). However, again, I do not think he knew or was reckless as to that fact of privilege at the time. It was not a topic he wanted to explore and Mr Depel moved on to other things.

Items 15 and 17: PP

700. In cross-examination, Mr Thompson accepted (correctly) that it had been a mistake to ask questions about the PP Report and he accepted he should have picked up Mr Depel's initial reference to PP in the interview. What Mr Thompson had actually asked about was the subject matter of the report and then who commissioned it. What he did not seek to elicit was what PP actually advised and nor did Mr Depel tell him. Both of them seem to have recognised that it would be up to the SFO to see if it could obtain a copy.

701. Again, I do not conclude that Mr Thompson knew or was reckless at the time as to privilege here.

Item 21: JD

702. Again, this is a case of Mr Depel volunteering some information in the context of a discussion about the SFO seeking information from lawyers under s2 of the 1987 Act. Mr Thompson expressly made the point that there was a problem over privilege. Mr Depel then talks about JD and a Partner there called Ms Irani and another lawyer at JD who was taken

off the deal because she had reservations about it. In cross-examination, Mr Thompson said that his remark about asking about matters relating to privilege and "it depends" was simply because they could be lawyers' communications that were not in fact privileged. Right or wrong, Mr Thompson was receiving privileged information. As to JD, I would accept that information that a lawyer from the firm instructed to advise, had reservations, would be privileged, since it impliedly refers to communications from that lawyer as part of the instruction to advise. Mr Thompson accepted that it was privileged. But it was here volunteered by Mr Depel although Mr Thompson should not have asked the follow up question about the nature of her reservations.

703. But again, I do not think that this was a knowing or reckless breach of duty at the time. As with other incidents, I do not find that Mr Thompson knew or thought about privilege at all. In other words, he was thoughtless (and negligent) but not reckless.

704. There were some supplementary questions here about the SFO seeking to get a waiver of privilege from the client if the lawyer raised the point about privilege. Mr Thompson was taken to his remark "got to have ammunition.". He could not explain what he meant there although it was obviously concerned with getting a waiver from the underlying client. Mr Thompson did say the context would be whether there was a process of cooperation going on and part of the process might involve the client agreeing to waive privilege. He thought, ultimately, that ammunition meant having a specific reason to explain to a client why the SFO wanted it to waive privilege. He denied that the ammunition reference was to information that he could then use (like the JD lawyer who had concerns, volunteered here anyway by Mr Depel) as a lever to get the client to waive privilege. He also denied the further suggestion that the entire purpose of the interview was to convince the client to waive privilege. I accept those denials and I think the questioning here was becoming somewhat far-fetched. Mr Thompson arranged the interview because, like any other interview, he thought there may be material which would assist the SFO in its investigation. And as we know, at the time he thought it did.

705. Accordingly, there is no misfeasance in relation to any of these items.

D: Mr Depel's report to the AC: items 3, 8-10 and 22

706. As to items 3, 8 and 10, I think, on balance, that Mr Depel's Compliance Reports at least in part consisted of him giving legal advice, namely as to what was required in order to achieve compliance with "adequate procedures" for the purposes of the Bribery Act. I agree that he was not principally advising what the law was; however, whether something complied with

the legal requirement or not could obviously be legal advice. Obviously, if the subject matter discussed was a particular system or process set up in order to comply with a legal requirement and how it was working or not, in other words the mechanics of the operation, that may well not be legal advice. The information is now about something which is a consequence or product of the legal advice. However, I cannot say that these reports can simply be characterised only as such.

707. All of that said, I would agree with the SFO that this was not "obviously privileged". Mr Thompson said in evidence that he thought this was all about the audit reports and later that he did not think the audit reports were privileged. He did not appreciate that the information was privileged if in fact it was. I think this is plausible.

708. As to items 9 and 22, Mr Depel was directly or indirectly disclosing advice he had given about non-compliance with various laws. I agree that this was itself privileged information. Mr Thompson said it was not obviously privileged to him at the time and that while it was clear now that Mr Depel did not seem to respect ENRC's privilege, again, he did not appreciate this at the time. These two points go hand-in-hand. If Mr Thompson did think that information was privileged at the time, he could not have thought that Mr Depel was free to dispense such information.

709. In both these cases what Mr Depel said had not come in answer to what Mr Thompson had been asking him.

710. Again, overall, I do not think that there was any knowing or reckless receipt of privileged information.

E: Investigation Policies: items 18 and 19

711. This was information volunteered by Mr Depel after Mr Thompson had asked who else the SFO should be speaking to. I would agree that information about the nature of the investigations policies advised or contributed to by Mr Gerrard and later sought to be changed by JD, would be privileged since in effect, it was relaying the content of their legal advice.

712. Mr Thompson agreed that Mr Depel should not have been telling him about JD's removing things from the investigation policy. He had earlier said that he did not see the existence of the investigation policy itself as the issue. It was not put to him in terms that he knew that this was privileged information at the time or was reckless as to that fact. In any event, I am quite sure that he did not.

F: Location of physical evidence: item 16

713. Tape 1 ended with Mr Depel saying "and I would also like to direct you to where you will have the physical evidence."

714. There appears to have been a 14-minute break before Tape 2 started and Mr Depel agreed that nothing had been discussed with Mr Thompson while the tape was being changed.

715. Although not pleaded, it was put to Mr Thompson that given where Mr Depel had left off on Tape 1, there must have been a discussion between them about physical evidence.

716. In cross-examination, Mr Thompson was asked about whether in fact there had been a discussion in the break. He said the location of physical evidence would have been interesting to him, but he could not remember if there was any discussion about it.

717. Of course, if there had been a discussion, then both Mr Thompson and Mr Depel would not have been telling the truth having regard to the statements made at the beginning of Tape 2. The Depel Interview Memorandum made no mention of the location of any particular physical evidence and ENRC did not suggest or put to Mr Thompson that it did.

718. In my judgment, this enquiry was pure speculation and I do not accept that Mr Thompson would start Tape 2 with a knowingly false declaration. Accordingly, the question of privilege does not even arise here.

Conclusion on the Depel Interview in relation to Mr Thompson

719. It follows from all of the above that I do not consider that there is any instance where Mr Thompson knowingly or recklessly received (and then recorded) privileged information which he should have stopped Mr Depel from communicating to him, or knowingly solicited it. Accordingly there was no misfeasance here.

720. In reaching this view, it is obviously different from what I found in respect of his state of mind in connection with DCs 8-10, 15, 23 and 24. I have taken into account the fact that I rejected his evidence in those instances as to his state of mind whereas I have essentially accepted it in this context. However, in my judgment, it is one thing to recognise that a solicitor is clearly speaking out of turn, as it were, in direct conversation with the solicitor, especially where there are numerous separate occasions. It is quite another to recognise that what someone else (i.e. Mr Depel) is saying not only about what he said, but about what other advisers had said or did on other occasions was in fact privileged. As already noted, privilege of the kind at issue in the context of the Depel Interview was not, in my judgment, of the most obvious kind.

721. In the light of this conclusion, the question of knowledge of loss does not arise here.

CONTACTS DC14A-DC26

DC14A: Telephone call between Mr Gerrard and Mr Gould on 17 May

722. This 18-minute call is revealed by the call records. There is no note. ENRC alleges that the call must have been about the Depel Interview the day before. In my judgment, there is no basis for finding any breach of duty whether by Mr Gerrard or Mr Gould simply because the call took place. As for the discussion of the interview, Mr Gould denies that this was the subject of their discussion and that is plausible, since Mr Thompson did not report it in detail to Mr Gould until 22 May. Mr Gerrard denied it also.

723. In addition, there were other matters which could have been discussed at that stage, not merely affecting ENRC but also non-ENRC matters given that Mr Gerrard and Mr Gould had developed something of a personal relationship by then.

724. On that footing, I am unable to find that the call itself was about ENRC and unauthorised. If DC14A is relied upon simply as a piece of evidence to show Mr Gerrard's knowledge of the Depel Interview, it has somewhat lost its importance, since Mr Gerrard has now admitted this anyway.

DC15: Calls between Mr Thompson and Mr Gould, and Mr Gerrard on 15 and 18 June and 18 June Letter, and OM6 on 18 June

725. The DC alleged here has two elements. The first is that on Friday 15 June Mr Gerrard spoke to Mr Thompson. They agreed that a short-notice meeting with the SFO should take place the following Monday 18 June at 1:30pm. This would become OM6. The latter would precede an already-planned SIC meeting at 4:30pm the same day. It is alleged that Mr Gerrard pre-agreed with Mr Thompson and Mr Gould certain messages to be given to ENRC on that occasion.

726. The second element of DC15 is the letter sent by Mr Thompson to ENRC by email (via Mr Gerrard) on 18 June ("the 18 June Letter") and it reads thus:

> "Dear Neil
>
> **Eurasian Natural Resources Corporation Plc**
>
> Further to our conversation this morning I am writing to confirm that we will meet at the SFO at 1.30pm this afternoon. The purpose is for you to provide us with an update on your progress and agree the immediate steps necessary for your client to continue to avail itself of our Protocol on Self-Reporting. In this regard, I would take this opportunity to remind your client of the following points:
>
> - The need for a frank and thorough formal report of any wrong-doing that has been discovered.

- The requirement that the SFO is satisfied that the scope of the investigation has been not been restricted.
- The Board of Directors have demonstrably committed to the process.

We look forward to seeing you later today."

727. The covering email to Mr Gerrard had the subject heading "Meeting today" and then said "Neil… Letter as promised… Regards… Mark…". It was forwarded to Mr Dalman and Mr Ehrensberger among others.

728. The allegation here is that Mr Gerrard effectively procured the SFO to write this letter in the course of a further conversation he had with Mr Thompson in the morning of 18 June.

729. In both cases, the motive for Mr Gerrard to do this was said to be so as to expand the scope of his work or ensure that it was not about to be reduced. As against the SFO, the motive of doing this so as to assist Mr Gerrard's desire for expansion was not put.

730. There was an issue at around this time as to whether Camec was still on the agenda for the SFO or not. I deal with this at paragraphs 1270-1286 below.

731. On 12 June, Mr Gerrard received an email from Mr Thompson at 9:14am:

> "Neil… How are things progressing? Can we fix a meeting date for your latest findings?… Regards… Mark"

732. Ms Adams forwarded it internally to others at Dechert, saying that Mr Gerrard had asked that no one contact the SFO as he would speak to Mr Thompson directly. He mentioned that they should start preparing presentations on both Kazakhstan and Africa for this meeting. At least at that point, it did not appear as if Mr Gerrard was contemplating a meeting with the SFO as soon as the following Monday. Indeed, there were no presentations as such at least not in terms of slides etc.

733. At 4:36pm the same day Mr Gerrard sent an email to Mr Dalman simply with the subject line: "Can we meet privately ASAP?", to which Mr Dalman replied that he could meet at 4.30pm the following day. At 5:28pm Mr Gerrard sent a long email to Mr Dalman. He said that very little progress on Africa had been made since the SIC meeting on 9 May. He went on to say "I am now very concerned as we can expect contact from the SFO any day now regarding the proposed June meeting." Finally, he sent an email at 6:33pm saying that "The SFO have now emailed me asking for the June update meeting!! We can discuss tomorrow." This was disingenuous, since of course, the email from Mr Thompson asking about progress had arrived in the morning. So, the concern which Mr Gerrard had expressed in the previous email to Mr Dalman was a self-fulfilling prophecy.

734. Mr Gerrard then spoke to Mr Thompson twice, late in the afternoon of Friday 15 June. He later emailed Mr Thompson saying that a meeting anytime on Monday early pm would be good. He also emailed Mr Dalman simply with the subject line: "Can we talk ASAP? SFO not good." Finally, Mr Gerrard called Mr Thompson in the morning of 18 June after which the letter was sent. On 18 June itself, there was an internal Dechert call with Mr Zinger. He had been told by Mr Dalman that they would be meeting with the SFO at 1:30pm. Mr Gerrard added that "we will get formal letter".

735. At OM6, Mr Thompson said twice that ENRC was in the "last chance saloon" and that it was essential that the investigation findings be disclosed in the near future for a civil settlement to be entertained. He also said he had been "concerned" by the mention of Mr Ehrensberger as a member of the SIC and Mr Gerrard then said that he would suggest that Mr Zinger replace Mr Ehrensberger.

736. For his part, Mr Gould said that unless electronic data was secured and reviewed quickly he would order a "raid on the company's premises in order to secure the E-data", that if Mr Gerrard's investigation was restricted in scope "the inevitable outcome would be a recommendation that a criminal investigation be commenced" and that he had been concerned by JD's conduct. As far as that latter point is concerned, I should add that it echoed Mr Gould's evidence in his WS that JD had been "defensive" in the OMs. However, in cross-examination he could not really justify this. In truth, it is obvious that his negative view of JD came from what Mr Gerrard had been feeding him. Indeed, he accepted in cross-examination that at least a part of his concern about JD came directly from what he heard from Mr Gerrard in private. However that understates the position, in my view.

737. I turn now to the first element of DC15. I am quite satisfied that Mr Gerrard did effectively request the SFO to send these messages to ENRC. Indeed, Mr Gould, at least, accepted that he had raised the prospect of a raid in one meeting as pre-agreed with Mr Gerrard although he thought it was OM5 (when he first met Mr Dalman). As there was no mention of a raid then, I agree that it probably was OM6. Mr Thompson considered that his own remarks were acceptable but said that Mr Gould's had been "overblown" and "complete nonsense", in particular, with regard to the likelihood of a raid or criminal investigation if information was not provided promptly. Nonetheless, it does not appear as if Mr Thompson criticised Mr Gould for what he had said, following the meeting. Also, although Mr Thompson did not refer to a criminal investigation, he must surely have been implying that when saying that the

investigation findings needed to be disclosed soon for a settlement to be entertained. On the face of it, the alternative to settlement would be a criminal investigation.

738. The urgency with which the meeting was arranged, once Mr Gerrard had spoken to Mr Thompson, does contrast with the tone of the latter's initial email asking about progress. I do not think that this was just a question of Mr Thompson being polite. Obviously, he would be looking for an update/further meeting but not necessarily as quickly as Mr Gerrard arranged things.

739. In my view, Mr Gerrard did want the SFO to "up the ante" with ENRC to ensure that the scope of his investigation was not reduced. At one level, I am sure that this was with an eye to his fees, but it may also have been to ensure that work was done which he thought might be necessary at some point or other anyway. However, I also think that Mr Gerrard wanted to impress the SFO as to his own position as being a lawyer whom the SFO could trust, both in terms of "delivering" ENRC to them without the need for a criminal investigation and enhancing his own image. Again, the notion of Mr Gerrard by now seeing himself as some kind of intermediary between the SFO on the one hand and ENRC on the other, springs to mind.

740. On any view, Mr Gerrard could not and did not have authority to make such requests or pre-agreements and he knew that or was reckless as to it. It is not an answer to say that he reported back to the client on his conversations with Mr Thompson. That all depends on what he said. The email said that the SFO was "not good". The message could simply be that the SFO was not satisfied with the rate of progress but without revealing his request to the SFO to give a certain message.

741. Accordingly, I find that Mr Gerrard was in breach of duty because he had no authority to do or say what he did. And he knew this or was reckless as to it.

742. As for the SFO, I deal with Mr Thompson first. Given the fact of the pre-agreement here, it is important to see how he could have thought that what Mr Gerrard was doing could have been authorised; it would mean that ENRC was in effect authorising Mr Gerrard to get the SFO to "put the wind up it" in order to ensure that it toed the line. That makes no sense. Mr Thompson says that he was in truth getting frustrated with ENRC's lack of progress by now. He may well have been, but that is not to the point. It is that the SFO were effectively engaging with Mr Gerrard's request. Whether, absent this request and at an OM arranged

without any prior contact with Mr Gerrard, Mr Thompson would have made the same points may be relevant on causation, but it does not affect the breach of duty.

743. As for Mr Gould, either he also spoke at some point to Mr Gerrard when he made his admitted "pre-agreement" or it arose once Mr Thompson told him what had been discussed on 15 June. There can be no doubt that by the time of OM6 itself, Mr Thompson and Mr Gould were "singing the same tune", as it were, and they must have discussed their approach beforehand.

744. Both Mr Thompson and Mr Gould may have thought that this approach was legitimate on the basis that it would assist the SFO in the long run if ENRC could be made to deliver in the way that Mr Gerrard wanted; but that could not negate any absence of authority on the part of Mr Gerrard which I find they must have and did know of, alternatively they were reckless as to it. The way in which the letter came about adds force to this, and I turn to it now.

745. The SFO accepts that the letter was written at the request of Mr Gerrard, but says that the context is not the same as ENRC would have it. I think that the letter was Mr Gerrard's substantive idea and it followed the "pre-agreement" theme from the previous Friday. It is correct that ENRC knew (because Mr Gerrard forwarded the email) that it had been sent to him "as promised" by Mr Thompson. Equally, Mr Gerrard told Mr Zinger on the Monday morning that a formal letter was on its way. That is one thing; the fact that the solicitor is told by the other side that a letter is coming and then receives it "as promised" could be entirely innocuous. But what Mr Gerrard did not tell his client was that he was instrumental in obtaining it in the first place, and without him, there would probably have been no letter at all. The aim of the letter in my view was clearly to scare the client into action. Whatever the ultimate motive, I consider that Mr Gerrard knew full well that none of this was authorised.

746. As for the SFO, I restrict the allegation here to Mr Thompson since the letter emerged out of his discussion with Mr Gerrard on the Monday morning and is signed by him. The terms of the letter itself are disingenuous. First, it portrays Mr Thompson's conversation with Mr Gerrard as effectively limited to agreeing the time and venue of the meeting and perhaps its stated purpose. But in truth, Mr Gerrard drove all of it, at least in general terms as to the message to be delivered. Second, Mr Thompson did not just happen to take "this opportunity". There would be no opportunity without the letter that Mr Gerrard had requested. And indeed, if it was only to record the agreed time and date of the meeting, the letter would not have been necessary; it would have been done by email.

747. Accordingly, and for the same reasons, Mr Thompson knew or was reckless as to whether Mr Gerrard had the authority to request this letter. As to why Mr Thompson agreed to write the letter, I think it was little more than helping Mr Gerrard (albeit wrongfully) to exert pressure on his client to "play ball". It was not in order to assist Mr Gerrard to expand his remit so as to charge more fees. However, that does not affect the facts as to his state of mind at the time.

748. In respect of both Mr Gerrard and Mr Thompson I have also taken into account here what I say in paragraph 750 below.

749. Given the letter and OM6, it is not surprising that the SIC decided in principle later that day to keep Camec in the investigation. This was confirmed at the next SIC meeting on 9 July (see paragraph 5.3 of the note thereof). It was on this occasion that Mr Ehrensberger was asked to stand down from the SIC as he was not independent from the review of African acquisitions. He would not attend further SIC meetings unless requested. The same applied to Mr Hanna for the same reason.

750. There is a postscript to this which is revealing about the state of mind of Mr Thompson and indeed Mr Gerrard at the time. There was an open conference call on 25 June between Mr Thompson and Mr Gerrard along with Mr Gould, Mr Wiggetts and Mr Zinger (I have not given this an "OM" number as such). In that call, Mr Gerrard "explained that the Chairman had been disappointed that [ENRC] had received the letter from the SFO… [n]o-one had understood where the SFO was coming from" and Mr Gerrard had not been able to answer the client when asked why the SFO's attitude appeared to have hardened. All of this was disingenuous. While it appears that Mr Dalman was indeed disappointed when he saw the letter, the way Mr Gerrard spoke was as if he had no prior knowledge of it, when of course he did. Equally, the reason he could not explain why the SFO's attitude had hardened was because he was involved in presenting it as having hardened. So far as Mr Thompson was concerned (and probably Mr Gould who would by then have known how the letter arose) he would have known it was disingenuous, too. But he did not intervene in the meeting to say so, and in cross-examination he could not explain why he did not do so. The obvious reason is that he knew that Mr Dalman was unlikely to have authorised Mr Gerrard to have done what he did in DC15 and would not have known about it. As against this, it is said that the views expressed in the letter were the SFO's views and Mr Dalman was indeed disappointed at learning of them. However, I fail to see how that removes Mr Gerrard's lack of authority. It is also said that he was entitled to ask the SFO to put its views in writing so the client should see them. But that completely understates what happened as I have set out above.

Moreover, the letter (as described above) does not say that Mr Gerrard asked the SFO to put its views in writing and ENRC did not know that he had in fact requested it. All it knew was that, according to Mr Gerrard, the SFO had told him that a letter was going to be sent. That is rather different.

OM6: 18 June 2012

751. I have dealt with the SFO's pre-meeting letter at paragraphs 737-750 above. Mr Gerrard updated the SFO on progress on Kazakhstan and referred to the stripping allegation. Progress on Africa, due to IT problems, had been slower. It was agreed that ENRC would submit a timetable for a further visit to Kazakhstan, a presentation on the SSGPO investigation and a report on SSGPO for the SFO with a proposal for settlement. By definition, that last report would have to disclose some criminal wrongdoing. Also there would be a proposal for progress on Africa, principally covering Camec and Camrose. On 25 June Mr Gerrard agreed to give a further update on Africa in July, though not a substantive report.

DC15A: Call between Mr Thompson and Mr Gerrard on 22 June

752. At just after 9am in the morning of 22 June, Mr Zinger issued a "protocol" by which "there should be no discussions or other unilateral contacts between Dechert and the SFO" and he should be involved in any discussion or contact ("the Zinger Protocol"). Emails had to be cleared with him first as well. Yet at 6.39pm Mr Gerrard spoke to Mr Thompson for 29 minutes. Although it had been suggested that it was Mr Thompson who initiated the call, the recently disclosed texts show that Mr Gerrard had wanted to speak to Mr Thompson but Mr Thompson texted that he could not speak until about 6:30pm as he was on a train, and Mr Gerrard should call then. Mr Gerrard accepted that he had a conversation. He suggested that he could hardly not take the call on the basis that his client did not permit it. But as to that, first, if that is what his client wanted, then he should have followed its instruction. Second, he was not taking a call from Mr Thompson, he was initiating one. He could easily have brought Mr Zinger in on a call the following Monday. Accordingly, Mr Gerrard was in clear and knowing breach of duty in speaking to Mr Thompson. The incident is of some importance because it shows that Mr Gerrard was quite prepared to ignore instructions if it suited him.

753. All of that said, as there is no note of the conversation and no particular information is alleged to have been imparted improperly, the allegation against Mr Gerrard does not go any further and it is not possible to find a knowing or reckless breach of duty on the part of Mr Thompson.

OM7: 20 July

754. The first part of this meeting focused on Mr Dalman and the changes he had made or intended to make to the governance of ENRC. The removal of Mr Ehrensberger and Mr Hanna from the SIC was referred to along with the addition of two new Board members. He stressed that he had now set the "tone from the top" and at the end of the day bore personal responsibility for and "owned" the SR process and getting it done. He added that the Board was now much more focused and would get rid of people with whom ENRC had contracted in the past who had a bad reputation. He added that after conversations with the shareholders (including the Founders) they had all told him to do what he had to do.

755. There then followed an extensive slide presentation on Kazakhstan and a much shorter one on Africa. These were given by Mr Gerrard with the assistance of Mr Duthie of FRA. It was pointed out that there were a number of red flags in relation to Camrose which required further investigation. Mr Dalman referred to the $35 million drawdown on the $400 million loan which had gone to Metalkol, where no documents had been provided and said that ENRC would get to the bottom of this issue.

756. On timetabling, Mr Gould said that a follow-up meeting should be scheduled for early autumn or latest, the end of September. Mr Dalman said he was looking to resolve the Kazakhstan investigation by the end of December with Africa going beyond that. In his evidence, Mr Dalman said that he considered that the making of the negative points which had been made about ENRC here was in its best interests, and it was attempting to be very open and frank.

757. After the meeting, Mr Gerrard emailed Mr Wiggetts to say that the meeting went really well and Mr Dalman did a "really sickening and overly sincere presentation. He literally threw both Beat and Victor under the bus. Would you believe it he was also very disparaging of Jones Day." He then wrote to Mr Dalman to say that it was a great result, the slides were a good idea and "It is a far better result than you will ever know." In response, Mr Dalman said that he could not thank Mr Gerrard and his team enough. "We achieved a lot and as a consequence gives me the credibility to. Initiate more changes within the firm. I am glad I stuck to my views in faces of criticism and pressure points." In evidence, he explained the latter by saying that there were elements in the Board's thinking that ENRC was doing too much and exposing itself too much in the investigation, and it questioned if Dechert was the right firm to do the job and whether ENRC should continue to cooperate with the SFO as opposed to defending its position as a company. But that was not the majority view.

758. ENRC has criticised the difference in tone between how Mr Gerrard described Mr Dalman's presentation internally and how he put it to Mr Dalman himself and said that it was an example of his duplicity. I do not see that, although it could be said that the approach taken by Mr Gerrard was somewhat two-faced. There was no difference in substance between what he was reporting. In cross-examination he said that he thought Mr Dalman had done a good job. ENRC says that this was merely Mr Gerrard seeking to deflect criticism from his internal email but I do not think anything really turns on this.

759. On 6 August, Mr Thompson emailed Mr Gould about the former being replaced on the ENRC case. He suggested that the case would boil down to two things: negotiating something sensible with Dechert and making sure it would pass muster with the Director. At this stage, therefore, Mr Thompson was clearly still looking at the case from the point of view of settlement. In his briefing to Sir David on 21 August 2012, Mr Gould said that there had been a sea change in the approach of the Board of ENRC and Dechert was now obtaining full access to data. Significant progress had been made on Kazakhstan and the full report should be delivered at the end of October. On Africa, he said that investigations had recently developed rapidly. He also made reference to the $35 million withdrawn in cash over a period of 10 days. The full report for Africa was expected in late January 2013 due to the quantity of electronic media now made available.

DC16: Calls between Mr Gerrard, Mr Thompson and Mr Gould on 6 and 7 August (P)

760. In his reply to Mr Thompson's email referred to in the previous paragraph, Mr Gould said (on 7 August) that he had received a call from Mr Gerrard the previous day. It is also common ground that Mr Thompson spoke to Mr Gerrard on 7 August. Neither Mr Thompson nor Mr Gould could clearly state what they had been talking about. Mr Thompson relayed Mr Gerrard's voicemail from 6 August as "to get feedback generally and on the remedial actions in particular". That might have been a reference back to OM7 but there is insufficient material for me to find anything more. If there was merely a general enquiry from Mr Gerrard as to the SFO's reaction to the meeting, that could have been impliedly authorised.

761. In the event, I cannot find breaches of duty by either Dechert or the SFO here.

DC17: Meeting between Mr Gerrard, Mr Gould and Mr Anderson on 20 August (P)

762. The meeting itself had been requested by Ms Adams on behalf of Mr Anderson re-"Kaz resolution". Mr Gould made some notes of this meeting and Mr Anderson made a note. ENRC alleges that Mr Gerrard made 4 statements which were obviously against ENRC's interests, being (i) that Mr Gerrard was being kept at "arm's-length" from investigating

certain issues by JD (ii) the $35 million was taken out in cash by Metalkol and turned up in an offshore account (iii) there were no background documents for that payment and (iv) "Camec/Camrose stinks".

763. ENRC also alleges that there was also a "without prejudice" discussion at this meeting, which it said Mr Gerrard had no authority to enter into. This is not in fact a pleaded allegation.

764. The salient parts of Mr Anderson's note of the meeting, which formed the basis for the pleaded allegations, are as follows:

> "VH hates talking to us. Drives it. Does deals. Said didn't know what Vipar loan was for. Says he didn't care. He says re: 35 million, needed it to pay liquidators on FQ. Because FQ was stymied they weren't doing anything. Had to put a bond up. Tracking payments 35 million gone into the bank account in Congo. Drawn out in cash over 10 days. Then been sent on to a BVI or Guernsey trust holding it on behalf of administrator. Tracked down 9-12 million for legal fees in Congo. 9 million for FQ legal fees in Africa. No docs from client on Metalkol 35 million…
> Promissory notes. HS great job on dd. Worry client. On reflection. Now thinking did we cover ourselves enough. Probably did. Can't get past. Second payment. Stirling [sic] UKLA looking at that…
> Kept at arms [sic] length by JD. JD done a certain amount of work. Missing 10% of story. Re-issue HS still…
> How do we pay 35 million w/ no background docs People do as frightened of VH Taken out in cash Then allegedly turns up in an offshore account FQ put in bond. Get back from [illegible] December. Not got around to it according to VH. Want to see documents. He is negotiating to get it back. He is trying to get it back to save himself. Camec / Camrose stinks…
>
> Hot docs_1 lever arch…"

765. On the question of being kept at arm's-length, Mr Anderson's note does not actually say that it was Mr Gerrard being kept at arm's length or what he was being kept from. Mr Gould's note just says that JD were dealing with UKLA on the promissory notes issue. I am not sure what was actually said here, and these notes do not really help. JD was looking at the promissory note question in relation to the Camrose acquisition (discussed at OM7). The original promissory notes had been cancelled and replaced with new bearer notes. There was an issue as to whether HS had advised on this aspect of the transaction. Although the SFO accepts that the words used here indicate that Mr Gerrard was being kept at arm's-length, I think, on the basis of Mr Anderson's note, it could have been a reference to UKLA being kept at bay.

766. As to "Missing 10% of story" this could be JD missing 10% because of the impasse over the role of HS. Mr Gould was asked whether he was seriously suggesting that he thought it was proper for Mr Gerrard to be revealing confidential and likely privileged information about what JD was doing and Mr Gould said that he could agree (now) about this. He later said "I don't think it is proper". But the question asked was premised on one view of the words. ENRC's pleaded case is not that Mr Gerrard was revealing privileged information; it is that

he was badmouthing JD. I cannot say if this is so and in my judgment this point goes nowhere. Mr Gould also said later that from where he sat, Mr Gerrard had been instructed by the client to deal with these issues. In the context of this DC, I think this is plausible.

767. As to the references to $35 million, I cannot see how Mr Gerrard was authorised to make these statements. While the $35 million payment had been referred to in OM7, the cash payments now revealed were not. Indeed, they only came out of the memo from FRA to Dechert on 16 August, and it seems they were not provided to ENRC until the SIC meeting on 30 August, or perhaps even later.

768. I think that this is a case of Mr Gerrard getting somewhat carried away with his latest information and wanting to share it with the SFO. It is information which is relevant to the question of the $35 million payment but Mr Gerrard had no authority to say it at this stage and he must have known that it was unauthorised. Equally, the expression "Camrose stinks" is plainly damaging to the interests of ENRC. I think Mr Gerrard was in breach of duty because he knew he had no authority to express matters in this way.

769. However, as for Mr Gould, it does not follow that he knew that Mr Gerrard would have been unauthorised to provide any further detail then about the $35m payment. As for the "Camrose stinks" he probably realised that Mr Gerrard had no authority to use these words but appears not to have done anything with them. The phrase is not contained within his notes and at the end of the day this was a short one-off expression. It is a breach of duty but one of little significance.

770. There is then the separate question of the "without prejudice" discussion which does not feature in Mr Anderson's note or indeed Mr Gould's. However, the final section of Mr Gould's briefing note to Sir David reads as follows:

> "At a meeting held on the 20th August 2012 the potential resolution for Kazakhstan was raised, on a without prejudice basis, insofar as the company has clearly committed a 'books and records' offence and has 'inadequate procedures' in place to prevent bribery and corruption. The recoverable property could be a multiple of the annual cost of suitable anti-bribery and corruption compliance resources. The basis for not prosecuting would be an extension of the fact that the victim has been ENRC. This may lead to a 'first stage' [sic] CRO in an amount ranging from £1 to £2 million through to £8 to £10 million."

771. Mr Gould and Mr Gerrard accepted that there was a "without prejudice" discussion and that is not surprising, since Mr Anderson's stated purpose for the meeting was "Kaz resolution". Although Mr Gould said that the figures referred to in his note were his own personal thoughts and not communicated to Mr Gerrard and Mr Anderson, I am sure that they were. If one is going to talk about resolution it would be odd not to make some reference to figures, especially in the case of someone like Mr Gerrard who would have wanted some ballpark

figures. Indeed, at a later initial meeting with Morgan Stanley on 5 October, he referred to a proposed £8 million fine from the SFO.

772. I also think that Mr Gerrard would have postulated a resolution based on ENRC's commission of a "books and records" offence and one concerned with inadequate procedures to prevent bribery. Those were the obvious offences to found a civil settlement, but they needed a criminal offence committed before there could be a settlement. I do not think he was making an unqualified admission of criminality in a vacuum. I also think that the reference to "without prejudice" here was in the normal sense of settlement negotiations, albeit that Mr Gould said that he did apply that expression to cover other things as well. In other words, even if Mr Gerrard did proffer the commission of those offences within these discussions, there was nothing that the SFO could actually do with it.

773. However, I am less clear whether the references to Africa were made at this meeting especially since the topic was meant to be simply Kazakhstan.

774. In fact, this element of DC17 was not actually pleaded. Nonetheless, it was clearly put to Mr Gerrard and he dealt with it in his evidence. So far as Mr Gerrard is concerned the point is not so much that negotiations involving figures would not form part of a process designed to lead to a civil settlement. Rather the question is whether he was authorised to enter into these discussions at all at this stage. There is no evidence that he was and I conclude that he was not and must have known that. He may well have felt that none of this really mattered since it was all without prejudice but I do not think that is an answer. Accordingly, I consider that Mr Gerrard was in breach of duty here.

775. The position of Mr Gould is different, however. It was not obviously against ENRC's interests for Mr Gerrard to have this meeting. Also, the reference to the offences was in the context of a postulated settlement not some separate admission. In any event, Mr Gould's view was that he could not have used it. I do not think that Mr Gould here knew that Mr Gerrard was acting without authority and so there is no breach of duty on his part.

DC18: Call between Mr Gerrard and Mr Thompson on 4 October (P)

776. This was evidenced by Mr Thompson's file note. Mr Gerrard had been asked by the SIC to inform the SFO about the resignation of Mr Zinger as Deputy General Counsel. The conversation went beyond that, however. It included Mr Gerrard telling Mr Thompson that "around £35 million [it was in fact $35m] in cash was withdrawn from ENRC company accounts in the past, and these sums have not been satisfactorily accounted for". It is correct

that at OM7 reference was made to the $35 million as a drawdown where no documents had yet been provided. The information that it had all been paid out in cash was significant. In fact, this information had been conveyed to Mr Gould in DC17. As with that DC, I cannot see how Mr Gerrard was authorised to disclose this information, especially given that the call here was meant to be only about Mr Zinger's resignation. Of course, it can be said that this was an update, but then there is no evidence that ENRC authorised Mr Gerrard to give updates in this way. Mr Gerrard must have known that. Accordingly, he was in breach of duty.

777. However, and as with Mr Gould in DC17, there is no reason why Mr Thompson should have known that Mr Gerrard had no authority to add the information about the cash nature of the withdrawal. So there is no breach of duty by him here.

DC19: Meeting between Mr Gerrard and Mr Gould at Shaw's Booksellers on 12 October (P)

778. It is common ground that Mr Gould and Mr Gerrard met for lunch at a pub called Shaw's Booksellers. It is near to Dechert's offices as Ms Adams emailed to Mr Gould when setting it up. She also said that it was "out of the way". Although it is suggested by ENRC that this indicated that both Mr Gould and Mr Gerrard knew it was to be an improper meeting I do not accept this. Mr Gerrard frequently met people there and Mr Pickworth had been there also. Mr Gould said he liked it because he did not like crowds. Whether Shaw's Booksellers was a particularly quiet pub I do not know, but the fact of his regular visits there and that it was in an area with many law firms and chambers nearby seems to me to make it an unlikely location for an improper meeting.

779. No note was taken of the meeting. However, Mr Gerrard's billing narrative stated that he discussed the changes to the voluntary reporting guidelines, gave an update on Project Moses (i.e. the Gertler buyout) and a date for the next open meeting. I am not prepared to infer that the meeting was improper or unauthorised, which is the only allegation made by ENRC.

780. In my judgment there was no breach of duty by either Mr Gerrard or Mr Gould here.

DC19A: The text from Mr Gould to Mr Gerrard dated 20 November

781. This is another of the texts that emerged following the disclosure on Day 24, referred to above. It reads as follows:

> "Sorry bad signal on the train. DGCBQC has shown he ignores or passes such requests for meetings etc back to the case team. We should have Alun Milford with us when we meet next week. That move is my suggestion to the 9th floor to get them on board as to how I believe this could be resolved—2 parts, one non pros and one pros (although the 2nd part may be more than one defendant). I believe AM will take a reasonable stance when the material is viewed; it is, in my opinion, after all not material we are ever going to get in an evidential format. Happy to chat later if you/client need more

> comfort—should be available from about 6.45 or so (or tomorrow afternoon in the office). DG (the non CBQC one!)."

782. As against Mr Gerrard, it is said that he should have passed this information on to ENRC because it showed how Mr Gould viewed the SFO's ability to obtain actual evidence against ENRC. Dechert makes the point that the SFO could in fact have obtained such evidence itself by serving notices under s2(3) of the 1987 Act, on ENRC, and its advisers in London. Such notices could have encompassed overseas material held by subsidiary companies. I see that, but nonetheless, in my judgment, Mr Gerrard should clearly have communicated Mr Gould's thought processes to his client. It could affect ENRC's view of continuing with the SR process and/or what information it would provide at the next meeting. This was more than mere negligence on Mr Gerrard's part. He must have known that he should have passed the information on, or he was at least reckless as to that. On being shown the text, Mr Gerrard said that he had "no memory" of it. I do not accept that, nor do I consider that the text can be dismissed as "unremarkable" and merely part and parcel of the SR process. Mr Gerrard was clearly in at least reckless breach of duty.

783. As for Mr Gould, he clearly had no business communicating his thought processes about the SFO's abilities to obtain evidence, or those of anyone else, or the attitude of Sir David. The evidence of other SFO officers on this point is revealing: Mr Thompson saw it as undermining the SFO and Mr Milford thought it was "not remotely sensible or appropriate"; had he known of the text, Mr Gould would have been removed from the case. At the end of his cross-examination, having said there was nothing wrong with saying in the text that there was material that the SFO would not ever get in evidential form, Mr Thompson then said that he would not disagree with Mr Milford's view that it was "not remotely sensible or appropriate".

784. By now, as I see it, both Mr Gerrard and Mr Gould's relationship was such that they were able and willing to communicate "beneath the radar" as it were. In other words they were prepared communicate on a confidential basis, i.e. just between themselves. Indeed, I think that by now, Mr Gould felt somewhat beholden to Mr Gerrard as someone who could give him useful career advice and Mr Gerrard wanted to continue to inveigle himself with the SFO. It may be that Mr Gould thought that all of this was in the interests of the greater good of the SFO obtaining a civil settlement, while Mr Gerrard thought that it was useful to obtain intelligence to this end (but without revealing it to his client) but in my judgment this does not affect the position.

785. Here, in my view Mr Gould was, first, plainly aware of his own breach of duty to the SFO in writing the text. Second, however (and consistent with the plea at paragraph 30.2 h (a) of the 2019 POC), it was put to him in cross-examination whether he expected Mr Gerrard to feel free to go off and tell his client about the prosecution of individual defendants as referred to in the text. His answers impliedly suggested that he did, but I do not accept this. One only has to posit whether Mr Gould would have been prepared to write formally to Mr Gerrard in the same terms (he surely would not) to see that. Not least because of his own breach of duty to the SFO, Mr Gould could not seriously have thought Mr Gerrard would have communicated the text to his client. This was effectively an "off the record" communication following an earlier conversation which Mr Gould either knew or suspected would go no further than Mr Gerrard. As such, there was at least a reckless breach of the Independence Duty on the part of Mr Gould here.

OM8: Meeting on 28 November

786. This was attended by Mr Rappo, Mr Thompson, Mr Gould, Mr Dalman, Mr Wiggetts, Mr Gerrard and Mr Duthie. The slide presentation given by Dechert contained 49 slides on Africa and two on Kazakhstan. I agree that there is a complete absence at OM8 of the references to Mr Hanna and Mr Ehrensberger in DC17 as being "above and beyond" the public interest, to their possible dismissal and to the giving of notice to the SFO in that event. Nor was there any mention of the "without prejudice" conversation. As already indicated, these were all significant matters and the only possible reason for them not to be mentioned at OM8 is because neither Mr Gerrard nor Mr Gould wanted to disclose them.

DC20: The draft 12 December letter to the SFO and the draft s72 undertaking (P)

787. At OM8, Mr Wiggetts said that, subject to obtaining Board approval, the Kazakhstan report would be sent to the SFO on 10 December, although not with its appendices at that stage.

788. In the afternoon of 12 December, Mr Gerrard sent a letter to Mr Gould as follows:

> "As you are aware we have prepared a draft report regarding our investigation into SSGPO, a subsidiary of ENRC.
>
> ENRC entered into a corporate self report process with the SFO under:
>
> • the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud dated 18 March 2009; and
>
> • the Approach of the Serious Fraud Office to Dealing with Overseas Corruption dated 21 July 2009.
>
> We note that the SFO restated its approach to corporate self reports on 9 October 2012. A questions and answers document issued by the SFO… on this date stated that:
>
> > *If before the publication of the revised policy statements the SFO entered into an agreement, with a corporate body based on an earlier SFO statement of policy or practice, and the*

> *corporate body has fully complied with the terms of that agreement, then the previous statement of policy or practice will continue to apply.*
>
> Given the restatement, we would like confirmation that ENRC is still part of the corporate self reporting process prior to Dechert submitting our report on SSGPO. Any report submitted by Dechert to the SFO will be submitted under a limited waiver of legal professional privilege for the purposes of the corporate self report only.
>
> Should an equitable settlement not be reached between the SFO and ENRC, please confirm that it is accepted that the report will not be used by the SFO as evidence of any wrongdoing or in any criminal proceedings against either ENRC, any subsidiary of ENRC or any employee or director of ENRC or its subsidiaries."

789. It is common ground that Mr Gerrard and Mr Gould had spoken earlier that day, and that at 1:24pm, Mr Gerrard sent to Mr Gould a copy of the letter in draft and he asked Mr Gould to call him to discuss it. The draft was headed "PRIVILEGED & CONFIDENTIAL DECHERT WORK PRODUCT DRAFT 12/12/2012" and it began "Dear Dick". Otherwise, it was the same as the version sent later that day ("the 12 December Letter"). Mr Gerrard accepted that he probably had no instructions to send a draft and discuss it in this way and I am sure he did not, as he knew at the time.

790. Mr Milford thought that Mr Gould's actions were improper. In cross-examination, Mr Gould said that he was being asked how a letter in this form would be received by the SFO. The SFO submits that it is hard to see how such an approach could be against ENRC's interests, which were that the letter should be well-received by the SFO. However, that depends on what changes might have been suggested by Mr Gould. If changes to make the letter more palatable to the SFO included, for example, the removal or lessening of the assurances sought, that would not be in ENRC's interests. On any view there was a clear conflict of interest here. The fact that, in the event, it seems that Mr Gould did not suggest any changes is beside the point. He must have appreciated that Mr Gerrard was not authorised to seek his comments on the letter. I think that this was another example of Mr Gould dealing with Mr Gerrard "beneath the radar" (see paragraph 784 above). And it reflects Mr Gould later telling Mr Gerrard expressly that the draft s72 undertaking should not be shared with his clients – see paragraphs 791-793 below. It is also hard to see how Mr Gould thought he was acting in accordance with his Independence Duty to be willing to give input in a letter to be sent from ENRC, the party potentially under investigation, to the SFO in these circumstances. Both Mr Gerrard and Mr Gould were in my judgment, in knowing breach of duty here.

791. There is a further element to DC20. On 18 December, Mr Gould emailed Mr Rappo, by now Joint Head of the SFO's Bribery and Corruption Division, and Mr Thompson, attaching a memo recommending that ENRC be offered a s72 restricted use undertaking as a response to the 12 December letter. The draft undertaking included a wide-ranging obligation on the part

of ENRC to provide the investigators, through Dechert, with all the information that became available. Mr Gould thought that he might have discussed this with Mr Gerrard and I think this is likely. Mr Gould agreed with Mr Thompson to go through it the following day. However, he also sent a draft of the undertaking to Mr Gerrard who had been chasing a response to the 12 December letter. In sending the draft to Mr Gerrard, Mr Gould said that it had yet to be signed off but should "provide a flavour of where I think we may wish to go". It appears that he had also said that the undertaking was for Mr Gerrard only to look at it and not to share with the client. It seems that this was to avoid any embarrassment on the part of Mr Gould if, in the event, the SFO did not agree with his approach and the undertaking.

792. In my judgment, Mr Gerrard was in breach of duty in respect of the draft undertaking in dealing with it at all, once he had received it, and was equally in breach to the extent he spoke to Mr Gould about it earlier on. He had no authority to do this. Moreover, once received, he should have told Mr Gould he was not prepared to deal with it unless his clients could see it. In fact, he sent the draft to Mr Wiggetts and Ms Black, saying that it was "for our purposes only". It is true that Ms Black informed ENRC that Mr Gould was considering the provision of a s72 undertaking but that had been a week earlier, on 13 December and it is common ground that the draft itself was not shown to ENRC.

793. As for Mr Gould, not only was he in breach of his own duty to the SFO by sharing a draft with Mr Gerrard but he must have known that Mr Gerrard could not have had authority to deal with it on the basis that his clients did not know about it.

794. As it happened, nothing came of this draft undertaking and the 12 December letter was not answered by the SFO until January 2013. So not much turns on these breaches. However, DC20 is strong evidence of just how close Mr Gould and Mr Gerrard had got by that stage.

795. I should add, as a matter of chronology, that Mr Gould also agreed that the time taken by the SFO to respond to the 12 December letter (before which the Kazakhstan report could not be sent) would not "count" against ENRC in terms of the resulting delay in the provision of the report.

DC21: Call between Mr Gould and Mr Gerrard on about 11 January 2013 (P)

796. Mr Gerrard had been asked by Mr Dalman to contact the SFO after the 7 January SIC meeting and on 11 January, Mr Gerrard reported back that he had done so in respect of the timing of the delivery of the Kazakhstan report and the fact that the aspect of the report

dealing with the "stripping" allegations in Kazakhstan was not yet ready. Stripping was the process of removing topsoil and rock to reveal iron ore in preparation for its extraction.

797. Mr Gould reported on his conversation with Mr Gerrard to Sir David in a memorandum dated 18 January. This said that "there is now some evidence of the involvement of [Ms Zaurbekova] in a dubiously awarded contract in Kazakhstan". Mr Gerrard admitted that he said as much to Mr Gould in their conversation a week earlier. However, Mr Dalman had told Mr Gerrard at the 7 January SIC meeting not to raise the issue of Ms Zaurbekova further until the SIC had fully investigated the position.

798. In fact, the SFO knew about Ms Zaurbekova from OM8 and the slides presented there. Nonetheless, Mr Gerrard had been positively told not to mention her and his report back to ENRC did not disclose that he had.

799. In my judgment, Mr Gerrard was in clear breach of duty because he acted without authority.

800. However, the position is different for Mr Gould. He would not have known about Mr Dalman's instructions, nor could they be inferred. And as the information had already been presaged at OM8, I cannot find that Mr Gould knew that Mr Gerrard was not authorised to say what he did. I do not find any relevant breach of duty in relation to Mr Gould.

The Rappo Letter

801. The response from the SFO to the 12 December letter from Dechert was sent by post on 21 January and received on 23 January ("the Rappo Letter"). It followed an internal SFO meeting on 21 January which itself followed the provision of a briefing note for Sir David on 18 January from Mr Thompson, with input from Mr Gould. The letter (reformatted) said this:

> "Thank you for your letter of 12 December 2012 to Dick Gould, which I have been asked to respond to.
> In essence you raise 3 matters:
> 1. You seek an assurance that ENRC is part of "the corporate self-reporting process" in light of the restatement of the approach to Corporate self-reporting, dated 9 October 2012
> 2. You state that any report submitted by Dechert to the SFO will be submitted under a limited waiver of Legal Professional Privilege, for the purpose of the corporate self-report only, and
> 3. You seek an assurance that the SFO will not use that report as evidence in any criminal proceedings against ENRC, its subsidiaries or any directors and employees of ENRC or its subsidiaries, should an "equitable settlement" not be reached between the SFO and ENRC.
> Regarding point 1:
> As you are aware any decision to prosecute unlawful activity will be governed by the Full Code Test in the Code for Crown Prosecutors, the Joint Prosecution Guidance on Corporate Prosecutions and, where relevant, the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010. As the existence of a criminal investigation is a precondition to the applicability of the Attorney-General's Guidelines to which you refer, I do not accept that they are applicable in this case, at this stage.
> One of the factors that the SFO will consider is whether there has been a "genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions".

> Self-reporting is not, and never has been and never could be, a guarantee that a prosecution will not follow. Each case must turn on its own facts.
> In this case the SFO approached ENRC, by means of a letter on 10 August 2011, in relation to allegations that had appeared in the press.
> Since that time although there has been a number of meetings between the SFO and ENRC and its legal representatives, and an internal investigation has been on-going, as yet no report nor any supporting evidence has been provided to the SFO. In any event no civil recovery settlement or plea agreement has been reached with ENRC.
> We await your reports and will analyse them in detail prior to making any decisions as to the way forward, including any possible prosecutions. You will appreciate that this is the only principled way we can deal with this case, or indeed any other case.
> Regarding point 2:
> It is a matter for ENRC and its legal advisers as to which, if any, elements of the reports are covered by LPP, and whether they waive any privilege that may attach.
> However please be aware that in assessing whether a company has adopted "a genuinely proactive approach" the Guidance on Corporate Prosecutions states that "the prosecutor needs to establish whether sufficient information about the operation of the company in its entirety has been supplied... This will include making witnesses available and disclosure of the details of any internal investigation".
> In light of the fact that we have not seen these reports, no assurances can or will be given at this stage that we accept it is subject to LPP or accept any conditions that you propose to attach to service of the reports.
> Regarding point 3:
>
> No assurances can or will be given at this stage as to what use the SFO will make of any report that may be provided to it.
> The SFO cannot and will not give any assurance in relation to underlying material, or evidence, upon which the reports are based, or which is provided in support of the reports.
> We are concerned at the apparent lack of progress since August 2011. We understand that your report on Kazakhstan has been completed, subject to an addendum dealing with the issue of the Chief Financial Officer, and that your report on the Congo is nearing completion. You will appreciate that if we cannot progress these matters with your assistance, we have no alternative but to progress them without your assistance.
> Therefore if we do not receive your report on Kazakhstan by close of business on Thursday 31 January 2013, we will have no option but to open a criminal investigation into ENRC's activities there, with a view to the exercise of our investigative powers.
> Assuming your report is received, we can agree a timeline for submission of any addendum report in relation to the CFO, and the report in relation to the Congo."

802. On any view, this was not the response which ENRC (and in particular Mr Dalman) or Mr Gerrard had been expecting. The SFO had clearly decided to take a tougher line.

803. On 31 January, Dechert wrote to Mr Rappo enclosing the draft 285-page Kazakhstan report and promising the appendix on the stripping allegations by the end of February. On the same day, Mr Dalman responded to the Rappo Letter in these terms:

> "Thank you for your letter dated 21 January 2013 to Mr Neil Gerrard of Dechert LLP. I wanted to personally respond to that letter.
>
> I am both concerned and disappointed with your letter, in particular, your comments regarding the corporate self-reporting process. Dechert have been engaged to conduct an independent in depth investigation exercise, to which the company has devoted a very substantial amount of management time and resource at all levels, and alongside this we have been engaged in an ongoing programme considering and implementing appropriate remedial actions. The SFO have of course been kept well briefed along the way. I can assure you that the committee with responsibility and oversight over this investigation (the "ENRC Special Investigations Committee") has worked tirelessly over the past six weeks.

> You will be able to gauge the volume of work that has been carried out when you read the draft report dated 12 December 2012 in respect of Kazakhstan (in the form requested in your letter) that we intend to deliver to you on or before 31 January 2013.
>
> In relation to Africa, that extensive investigation is continuing, fully supported by me and the Board of ENRC PLC. We look forward to engaging with you on the timetable for submission of that report.
>
> It remains our prime objective to reach an equitable settlement between ENRC and the SFO and we want to engage with you to discuss a settlement in relation to Kazakhstan as soon as appropriate."

DC22: Call between Mr Gould and Mr Gerrard on 22 January

804. In the meantime, the day before the Rappo Letter had been received, Mr Gould and Mr Gerrard had a 19 minute conversation. There are no notes. Mr Gerrard says he was calling to chase the SFO's response to the 12 December letter. ENRC says that he must have discussed with Mr Gould the substance of the Rappo Letter which had already been sent and that this call was unauthorised. However, Mr Dalman had asked Mr Gerrard to chase the response and to that extent the call was not unauthorised. Mr Gerrard said later, in an email to Ms Coleman, that Mr Gould had told him that a reply could be expected within 12/24 hours, but it would come from a different SFO officer. In essence, that was true.

805. Despite the length of the call, I am not prepared to find that Mr Gerrard was told of the substance of the Rappo Letter, and in fact it is not alleged that he was in breach by, for example, not communicating this information to the client. So I find there was no breach of duty here by Mr Gerrard. As for Mr Gould, the allegation that he failed to document the call was not put. Accordingly, there was no breach of duty by him, either.

DC23: Call between Mr Gerrard and Mr Thompson on 27 February (P)

806. After a short call from Mr Gerrard who was in New York, Mr Thompson returned his call later in the day and they spoke for 15 minutes. Mr Thompson made a manuscript note which he later typed up and also sent an email about the conversation to Mr Rappo and Mr Coussey. The latter read thus:

> "Note of my phone call to NG at 1650 today:
>
> I called NG on his mobile - he was in the USA. We discussed his client's position and where they are with reporting to us.
>
> Re Kazakhstan, they have largely completed the additional work on the stripping contracts and the more recent allegations about the CFO. The stripping contracts have been found to be consistently inflated/fraudulent by about 30%. The position with the CFO is that whilst they have found "unfortunate coincidences" the allegations have not been substantiated. His overall view is the there is insufficient evidence to amount to relevant criminality for our purposes (though some sort of civil action or referral to UKLA could be considered). However he said that his current report on these points is still in draft and is subject to: firstly a need for experts to agree; and secondly Board approval. He described the Board as nervous after Patrick's latest letter. In consequence he is seeking an extension of time to report properly to us towards the end of March.
>
> In respect of Africa he was vague but what he said was very interesting. He described the situation as complicated but more concerning for the Board. He said he thought that he had taken his work as far as

> he could without there being a risk to any investigation we might wish to carry out. I think this was in respect of risks of loss of evidence or by alerting potential suspects, but he was not at all specific. He said he would ideally like to come and meet us about this and explain further.
>
> I said I would relay all this to Patrick and we would get back to him. NG said he would be back in the UK 0730 on Thursday and would be keen to meet next week if at all possible (in addition to knowing our view on the delivery of the Kazakh addendum reports).
>
> My inference from what he said is that there is some real substance to the issues found in Africa, presumably in respect of the Camrose transaction and the cash payments previously flagged as unaccounted for. I would suggest that we agree our position and Patrick relays this to him when he is back in."

807. ENRC's case here is that the first two paragraphs of the information communicated to Mr Thompson were both plainly against ENRC's interests. In fact, in respect of Mr Thompson, only, the second paragraph was put to him and as for Mr Gerrard other parts were, too, but the second paragraph was emphasised. So far as the first paragraph was concerned, this at least had some relevance to what Mr Gerrard said was the reason behind the call, namely to extend the time for the provision of the final version of the Kazakhstan report which would include the stripping allegation information, until towards the end of March. It appears that the reference to the excess on the stripping contract being 30% is wrong because it was later shown by KPMG to be 10%. But overall, I do not see that what he said is necessarily unauthorised since he was reporting where he was up to in the production of the final report. Mr Gerrard could not have been authorised to say that the Board was nervous, however, and that was a breach of duty although where it goes is another matter. For the avoidance of doubt I do not find any breach of duty on the part of Mr Thompson in respect of this first paragraph.

808. As for the second paragraph, that is clearly what interested Mr Thompson more. There is a preliminary question as to what exactly Mr Gerrard meant when he said (according to the email):

> "… He thought that he had taken his work as far as he could without there being a risk to any investigation we might wish to carry out. I think this was in respect of risks of loss of evidence or by alerting potential suspects, but he was not at all specific. He said he would ideally like to come and meet us about this and explain further."

809. In his WS, Mr Gerrard said that what he had said was that he had taken his work as far as he could without there being a discussion with the SFO about how his investigation should proceed. That is not quite what Mr Thompson reported in his email and I have no reason to think that what Mr Thompson reported here was not accurate. In Mr Thompson's WS he did not elaborate on what had been expressed in the email.

810. ENRC contends that Mr Gerrard was saying that he could not do further work on Africa without creating a risk to any future criminal investigation into ENRC, and this was

extremely prejudicial because it was suggesting that if he carried on with his own work his own client would destroy evidence which would hamper any SFO investigation.

811. However, in evidence, Mr Gerrard, and later Mr Thompson, said that what was being said was different; it was that Mr Gerrard's work might risk a later investigation not into ENRC but into certain individuals (like Mr Hanna) and was not about ENRC's corporate position at all. Since Mr Gerrard did not act for any individuals, he owed them no duty and was not, therefore, acting against the interests of ENRC at all. Indeed, in seeking to protect the SFO's position as against individuals, he and ENRC could be said to be co-operating as fully as they could. Moreover, there were cases where the SFO made a civil settlement with the company but then investigated individuals and this possibility had been recognised here, much earlier.

812. At one point in his evidence, Mr Gerrard also said that he had actually had authority from ENRC to express his concerns about continuing his work, but there is no evidence to back this up and I reject it. He also explained his statement by reference to the fact that "authorities like to know before you start trampling on the evidence in respect of individuals" but I do not regard that as a plausible interpretation of what he was saying at the time. Quite apart from anything else, Mr Gerrard was suggesting that he might have to stop work altogether on Africa not just work that might possibly prejudice an investigation into individuals. And his reference to "any" investigation which the SFO might want to carry out was surely in relation to (or certainly inclusive of) ENRC itself.

813. In cross-examination, Mr Thompson also drew this distinction and said that the reference to an investigation could have been to individuals and this might have assisted ENRC as against the SFO. But I did not find his evidence on this distinction any more persuasive than Mr Gerrard's, especially as he did not mention it in his WS. Moreover, the context here was that of the Board being nervous and then Mr Thompson's inference that there could be lots of evidence and his view that there was now real substance to the issues in Africa, which must have been as against ENRC and not simply individuals.

814. The following points should also be made about the supposed companies/individuals distinction. All of this was in the context of Africa. At OM8, Mr Dalman had suggested that a report could be produced by the end of March. But as at 27 February, there was no sign of it, and of course there was now the added pressure of the Rappo Letter. On the face of it, and as indicated by Mr Gerrard, there were matters of substance to be investigated and which would form the subject matter of the Africa report. Without a report, there was no prospect of a civil

settlement regardless of any updates along the way, because that is what the SR process required.

815. When, therefore, Mr Gerrard said that he was not sure if he could continue his work, that would mean an end to Dechert's investigations in relation to Africa for ENRC, which was designed to produce a report. That (very serious) possibility existed, whether the SFO was contemplating an investigation into individuals or into ENRC itself. If Mr Gerrard did stop work, then someone else would have to take over or otherwise there would be no report, in which case the only course for the SFO (other than doing nothing) would be a criminal investigation.

816. Further, Mr Thompson rightly guessed that the prejudice to an investigation might be the loss (i.e. removal or destruction) of evidence or alerting possible suspects. Nothing here suggested a distinction being drawn between a possible future investigation into ENRC and into individuals.

817. On any view, therefore, Mr Gerrard was saying that he might have to stop work (and therefore acting for ENRC) in order not to prejudice some possible investigation by the SFO into ENRC and/or individuals within it. It is quite impossible to see how this could be said to be in the interests of ENRC since it implies a loss of evidence and/or alerting suspects within ENRC.

818. Mr Rappo spent much time in cross-examination (relied upon by Dechert and the SFO to support the individuals/company distinction) saying that it might very well be in the interests of a company which was seeking a settlement to agree, as part of that settlement, to assist the SFO in any criminal investigation against individuals. I see that, and indeed, as Mr Thompson's note to Mr Gould of 18 January recounted, Mr Dalman had said that the company was willing to assist here if necessary. But that is all in the context of some overall deal. That is not what Mr Gerrard was talking about here; he was talking about cutting his work short because of a risk of evidence going missing which could hinder any SFO investigation.

819. Dechert and the SFO also suggest that Mr Rappo had also drawn the individuals/company distinction in the context of his conversation with Mr Gerrard which is the subject of DC25A. I deal with that below, but it is worth pointing out here that as it happens, the point made to Mr Rappo was not the same as the point made by Mr Gerrard to Mr Thompson. He was not raising the question of whether he would continue his work for ENRC; rather, it was about

the suspension of individuals which Dechert was going to recommend to ENRC while the Africa investigation continued. Even here, the risk of suspension of individuals could be that they remove evidence of wrongdoing that could be alleged either against ENRC or themselves. Further, it would seem odd to share the intended suspension of individuals with the SFO, in advance, at least without the clear authority of the client.

820. So, on a careful analysis, the company/individuals distinction, if it was intended here by Mr Gerrard (and I think it was not) is in fact irrelevant to the issue of whether what he said was clearly against his client's interests.

821. For all those reasons, therefore, I reject the "individuals" explanation given by Mr Gerrard and Mr Thompson.

822. Mr Thompson also made the point that, having reported the conversation as a whole to Mr Rappo and Mr Coussey, neither suggested that he should stop his work on the investigation. I see that but merely because they did not react to his email in that way or in relation specifically to Mr Gerrard's point about continuation of his work, it does not mean that what Mr Gerrard was telling Mr Thompson was not plainly unauthorised. It is further submitted that the very fact that Mr Thompson wrote up a file note for both this DC23 and DC24 recording the essence of what Mr Gerrard had told him shows that he did not have a "guilty mind". I do not agree. Mr Thompson might well not have seen any reason not to record valuable intelligence coming from Mr Gerrard even if unauthorised, especially if, at the end of the day, he knew that without a settlement, the SFO would need to obtain actual evidence. In other words, this is another example of seeking the "greater good" of improving the SFO's position as against ENRC.

823. In my judgment, Mr Thompson clearly knew that Mr Gerrard was talking about putting at risk the investigation into ENRC and if so, he must have known and did know that what Mr Gerrard said could not possibly have been authorised by his clients from whom he was now trying to distance himself. I should add that in my view, it is hopeless to suggest that the disclosures made here could not be viewed as unauthorised because they were simply part and parcel of a normal SR process. See further, my general observations at paragraphs 490-492 above.

824. In that context, Mr Gerrard's wish to come and see the SFO to discuss his concerns further is part of the information which was against the interests of ENRC. He could have no possible authority on the part of ENRC to discuss a matter with the SFO of which he would obviously

not inform ENRC. He had emailed Mr Rappo the day before wanting to speak about a "number of increasingly urgent matters". Mr Gerrard said he could not remember what this was about, but I think he wanted to say to Mr Rappo the same sort of thing he said the following day to Mr Thompson.

825. As to why Mr Gerrard would have said this to the SFO (on the interpretation as I have found it) I think that it must be remembered that relations would have been strained with ENRC by now because of the Rappo Letter, which indicated that Mr Gerrard had not been able to deliver the SFO settlement that he thought he could. And this was after an extremely large amount of money had been spent on his firm's fees. I do not think that he gave this message to the SFO to cover up his previous misdeeds as it were or in order to provoke a criminal investigation in order to generate yet more fees. I think it is more prosaic than that. He could see the Kazakhstan report being ultimately finalised and delivered soon which would then deal with that aspect of the SFO's interest. However the real emerging problem was Africa and he was now less keen to do it or thought that ENRC might terminate his retainer. However, he wanted to maintain the position of being a "trusted lawyer" in the eyes of the SFO for future dealings which he might have with them.

826. It is also necessary to take account of what then occurred at DC24, which I discuss below.

827. In my judgment, Mr Gerrard and Mr Thompson were both in knowing breach of duty here.

DC24: Call between Mr Gerrard and Mr Thompson on 28 February (P)

828. Mr Gerrard spoke to Mr Thompson on the former's return from New York. Mr Thompson's file note reads thus:

> "I received another call from NG. He had called me as he had been unable to get hold of Patrick. He confirmed that his further report on Kazakhstan was not yet ready. I said that, having discussed it with Patrick, we were content for the report to be finalised in March.
>
> NG said that he had recently received further information from another whistleblower claiming that the management of SSGPO were behind the fraudulent stripping contracts. He also mentioned the involvement of the ENRC CFO's son in a company involved in a stripping contract. It was unclear exactly what the CFO knew but he repeated his comment to me of yesterday that there were a number of unfortunate coincidences. This will be addressed in the further report when it is finalised.
>
> NG then moved on to Africa. He said there were "massive problems on sanctions". It appears that the company has conspired to beach [sic] various sanctions and had even been dealing with sanctioned individuals until very recently. The previous engagement (i.e. information provided by Pierre Prosper in March 2012) with the SFO over the sanctions issues now looks as if it may have been misleading. He requested a discussion so that he could get a steer on whether to continue investigating this.
>
> NG then commented on the £35m cash payment linked to the Camrose take over and the promissory notes. He described the cash payment as a "corrupt" payment to Dan Gertler in which Victor Hanna (ENRC Africa) had connived. He described the arrangements around the promissory notes as "bemusing". He repeated his concern that he did not want to continue his work to the detriment of any future investigation by the SFO. NG also said that he now believes there are relevant e-mails and documents to which he has been denied access thus far.

> NG again repeated his offer of a meeting to explain the position in more detail I said that whilst this was potentially helpful, the SFO's position remained that we needed substantive reports to consider rather than verbal updates. I said I would relay the conversation to Patrick and his team."

829. Here, ENRC concentrates on the information described in the third and fourth paragraphs of this note.

830. As with DC23, the information given in relation to Africa was plainly not in ENRC's interests and was unauthorised. In relation to sanctions, what Mr Gerrard now said suggested that the question of sanctions was not merely historic. Second, reference to payments as "corrupt" was bound to raise the stakes. Mr Gerrard said that Mr Thompson had misunderstood what he was saying because he did not use the word "corrupt". Mr Thompson said that he did, and I am sure that he did. The same is true about Mr Gerrard's reference to relevant emails and documents to which he had been denied access thus far.

831. Moreover, Mr Gerrard had had specific instructions from Mr Dalman not to communicate about sanctions, or at least, he knew he should not, because the allegations needed to be bottomed out first. Mr Gerrard did report back on his conversation with Mr Thompson to Mr Coffey of Addleshaw Goddard ("AG"), in that he referred to getting more time for the Kazakhstan report and the SFO coming back on Africa but that was far from the substance of what he had told Mr Thompson. He accepted that it was an inadequate report back. At a Dechert/AG meeting an hour later, Mr Gerrard proposed updating the SFO on sanctions and the $35 million, but without saying that he had already done so.

832. In addition, he referred again to the future of his own work and the possible detriment of any future investigation by the SFO. In respect of that, I repeat all the comments I made about such remarks in relation to DC23, both as to Mr Gerrard and Mr Thompson.

833. In my judgment, Mr Gerrard plainly had no authority to communicate what he did, other than to seek more time and it was clearly against his client's interests, too. He knew as much.

834. I then turn to the position of Mr Thompson. He was not cross-examined about the Kazakhstan points made in the first main paragraph of his note so I disregard them for present purposes. As for the rest, he denied that what had been said made the Africa allegations look much more serious. Yet he said as much in an email to Mr Rappo and Mr Coussey, recounting this discussion, sent the following day. Mr Thompson also accepted that, coming from ENRC's solicitor, there was nothing more likely to pique the SFO's interest than the use of the word "corrupt". He also agreed that the reference to sanctions was about current and not historic conduct. When Mr Thompson was asked about the significance

of the reference to massive problems on sanctions and conspiracy to breach various sanctions, he said that he just saw this as Mr Gerrard asking if the SFO was still interested in the issue of sanctions. I do not accept that explanation. It makes no sense. So far as the reference to "bemusing" promissory notes, it is correct that the issue of promissory notes had already been raised. In a different context, and taken by itself, it might be that not much would turn on this remark. But in this context, as part of the Africa allegations, coming as it did (at least in Mr Thompson's note) between the reference to the corrupt payment and Mr Gerrard not wishing to continue his work, and appearing as Mr Gerrard's comment, it is really all of a piece with the Africa allegations generally which were plainly damaging to ENRC.

835. Importantly, Mr Thompson also accepted that what Mr Gerrard said here was referring to offences by the company and not just individuals. This reinforces the point that his expression of concern which he made on this occasion again, of not wishing to continue work to the detriment of any SFO investigation, was to an investigation of the company, his client, and not to separate investigations of individuals.

836. Further, I do not accept that Mr Gerrard's reference to being denied access to emails was no more than a reference to "blockages" which had been disclosed on earlier occasions. In this context, Mr Gerrard was clearly saying that his own efforts as ENRC's solicitor were being obstructed, this coming immediately after he said that he did not wish to continue his work to the detriment of any further investigation by the SFO. The SFO has also pointed to OM8 (28 November 2012) where Mr Gerrard had said that Dechert had not been denied any access during the investigation. Quite, but if so, to suggest now that there <u>was</u> a denial of access was significant and especially damaging to ENRC. Here, I do not accept Mr Thompson's evidence that he thought this was just about the earlier problems in Kazakhstan or to do with Mr Hanna specifically. Nor do I accept that Mr Gerrard's remarks here (properly understood) could actually be in ENRC's interests in terms of buying time or so as to provide an innocent explanation for any gaps in the final report.

837. In these circumstances, it cannot be suggested that all of this was simply repeating what had been said at OM8 so that they could not constitute remarks which were plainly against ENRC's interests.

838. Again, therefore, Mr Thompson clearly knew that Mr Gerrard was acting without authority and against his client's interests in respect of the matters disclosed as set out in the third and fourth paragraphs of his note.

The March Article

839. On 8 March, ENRC discovered that there had been another leak, with the FT claiming to have a copy of a draft of Dechert's presentation for OM6. The article in the FT was published on 14 March. It referred, among other things, to that draft presentation. I deal with this in detail in paragraphs 1428-1464 below.

DC25: Call between Mr Gerrard and Mr Rappo on 13 March (P)

840. On 13 March, Mr Gerrard spoke to Mr Rappo. The former had been asked to discuss a coordinated response to the forthcoming article, by ENRC and the SFO. According to Mr Rappo's file note, they agreed a "no comment" line. But Mr Rappo's note continued:

> "Separately NG raised the issue of Africa:
> 1. They had identified significant evidence of wrongdoing.
> 2. They will be recommending to the ENRC board this Friday that 1 or 2 people be suspended pending the investigation continuing
> 3. Criminality identified in summary as follows:
> - OFAC sanctions breaches
> - Euro sanctions breaches
> - Bribe payments—Hard evidence that 35 million was given to Gertler, and material to suggest that this has gone on as bribes
> Main suspect Victor Hanna, UK resident, US national, Africa CEO Decherts want to give the SFO an update briefing on this, in advance of any report, as there are complications with 'lawyers' being involved, who appear to be aiding and abetting, and also misleading HMT and the SFO. Ideally they want to do this this month, particularly as they want to suspend 1/2 people, and do not want to jeopardise any subsequent SFO investigation."

841. Mr Gerrard agreed that he said all of these things.

842. On the face of it, none of these remarks by Mr Gerrard were authorised. The references to identified criminality on sanctions and hard evidence that the US$35 million had been given as a bribe to Mr Gertler and to the lawyers aiding and abetting and misleading HMT and the SFO were clearly damaging to ENRC. Mr Gerrard did not suggest he had specific authority to say these things (which went way beyond agreeing a line for the FT). His answer was that he was entitled to say them because he had authority to "manage the SFO". However, that is not a plausible answer, for reasons already given above. It is noteworthy that he never reported these elements of the conversation back to ENRC. He did not do so even after Ms Coleman had asked him for attendance notes of his conversations with Mr Rappo in the context of dealing further with the question of leaks and the press, on 15 March.

843. Later on 13 March, Mr Gerrard sent an email to Mr Rappo in these terms:

> "So sorry Patrick. The client has been at six's and sevens. Apparently most of the press are on to it. I've finally agreed a short statement which says nothing more than we are investigating WB's and have reported matters to the SFO. See tomorrow. We have a Board meeting tomorrow and expect a rough ride. Will call you in the morning."

844. In evidence, Mr Rappo said that he understood from this email that the investigators had uncovered criminality, that it was going to be reported to the board and there would be elements within the board that would be grilling Mr Gerrard about it. Again, communicating to that effect could not have been and was not authorised.

845. In my judgment, Mr Gerrard was clearly in breach of duty in respect of both his conversation and the email. He was taking opportunities to damage his client in the eyes of the SFO. Again, this was not because he wanted to foment a criminal investigation, but because he now saw his interests lying much more with impressing the SFO than protecting his client.

846. As for Mr Rappo, although DC25 is referred to in paragraph 12.29 of the Particulars of Claim against the SFO, it is not pleaded as part of any cause of action against the SFO in the later paragraphs 30-43.3. Accordingly, there is no basis for any finding of breach of duty on the part of Mr Rappo and thus the SFO, here. It must be remembered that Mr Rappo was relatively new to the ENRC case and to Mr Gerrard; he had not had the extensive dealings with him that Mr Thompson and Mr Gould had.

847. However, and as already indicated, I do not think Mr Rappo's cross-examination on the question of what was in the client's interests assists the SFO in relation to its position on DC23 and DC24, for the reasons already given.

848. Moreover, overall, while I am quite sure that Mr Rappo would have realised that Mr Gerrard must have been acting without authority had he really thought about it, in my judgment, he simply did not think about it. He saw it all as part and parcel of a larger dialogue. While he was wrong (and negligently so) to view it in this way, I do not find that he was reckless as to the existence or otherwise of Mr Gerrard's authority even if there had been a cause of action pleaded here.

DC25A: call between Mr Rappo and Mr Gerrard on 27 March (P)

849. This occurred prior to the termination of Dechert's retainer later the same day.

850. Mr Rappo's file note of the conversation reads thus:

> "NG discusses proposed meeting On Wednesday 3 April
> There is a risk that Decherts may be sacked by the Board
> There is a further risk that the Board or at least several members of the Board may also be removed
> If meeting is to proceed Mehmet Dalman and Terence Wilkinson to attend along with NG
> The meeting is to be a presentation on Africa. As yet no report has been produced
> PR requests that a presentation is created in advance and that the full report be produced asap"

851. However, Mr Rappo's manuscript note included the following:

> "Risk may not make a meeting
> Risk sols/Board may get sacked
> If not * section 2 A?

with arrowheads pointing to the first and third lines, joined by a vertical line.

852. ENRC alleges that this manuscript note shows that Mr Rappo and Mr Gerrard had discussed the question of a s2A notice against ENRC. If so, that would clearly have been wholly improper on the part of Mr Gerrard because it was suggesting a course of action to the SFO. However, Mr Rappo denied that they spoke about this (as did Mr Gerrard). Mr Rappo said it was a note to himself and it would have been in different terms had it been Mr Gerrard who was suggesting to Mr Rappo that the SFO might serve such a notice. This was so, even though Mr Rappo's usual practice was to record his own thoughts on the left-hand side of the notebook whereas notes of a conversation would be recorded on the right-hand side, as here.

853. I think that Mr Rappo is correct, nonetheless. It would be an obvious thought to record, in circumstances where the SFO's main lawyer contact with ENRC may have been about to be sacked. It would not have needed Mr Gerrard to tell him of this possibility.

854. So far as Mr Gerrard is concerned, he cannot possibly have been authorised to say that he might get sacked along with some board members. The implication is that ENRC did not agree with Dechert's stance on the SR process for its investigation and that he thought the SFO should know this. Mr Gerrard must have known that he had no authority to say this. As it happens, of course, Dechert was sacked later the same day and so the SFO would obviously find out about it anyway. Nonetheless, that is a breach of duty on the part of Mr Gerrard.

855. As for Mr Rappo, while DC25A is pleaded at paragraph 12.30 of the Particulars of Claim, again, no cause of action is actually pleaded against him for which the SFO is liable in paragraphs 30 - 40.3 thereof.

DC26: Call between Mr Gerrard and Mr Gould on 28 March

856. On 28 March, the SFO served a s2A notice on Dechert. Prior to its service at 5pm, Mr Gould had called Mr Gerrard at 1:50pm to discuss it, for 14 minutes. ENRC alleges that Mr Gerrard was under a duty to his (former) client to inform it of the forthcoming s2A notice immediately but he did not do so until 5:09pm, when he emailed Ms Coleman and Ms Caswell, saying:

> "I need to speak with one of you asap. We have just been visited by the SFO. I have tried to call each of you"

857. In cross-examination he was asked why he did not tell ENRC until more than 2 hours after his conversation with Mr Gould. He said he did not know. It was not put to him that this was a deliberate delay nor that the call itself was unauthorised. In any event of course he was no longer acting for ENRC.

858. On that basis, I can see no breach of duty by Mr Gerrard or indeed Mr Gould.

MISFEASANCE: KNOWLEDGE OF LOSS BY THE SFO IN RELATION TO THE DCS

Introduction

859. I have set out in paragraphs 188 to 194 above how ENRC pleaded its case in this regard and how I proposed to deal with it in relation to the DCs. While, as earlier indicated, I can look at the relevant DCs cumulatively, the requisite knowledge has to be shown in relation to each relevant officer separately, rather than the SFO somehow collectively.

860. I now turn to how this matter was put in cross-examination.

861. It was suggested to Mr Thompson that he must at least have suspected that, by receiving unauthorised information from Mr Gerrard and indeed privileged material from Mr Depel, and by agreeing with Mr Gerrard to send those pre-agreed threatening messages, ENRC was going to be caused to incur huge legal and other costs to conduct the investigation that Mr Thompson was expecting or requiring it to do. Mr Thompson disagreed. He also disagreed with the further proposition that it was obvious and he could see at the time, that the same type of costs (i.e. legal fees and other expenses) were going to be incurred once the criminal investigation had started itself a result of those calls and disclosures by Mr Gerrard. Mr Thompson again denied this, saying that he was not that far-sighted. I accept Mr Thompson's evidence here.

862. As far as Mr Gould was concerned, it was suggested to him that by lending himself to sending the message to ENRC that they should participate in the self-report, this was bound to cause ENRC to incur very significant legal costs. Mr Gould replied that they would incur significant legal costs whichever firm they used. It was then suggested that if what he was doing with Mr Gerrard behind ENRC's back in private meetings was to set things up so they were encouraged to make a report when otherwise they would not have done, he must have realised that this would cost them a significant amount of money. Mr Gould replied that there was nothing he could have done to force ENRC to make a self-report - this was a ludicrous suggestion. I accept Mr Gould's evidence here.

863. As for Mr Alderman, of course, as he did not give evidence, the question of knowledge could not be put to him.

864. While knowledge of loss was thus put in broad terms to Mr Gould and Mr Thompson, the pleaded motive - to assist Mr Gerrard in expanding the retainer so as to earn very large fees - was not. Even if it had been, I would have rejected it.

865. I think that in truth the SFO (whether by Mr Alderman, Mr Thompson, or Mr Gould) was content to take the information supplied on the basis that Mr Gerrard had provided it and it might or might not prove to be of some use later on.

866. As it happens, I also think that Mr Thompson at least knew that the SFO could only rely on what was said at the OMs - see my observations above about the Depel Interview. I also think, as Mr Thompson sometimes suggested in evidence, that Mr Gerrard was himself not always credible and Mr Thompson was at least somewhat cautious about what Mr Gerrard would say. This is, in my judgment, also reflected in the remark made by Mr Gould that Mr Gerrard was "up to no good" - meaning that he was, at least, something of a loose cannon.

Mr Thompson and Mr Gould

867. I have found Mr Thompson to have been in relevant breach of duty in respect of DC8, DC9, DC10, DC15, DC23, and DC24. I have found Mr Gould to be in breach of duty in relation to DC13, DC15, DC17, DC19A, and DC20.

868. It is not necessary for me to analyse each of those DCs by reference to the question of knowledge of loss. But in addition to the general points made above, I would add these further observations.

869. All of these DCs of course occurred after the 9 November Letter. So on any view, the knowledge alleged could not be by reference to the initial decision to engage with the SFO because that had already happened. It would have to be in terms of the maintenance and/or expansion of that engagement.

870. I would make particular mention of DC15. I have explained above what I believe was Mr Thompson's thinking in writing the letter of 18 June 2012. It did not entail the probability of loss for ENRC. It simply had the prospect that ENRC would now engage more extensively with the SFO than before. At one level, I can see that if this meant that ENRC would have to look for and disclose more information than previously, it was foreseeable that legal and other costs would increase. But whether this would actually happen was entirely speculative at the time and Mr Thompson (and Mr Gould for that matter) were not thinking about

ENRC's legal fees, huge or otherwise. There was no reason for them to turn their minds to ENRC's costs at that stage, and I do not believe that they did. If so, they cannot have had the requisite knowledge of loss. Had they been doing Mr Gerrard's bidding to help him expand the investigation greatly so as to earn many more fees, that might be a different matter, but that is not now part of ENRC's case, and I would have rejected it if it was.

871. More generally, from a common-sense point of view, knowledge of the losses claimed by ENRC is not obvious at all from the nature of the SFO's breaches of duty. Whereas, and by way of contrast, to take *Three Rivers* as an example, one can see a fairly straightforward connection between a breach of a duty not to issue a licence to, or to revoke the licence of, a suspect deposit-taking bank and the probable risk to depositors' money if the bank continued to trade. This case is far removed from that one.

872. In my judgment, in the light of everything I have said above, it is not possible to find the requisite knowledge of loss on the part of either Mr Thompson or Mr Gould by reference to any particular DC. Nor can it be found by looking cumulatively at the relevant DCs where they were found to be in breach of duty.

Mr Alderman

873. As for Mr Alderman, I found him to be in breach of duty in relation to DC1, DC4, DC5, DC6, DC7 and DC11.

874. These DCs did not, on my findings, involve alleged "pre-agreement" of the kind alleged against Mr Thompson and Mr Gould which seems to have formed at least a main focus for the allegation of knowledge of loss although not the only one. In relation to DC1, my finding is not on the basis that Mr Alderman had, for example, agreed to send the SFO Letter at Mr Gerrard's bidding, whereas he would not have done so without DC1. As indicated above, his breach of duty in relation to DC1 was limited although, given that it was committed by the Director of the SFO, this is obviously a serious matter, along with the other DCs involving him.

875. As for DC4, Mr Alderman received some useful intelligence but I fail to see how that would entail knowledge of probable loss in the sense of subsequent fees which would otherwise not be increased. By now, of course, in any event, the SFO Letter had been sent. There was the prospect of ENRC engaging in any event. I do not think that Mr Alderman turned his mind to the question of ENRC and losses at all. The same is true of DC5-DC7 and DC11. DC5, DC6 and DC11 were relatively minor breaches.

876. Again, whether by looking at the DCs here individually or cumulatively, I do not consider that the requisite knowledge of loss has been established for Mr Alderman.

Conclusion

877. It follows that, notwithstanding the breaches of duty found in relation to the DCs referred to above, ultimately ENRC's misfeasance claim against the SFO in respect of the DCs must fail.

INDUCEMENT: FURTHER ANALYSIS

Inducement of Mr Gerrard's breach of contract

878. In all those DCs where I have found a breach of duty on the part of the relevant SFO officer, the next question is whether the breach of duty on the part of Mr Gerrard was induced by that officer.

879. While it is true that virtually all of the DCs were instigated by Mr Gerrard the fact of the matter is that the SFO was a willing audience. The relevant officers allowed him to speak to them on many successive occasions. When, as he often did, he communicated information which he was plainly not authorised to impart and/or which was clearly not in his client's interests and the relevant officer knew this, that officer was assisting Mr Gerrard to commit the breach caused by that very conduct on his part. Without the SFO's willingness to listen, there would be no breach on his part since it required an audience. If what he had done instead (which obviously he would not do since it would incriminate him) was to write to the SFO with all the unauthorised information and the SFO simply opened the letter and then put it in the bin, it would be hard to see any real assistance by the SFO. None would be needed, because the act of sending the letter would surely be enough. But that is not what happened here. The SFO officers engaged with Mr Gerrard at each meeting, usually notes were taken and they spoke to him or asked questions about what he was saying. There was therefore full engagement in that sense.

880. And in relation to DC15 when the SFO did as Mr Gerrard requested and delivered certain messages at OM6 along with the 18 June letter, that was more active assistance.

881. The assistance described above is in my judgment sufficient to constitute inducement for the purpose of the tort.

882. In fact, the case on inducement goes somewhat further. That is because each of the three relevant individuals, in being prepared to countenance conversations or meetings with him when they knew he was likely to volunteer information which they should not have, were effectively encouraging him to continue this process, as indeed he did. They never turned

down a request for a meeting nor did they ever tell him in any particular meeting or conversation that he should not refer to obviously unauthorised matters. They were perfectly willing to entertain whatever he said. Moreover, Mr Gerrard knew from an early stage that the SFO was not going to reveal to the client what he had said in the DCs. The proof of that is the fact that the SFO individuals did not ever point it out at any of the OMs. They may not have had a free-standing duty to do so but the message to Mr Gerrard must have been that they would not disclose his own breaches of duty and he could therefore feel secure in committing more of them.

883. The form of inducement by effectively encouraging Mr Gerrard to come and talk whenever he wanted, is more cumulative. It adds to the individual inducements already constituted by assistance described above.

884. In relation to any of the relevant individuals, had there only been one or perhaps two conversations where Mr Gerrard dropped in some unauthorised information, whereupon the conversation was stopped, it would not be difficult to conclude that there was no inducement by way of assistance at all. But that is not what happened here.

885. The SFO has raised the specific point of whether inducement can properly be found in relation to DC5-DC7 and DC 9. That is because the claim in those respects is not made against the direct SFO interlocutor on those occasions (i.e. Mr McCarthy for DC5-DC7, and Ms von Dadelszen for DC 9) but rather the person to whom (on my findings) the relevant information was conveyed afterwards, namely Mr Alderman for DC5-DC7 and Mr Thompson for DC9. I agree that, by definition, the latter individuals could not have been a direct willing audience for Mr Gerrard because they were not there with him. They did not write down what he was saying or ask questions.

886. However, both Mr Alderman (until April 2012) and Mr Thompson were important parts of the whole process of the engagement with Mr Gerrard outside the OMs, in which Mr Gerrard felt secure in committing his own breaches of duty to ENRC, in terms of what he said at the DCs. Mr Alderman was in at the start, as it were, with DC1 and DC4 and was plainly prepared to allow Mr Gerrard to engage with other SFO officers both before and after DC5-7. He was in a position to do so as Director. He further engaged directly with Mr Gerrard in DC11. As for Mr Thompson, he had already been present at DC8 and involved in OM2 and directly in DC10, being the "quiet meeting" suggested at DC9 (taken by his junior, Ms von Dadelszen), and of course later, in DC15, DC23 and DC24. He, equally, took no steps to halt the conversations once he became involved.

887. In those circumstances, I think it can fairly be said that Mr Alderman and Mr Thompson respectively still induced Mr Gerrard's breaches of duty in the DCs attributed to them here (i.e. DC5-7 and DC9). But, in any event, they were certainly part of the inducement in the overall or cumulative sense referred to in paragraphs 882-883 above.

888. I have considered in this context whether, for each of Mr Alderman, Mr Thompson and Mr Gould, I should decline to find an actionable inducement at least on the first of their respective encounters because in truth there was not much they could have done to stop him saying what he did. However, I do not think that would be correct. First, they could have stopped the conversation as it was happening, even on the first encounter. Second, Mr Alderman already knew of Mr Gerrard's ability to act against his client from DC1. He would have known pretty quickly from DC4 that he was again not acting in his client's interests. As for Mr Thompson, his first encounter, DC8, contained seriously damaging information including references to what Mr Gerrard said he did not know "officially" and saying that he might have to resign. Again, he could have, but did not, stop it there and then. As for Mr Gould, his first meeting was DC13. By then, he had already had other contact with Mr Gerrard sufficient (on his own evidence) to know that Mr Gerrard would take things to "the very edge". That was Mr Gould's explanation of the "up to no good" email of 23 March. And again, he could have stopped any particular conversation. By DC13, he must have been aware of what had been happening when Mr Thompson spoke to him as well.

889. As for DC1 itself, on the basis of what I have found in paragraphs 485-486 above, Mr Alderman's actions in engaging with Mr Gerrard were quite sufficient to establish the relevant inducement.

890. None of the above can be dismissed as mere facilitation of Mr Gerrard's breach of duty nor the simple acceptance of a "bounty".

891. Accordingly, inducement is made out.

Intention

892. Since the analysis of whether there is a relevant intention requires an examination of what the SFO officers' "end" or aim was, this needs to be addressed first.

893. As to why the SFO individuals were prepared to act as they did where I have found them to have been in breach of duty, I think this may best be described as "bad faith opportunism". I have rejected any notion of consciously assisting Mr Gerrard to expand the work of the investigation so that he could earn more fees. The truth is more prosaic: they were prepared

to receive the information which he should not have given them on the basis that it might prove useful intelligence in going forward. That does not mean that they thought that they could use it in any future prosecution as evidence or even incorporate it in any settlement negotiations. Almost certainly, they thought they could not. As has been seen, Mr Thompson's questions of Mr Depel in the Depel Interview suggest that he realised that Mr Gerrard was for some reason unable or unwilling to say officially what he had said unofficially.

894. But that does not mean that the information was worthless. For the most part, I think the SFO officers simply banked the information they were given without any clear idea as to how they might use it later on. As it happens, there were at least some examples of the SFO making use of the information. This included how they presented matters at OM5 and OM6 to ENRC. I would also accept that it seems likely that some of the information referred to in the statement of reasons for doing Mr Depel's interview were in fact drawn from what Mr Gerrard had previously said.

895. The above is relevant to the question of whether the Intention Requirement is satisfied here. On the basis that the SFO individuals were prepared - again and again - to act as Mr Gerrard's willing audience when his client was not present and when he might well disclose unauthorised information, it means that they saw there was some value in continuing to receive it. If so, then their aim was the continued receipt of that information. But if so, almost by definition, the means to that aim was Mr Gerrard's very breach of contract which enabled this to occur. They could not have got that information without his breach which was an essential part of it. This squarely satisfies the Intention Requirement here. The breach of Mr Gerrard's retainer was not a mere by-product; it was the very means of providing the information.

896. I appreciate that ENRC's pleaded case as to why the SFO officers were engaging in this way with Mr Gerrard is put in slightly more concrete terms ie to achieve a satisfactory settlement or a criminal prosecution- whereas I think it was more generalised opportunism. However, in my judgment that does not make any difference.

The SFO's Overarching Point

897. In the context of considering both inducement and intention, I have considered an overarching argument made by the SFO which is to the effect that overall, it was Mr Gerrard who was taking the initiative in the DCs and not the SFO. In support of that point, the SFO set out numerous references from the evidence to show that it was Mr Gerrard who was

inducing the SFO. In its Closing, it suggested that ENRC's case on inducement in relation to Mr Gould and Mr Thompson was "striking in its passivity". It was not as if the SFO generally approached Mr Gerrard, nor did the relevant officers actively pump him for information.

898. In a broad sense, I agree with all of that. The essential driver for all of this was Mr Gerrard. What then happened was that the SFO, to put it colloquially, picked up what he was doing in breach of duty and ran with it, as it were.

899. That broad point cannot affect the focused questions as to whether as a matter of law there was the necessary inducement and intention. In my view, there was, for the reasons already given. Mr Gerrard's leading role may be relevant to questions of causation and loss, but that is not the issue here.

Conclusion on Inducement

900. It follows from what I have said that the ingredients of the tort of inducement, save for causation and loss, have been established here as against the SFO to the extent described above.

ABUSE OF PROCESS

Introduction

901. The SFO argues that it was not open to ENRC to make its claims against it in relation to 17 of the DCs (being DCs 4-7, 9, 10, 14, 16-21, and 23-25A all marked "P" above). This is on the basis that to do so would be an abuse of process because of what Andrews J said, or held, in the Privilege Proceedings on one particular issue on which some disclosure was given by the SFO and witness evidence adduced. The thrust of the argument is that if ENRC was now to pursue its claims against the SFO in respect of the relevant DCs, it would be relitigating a matter already decided, albeit not giving rise to *res judicata* or an issue estoppel. Strictly, the abuse argument is not now required in relation to DCs 14, 16-19, 21, 25 and 25A since I have found no relevant breach of duty by the SFO there anyway. However, the abuse point is a general one and I deal with it as such.

The Law

902. I did not understand this to be controversial. The species of abuse of process relied upon by the SFO is that whereby the instant claim could be said in some way to have mounted a collateral attack on what was in some sense decided or found in earlier proceedings. In that regard, I would refer to the summary of principles set out by Simon LJ in *Michael Wilson v*

Sinclair [2017] EWCA Civ 3, itself cited with approval by Peter Jackson LJ in *Tinkler v Ferguson* [2021] 4 WLR 27 at paragraph 29.

> "(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated;.. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter's case. Both or either interest may be engaged…
>
> "(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse.. and the court's power is only used where justice and public policy demand it,…
>
> "(3) To determine whether proceedings are abusive the court must engage in a close merits based analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process…
>
> "(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within the spirit of the rules,.. thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated…or,… if there is an element of vexation in the use of litigation for an improper purpose.
>
> "(5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process.."

903. Effectively, the vehicle for SFO's abuse of process argument is the procedural remedy of a strike-out of the relevant parts of the claim. Here, of course, the argument is made at trial and not at an earlier stage. In that regard, I would refer to the decision of the Supreme Court in *Summers v Fairclough Holmes* [2012] 1 WLR 2020. This was a case where the claimant had dishonestly exaggerated his personal injury claim. At the trial on quantum, the judge accepted that the claim as presented was substantially fraudulent but considered himself bound by authority to be unable to strike out the claim and awarded damages of just under £90,000. At paragraph 43 of his judgment, Lord Clarke stated as follows:

> "We agree with the Court of Appeal in *Masood v Zahoor*…that, while the court has power to strike a claim out at the end of a trial, it would only do so if it were satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined. The Court of Appeal said that this is a largely theoretical possibility because it must be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way. We agree and would add that the same is true where, as in this case, the court is able to assess both the liability of the defendant and the amount of that liability."

904. In the case before it, the Supreme Court did not strike out the claim despite the claimant's serious abuse of process since on the judge's findings of fact he had suffered significant injury anyway as a result of the defendant's breach of duty for which he was entitled to damages. To strike it out would not be just or proportionate.

The Facts

905. In the Privilege Proceedings, the SFO brought a claim under Part 8 for a declaration that certain documents generated during the investigations of Dechert/FRA for ENRC were not subject to LPP. The claim was supported by a 74-page WS from Mr Thompson setting out the history of communications with ENRC.

906. By way of defence, ENRC's primary argument was that the communications were subject to LPP. However, a secondary argument was that in any event, the Court should not grant the declarations sought in its discretion, even if there was no privilege, because in his dealings with the SFO, Mr Gerrard had acted without authority and the SFO knew it, or should have known it. That allegation was responded to by the SFO in the form of a second WS from Mr Thompson. ENRC then sought, and was given limited permission to, cross-examine the SFO's witnesses. At the trial in February 2017. ENRC cross-examined Mr Thompson for two hours on the authority/knowledge issue.

907. By her judgment, Andrews J held that the relevant communications did not attract LPP and she made the declarations sought by the SFO. However, she added the following:

> "201 I am satisfied that if what Mr Gerrard was doing was unauthorised (a point on which I expressly refrain from making any finding) his lack of authority was not something of which the SFO was aware or ought to have been aware at any material time. I note that what Mr Gerrard is recorded as saying on occasions when his clients were not present was often repeated by him in their presence without demur. In any event, there was nothing of any substance in the records of those meetings or conversations which cast any light on whether litigation was reasonably in contemplation at any material time (especially bearing in mind that every one of those meetings post-dated 19 August 2011). Moreover, I did not need to rely on anything said by Mr Gerrard on any of those occasions, and did not do so, in order to form a view about the dominant purpose for which the Category 1 documents were created.
>
> 202 Even if I had been satisfied that the SFO was on notice that Mr Gerrard was acting without authority at any material time, it would have made no difference to the exercise of my discretion regarding the granting of declaratory relief. The Disputed Documents are either privileged, or they are not. If they are privileged, ENRC does not have to disclose them in response to a section 2 notice. If they are not, it must disclose them. The question whether Mr Gerrard was or was not authorised to do or say what he did, has no relevance to the issues of privilege that I have decided. Any lack of authority on his part would be no justification for refusing the SFO the declaratory relief to which it is otherwise entitled."

908. ENRC appealed on the key point as to the privileged status (or not) of the relevant documents. It did not appeal Andrews J's rejection of the second argument which, as has been seen, would have made no difference to the grant of declaratory relief anyway.

Analysis

909. The SFO contends that, insofar as the 2019 claim relates to the relevant DCs so far as liability of the SFO is concerned, ENRC is seeking to re-litigate a matter already decided against it by Andrews J on the question of authority and knowledge. It is therefore an abuse of process. It

makes the point that in this case, the same parties were involved as in the earlier proceedings and it was ENRC which itself raised the point, and then sought disclosure on it and cross-examined Mr Thompson on it.

910. I see all of that, but there are, in my judgment, two compelling answers to the argument. First, and as decided in *Summers* it will be rare for a Court to strike out a case for abuse of process when it has in fact decided the case at trial in any event. Indeed it did not do so in *Summers* itself, even though it found a serious abuse of process. Here, if the SFO seriously wished to avoid a trial of the relevant elements of the claim against it, it could and should have applied at an early stage to strike out the relevant parts of the claim. It is futile to do so at the trial stage because no time or costs will be saved. Indeed, they will be increased by the Court and parties having to deal with the abuse of process argument. The position is especially graphic here where, not only has there been a lengthy trial on the merits, but there was much more material adduced on the issue of knowledge and authority. The SFO disclosed 250 documents in the Privilege Proceedings while here, they disclosed 6000, albeit not all concerned with the relevant DCs. In addition, there was further evidence from Mr Thompson, a substantial WS from Mr Gould and a WS from Sir David, which has relevance to how companies were engaging with the SFO prior to his appointment. Mr Thompson was cross-examined for 3½ days, and Mr Gould was cross-examined for 3 days. Moreover, the relevant DCs had to be considered in the context of other events, in particular other DCs and the OMs.

911. In those circumstances, it would in my judgment be clearly unjust and disproportionate for me to disregard, as it were, findings made against the SFO of bad faith made after a trial on the merits. Accordingly, on this first ground alone, the abuse of process argument must be rejected.

912. However, the argument also fails on its own merits.

913. First, while I appreciate that Andrews J's observations on knowledge and authority were not themselves disturbed on appeal, it remains the case that she said they were irrelevant to the issue of declaratory relief. They were not, in my judgment, akin to a significant element of a first instance trial (especially if it was on the law) that then happens not to be the subject of the appeal which followed. Moreover, even if ENRC had sought to appeal Andrews J's findings on knowledge and authority, together with her finding that they were irrelevant anyway, just in case the Court of Appeal upheld her judgment on privilege, we know what the result would have been. It was that she was reversed on the issue of privilege and it is

very difficult to imagine that the Court of Appeal would in those circumstances still have dealt with the appeal on the secondary argument.

914. I appreciate that it was ENRC which, in one sense, may be said to have set this particular hare running. On the other hand, the SFO brought the claim in the privilege proceedings and was dismissive of ENRC's secondary point describing it as "undeveloped" and "a distraction". Further, what is really being said by the SFO is that the Privilege Proceedings were the appropriate forum, not merely for ENRC to make the argument it did make, but to bring the relevant underlying claims in misfeasance and inducement at the same time, counterclaim against the SFO, and turn the Privilege Proceedings into the sort of full-blown trial conducted before me. And either it would do so without including the other claims made against the SFO and Mr Gerrard which, from a case management point of view, would make no sense, or the Privilege Proceedings would be expanded further to include them. To that extent, the SFO's argument shades into a *Henderson v Henderson* type of abuse of process arguing that the relevant party could and should have litigated the relevant point earlier on. That is a hopeless contention here.

915. Looking at all the circumstances in the round, it was plainly not abusive for ENRC to bring its claim against the SFO in respect of the relevant DCs.

916. In its oral Opening, the SFO introduced a secondary argument that even if abuse of process was not made out, the observations and findings of Andrews J themselves constitute a "powerful evidential factor" which I should take into account. There is nothing in this point. First, it is well established that the factual findings and conclusions of a judge in earlier proceedings are not admissible as evidence of the facts sought to be established in later proceedings. See the judgment of the Court of Appeal in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 (CA) at para. 27. Second, given the entirely different nature and extent of the proceedings before me, compared with the Privilege Proceedings, there is no possible basis or need for me to have regard to what was said about any matters in issue outside this courtroom, as it were.

DECHERT'S FURTHER ALLEGED BREACHES OF DUTY: INTRODUCTION

917. Thus far I have dealt with the allegations of breach of duty against both Dechert and the SFO in respect of the August Leak, the DCs and the Depel Interview. I should add that in relation to all of those matters, where I have found Dechert to be in breach of duty, that relates to breach of contractual duty, duty of care in tort and fiduciary duty.

918. In the next section of this judgment I will deal with other breaches of duty alleged against Dechert, as follows:

(1) Failing to record advice in writing;

(2) Wrong advice as to criminal liability, raids, SR and penalties;

(3) Unnecessary expansion of the investigation;

(4) Failing to establish the scope of the SFO's concerns;

(5) Failing to protect ENRC in relation to privilege;

(6) Wrong advice about bringing documents into the UK;

(7) The Sunday Times Leak, December 2011;

(8) The Financial Times Leak, March 2013; and

(9) The June 2013 Material.

919. Again, where a breach of duty is established, this will be breach of contractual duty, duty of care in tort and fiduciary duty. I will deal with the relative seriousness of such breaches (i.e. whether they were merely negligent or reckless) in context below.

DECHERT'S FAILURE TO RECORD ADVICE IN WRITING

920. In an ongoing matter of this complexity and seriousness, it was plainly part of Dechert's duty of care towards ENRC, and its duty to act in its best interests, that all of its advice to its client should be accurately recorded in writing. The same goes for the content of any meetings attended by Dechert purportedly on behalf of ENRC. This does not mean that Mr Gerrard had to compile the record himself of any advice or meeting involving him; if others at Dechert were party to the advice or meeting or conversation, they could make the note, provided, of course, that it was accurate and Mr Gerrard approved its contents.

921. The pitfalls of not doing so are starkly revealed by this case, where the number of pieces of advice allegedly given but not recorded, together with other conversations involving Dechert, is significant. Neither the client, lawyer nor indeed the court should be put in a position of having to try to piece together what was or was not said, from other materials or witnesses' recollections years after the event.

922. Mr Gerrard sometimes suggested that it was a deliberate policy not to record advice in writing lest it be leaked. I do not accept that. The same could be said of the advice given in writing at DLA, where Mr Gerrard was previously, and yet there would have been the

possibility of leaks there, too. Second, on that basis, there should be no internal notes of anything in the ENRC internal investigation lest it, too, be leaked. That would be absurd.

923. Mr Gerrard also suggested that records of advice should not be in writing because if ENRC was raided, the SFO could seize that material. That is an equally absurd suggestion since any privileged document could not be taken by the SFO or used anyway. When it came to exercising its powers under s2 of the 1987 Act in relation to documents from ENRC in 2013 and beyond, the question of privilege was very much an issue as the Privilege Proceedings showed. It is not suggested that the SFO simply took documents containing legal advice without more.

924. The truth, in my view, is that Mr Gerrard did not like committing himself to writing. This is demonstrated by what he said to FRA on 20 September, 2011:

> "We are all to blame. Better to verbally report. Put advice in writing at start. Was a problem. Told them what they needed to do. Tried to sack me. Another law firm comes in to give a second opinion […]"

925. In cross-examination, Mr Gerrard denied that this was why he stopped advising in writing, but could offer no other explanation.

926. Mr Gerrard's failure to make notes where appropriate is so basic and so legion here that there is no alternative but to find that he was committing a reckless breach of duty in this regard.

WRONG ADVICE AS TO CRIMINAL LIABILITY, RAIDS, SR AND PENALTIES

General Introduction

927. A number of these alleged breaches of duty occur very closely to each other or even on the same occasion or in the same context. It is clearly helpful to consider them chronologically. I propose to do so, taking ENRC's demarcation of two periods: (a) December 2010-9 November 2011 and (b) 10 November 2011-June 2012.

December 2010 – 9 November 2011

928. The end date of 9 November reflects the writing of the 9 November Letter noted in paragraph 583 above.

929. First, many of the allegations here involve Mr Gerrard's engagement with Mr Ehrensberger and Mr Ammann, and their take on what he was saying orally if not in writing. Accordingly, it is important to say something about their credibility as witnesses.

930. Mr Ehrensberger's evidence needs to be treated with some caution where it is not supported by documents. This is not because he set out to mislead or was generally an unreliable witness but because I thought he lacked objectivity and had a tendency sometimes to

exaggerate. He clearly resents Mr Gerrard, perhaps because he felt that it was Mr Gerrard who sidelined him when he was removed from the SIC on 9 July, 2012. He tended to blame Mr Gerrard for everything that went wrong leading up to the Rappo Letter. In addition, sometimes he was unwilling to make obvious concessions. In some respects, his WS was also misleading because of the selective quotation of documents. That is a vice which affected Mr Ammann's WS as well, and indeed some of the WSs of the other parties too, for example that of Ms Coppens.

931. That said, it has to be remembered that in this context it is sometimes a question as to whether to believe Mr Ehrensberger or Mr Gerrard, whose own credibility I found to be much more seriously in question than that of Mr Ehrensberger.

932. I should add that it was not put to Mr Ehrensberger that he was part of some deliberate obstruction of the investigation on the part of ENRC.

933. As for Mr Ammann, he was a somewhat arrogant and at times bombastic witness. I have no doubt that he was a very difficult person for others at ENRC, and perhaps its lawyers, to deal with. I think that, as with Mr Ehrensberger, Mr Ammann is not now (if he ever was) objective so far as Mr Gerrard and Dechert were concerned. He always took the view that the investigation was far too costly an undertaking and to some extent viewed this through the prism of his professional background as an auditor.

934. However, and as with Mr Ehrensberger, a number of the complaints he makes now were reflected in the contemporaneous documents. He was also prepared in evidence to make concessions. He frankly said that despite his views of Dechert, its retainer was not terminated much earlier because he was overruled by others and I think this is probably true.

935. I do not think (to the extent that this is still pursued) that Mr Ammann was obstructing the investigation as opposed to complaining genuinely, if vociferously, about Dechert's conduct of it. I thought his reaction ("outraging") was genuine when informed in re-examination of the fact that Mr Gerrard had told PwC that Mr Ammann may have leaked the investigation plans to SSGPO.

936. As with Mr Ehrensberger, in some cases it is a question of whether to believe him or Mr Gerrard and again he was much more credible as a witness than Mr Gerrard.

937. While Mr Barker and then Mr Ehrensberger were ENRC's General Counsel, and Mr Depel was a qualified lawyer, the fact remains that Dechert had been retained as an external law firm to advise and assist ENRC as to its investigation. Later, that included its engagement

with the SFO. It was Dechert, through Mr Gerrard, that claimed a special expertise in these areas and, as already noted above, Mr Gerrard would frequently assert his superior knowledge and experience. This is important when considering arguments by Dechert to the effect that views about the risk of raids, or the desirability of the SR process, were emanating not from Mr Gerrard but from these individuals. If they did express views which were not correct and Mr Gerrard was aware of this, it was his job to disabuse them.

938. I further agree with ENRC that in relation to this period, it is possible to subdivide the allegations into (a) wrong advice as to criminality (b) wrong advice on raids and SR and (c) wrong advice as to potential penalty.

(a) Wrong Advice on Criminality

939. I now turn to the chronology.

940. At 2pm on 7 January, 2011, there was a telephone conference attended by Mr Gerrard and Ms Coppens, with the AC, together with Mr Barker and Mr Depel. When that meeting finished at around 3pm, there was a discussion between Mr Gerrard (with Ms Coppens still present) and Mr Depel alone from ENRC. Ms Coppens made a manuscript note of all of this. In addition, she produced a formal note of the meeting. Her manuscript note of what Mr Gerrard was saying to Mr Depel reads:

> "in [???] with regulators
>
> At a certain point, become co-conspirator v aid and abet
>
> they are there under new Act [Bribery Act] if recognise issues, co & they themselves can be criminally liable.
>
> Know it's a pb & we are not at bottom of it.
>
> Running risk of getting convicted."

941. Her typed note reads:

> "36. NG explained that there is a concern that shareholders might sue for negligence as ENRC cannot control SSGPO. The AC can also be accused of "aiding and abetting" the fraud and under the Bribery Act 2010, ENRC and the AC could be held liable for "wilful blindness."

942. I deal first with Mr Gerrard's references to criminal offences. As for the AC aiding and abetting the fraud, the fraud was what WB1 had referred to, which was essentially a fraud <u>on</u> SSGPO. It is impossible to see how ENRC's AC could have been said to have aided and abetted such a fraud which was alleged by WB1 to have occurred earlier on, and prior to ENRC's knowledge of it. As for the Bribery Act reference, first this Act did not come into force until 1 July, 2011. Second, there is no offence of "wilful blindness" under the 2010 Act. The latter refers to a state of mind that may be relevant to showing a particular *mens rea* but

it is not an offence in itself. It was quite incorrect to suggest that ENRC and the AC could be held liable in this regard.

943. Mr Gerrard ultimately accepted in cross-examination that none of this could be right, based on the information he had at the time. This was after he had wrongly suggested that Mr Depel may have made these remarks or that they reflected his concerns, not Mr Gerrard's. Finally, Mr Gerrard said that his role was to conduct an investigation into the matters alleged in WB1 and not to advise on criminal liability generally. But that cannot work if what he purports to do is then to advise on such liability.

944. It is clear that Mr Gerrard was sufficiently unsure of himself at the time to get Ms Coppens to organise some research on wilful blindness, gross negligence and the Bribery Act as her manuscript note also recorded. This led to the internal advice note of 10 January 2011 which painted a rather different picture (see below).

945. In my judgment, Mr Gerrard was not merely negligent - he was in reckless breach of duty. I do not believe that he gave any real thought at all to the accuracy or otherwise of what he was saying. He did not care one way or the other. This is in fact supported by the fact that when the 10 January research note showed that what he had said was wrong, he took no steps to correct his advice to Mr Depel.

946. As against that, Dechert invites me to disregard Mr Gerrard's admission that he gave incorrect advice on the basis that ultimately this is a question for me to decide. The latter is, of course, true, but Mr Gerrard's admission is not irrelevant. It is relevant to his state of mind at the time and his entirely casual approach to the question of criminal liability. Put rhetorically, if he now accepts that his advice was wrong, there is nothing to indicate that he did not know or suspect this to be so at the time. Dechert also says that there were other criminal offences that might have been relevant here, apart from those referred to by Mr Gerrard. But that takes the matter no further since I am concerned only with the offences he did refer to. Since he was not re-examined, they could not be and were not put to him for comment.

947. Chloe Barker, a trainee at DLA, produced a research note for Ms Coppens. Her note concluded that:

(1) There was probably no liability under the Bribery Act 2010 since SSGPO was not a relevant commercial organisation. It was also questionable whether any of SSGPO's employees had the relevant intent;

(2) Wilful blindness is evidence which could go to knowledge (i.e. was not a separate criminal offence);

(3) It was unlikely that ENRC committed an offence under ss 3 or 4 of the Fraud Act 2006;

(4) The common law offence of bribery did not apply; and

(5) It is unlikely that ENRC could have been guilty of aiding and abetting fraud.

948. The note omitted to mention that the Bribery Act did not come into force until 1 July, 2011 though this error was rectified later, in March.

949. There is no documentary evidence that any of this advice was passed back to ENRC. Mr Gerrard himself could not recall if he ever corrected his original advice. I am satisfied that he did not.

950. Following the letter of 7 January, Mr Gerrard wrote again to Mr Ammann on 17 January and had a meeting with the AC on the same day. The thrust of his advice then, as in the letter, was that first, a much more thorough investigation into the allegations in WB1 was warranted since there had already been two earlier investigations (i.e. the HS and PP reports). Second, he emphasised that it was important that the parent company (ENRC) was seen to be exercising sufficient control over its subsidiary. The letter said that it was not in ENRC's best interests that any further investigation into the suspicious acts fell short, because it might suggest to third parties that neither the Board nor the AC could control the subsidiary ie SSGPO. This theme was continued when Mr Gerrard told Mr Kowalewski on 26 January that unless the subsidiary was controlled, ENRC (or possibly its directors) could get prosecuted here.

951. ENRC has focused on the letter of 29 March as sent by DLA. This had started life as a description of proposed work plans for the investigation - see the earlier draft dated 24 March 2011. It was very considerably beefed up, first in a draft produced by Ms Coppens on 25 March and then after a conference call with Mr Depel and Mr Barker on 28 March.

952. The relevant part of the letter as sent said this:

> "POTENTIAL CONSEQUENCES OF FAILURE TO FULLY INVESTIGATE
>
> If a regulatory investigation were to be commenced by one of the government agencies in the UK or the USA and/or civil litigation commenced by third parties, it is likely that the Audit Committee will be asked what steps it took to investigate the allegations of which it was aware. If third parties believe that the AC ignored or failed to properly investigate serious allegations of misconduct, this could result in litigation and/or a regulatory investigation against ENRC plc and its directors (including non-executive directors). Additional consequences could include any of the following:

> 1. Breaches of the Companies Act 2006, including for example breaches of directors' duties including, criminal charges for inaccurate accounting and record keeping;
>
> 2. Possible derivative civil claims by shareholders against individual directors;
>
> 3. Significant reputational damage and drop in share price;
>
> 4. Suspension of trading of ENRC pic shares;
>
> 5. De-listing of ENRC plc.
>
> We should make it clear at this stage of the investigation that we are not saying that ENRC plc or its directors are guilty of any misconduct. However, the real risk to ENRC plc is the threat of a regulatory investigation which, from our experience, can take a number of years, is hugely disruptive and expensive."

953. In cross-examination, Mr Gerrard reiterated the notion that in some circumstances, a parent company can get into trouble for the sins of a subsidiary. However, without more, that was not a real risk before the commencement of the Bribery Act and even afterwards, there still had to be some connection between the bribery and the commercial organisation; see paragraphs 102-110 above. All of that said, I do not think that the error of law here was as startling as that made in relation to the 7 January meeting. It was negligent on the part of Mr Gerrard to frame matters as if there was a simple offence of failing to control a subsidiary - but no more.

954. A second aspect is the reference to the risk of an investigation by authorities, and other consequences. I agree that although Mr Gerrard did not accept it, the focus of the reference to third parties or authorities must have been by that stage, to the SFO, especially by saying that "in our experience" an investigation may take a number of years. Certainly, that was Mr Ammann's understanding who said that Mr Gerrard often verbally made reference to it. I see no reason not to accept Mr Ammann's evidence here.

955. The entire paragraph from the letter quoted above is somewhat circular since its initial premise is a regulatory investigation and/or civil litigation in the course of which the AC is shown not to have investigated matters properly so as to lead to an investigation into ENRC and its directors. That is, unless the original investigation and/or litigation was into SSGPO as opposed to ENRC, but that seems unlikely since it is not in this jurisdiction.

956. As for other consequences, I can see that they were all theoretical possibilities. But in this context, they were being put forward as realistically possible. In this context, I refer to the advice letter from Taylor Wessing ("TW") dated 14 April. It had been sought by Mr Ammann effectively to give a second opinion on the letter of 29 March from DLA, and the proposed work plans. As for consequences 1 to 3 in the paragraph quoted, TW thought that such claims would be rare. As for suspension of trading or de-listing, TW thought it was very

unlikely. Indeed, when asked, Mr Gerrard accepted that he had never heard of a case where this had happened.

957. In my judgment, there was no reasonable basis for advice in the terms of this paragraph. If it was done simply because Mr Depel and Mr Barker wanted a tougher letter, as Mr Gerrard said, that is no excuse since the letter and its contents are those of Mr Gerrard and Dechert. The targets of the letter, of course, were neither Mr Depel nor Mr Barker but Mr Ammann and other members of the AC.

958. Accordingly, I think that there was a negligent breach of duty on the part of Mr Gerrard here.

959. A matter not covered by WB1 was what has been referred to as the "Education Allegation". On 25 February, 2011, Mr Makarov, Vice-President of ENRC's Legal Department sent to Mr Kowalewski a memo which said that SSGPO was paying for the full-time education at the University of Michigan of Maksat Biazhasarov. He is the son of Bulat Biazhasarov, said to be the Head of Internal Affairs in the Kostanay region of Kazakhstan. This was likened to the role of a local police chief. Mr Gerrard described him as "a local traffic policeman" but the information from Kazakhstan put him in a more senior role than that. A further report came on 10 March. It stated that his son had been selected for an SSGPO scholarship which is normally only open to the children of employees to apply for. However, no such children applied so it was opened to all graduates and advertised. Maksat had the highest average grades among the applicants and so he was given the scholarship. All of this was set out in DLA's letter to the AC dated 11 March. Among other things, it said that there was a concern that these payments might be in breach of UK and US anti-bribery laws.

960. At this stage, I do not think that Mr Gerrard can be criticised for raising the issue of anti-bribery laws even though there would obviously have to be shown the relevant connection to the UK for the purposes of those laws as at March 2011, and the Bribery Act insofar as it was thought that the payments might continue beyond 1 July. It appears that, although not mentioned in this letter but mentioned at a follow-up meeting with Mr Kowalewski on 16 March, an undated letter had been written to Mr Vulis to obtain his authorisation for this scholarship. The question was then asked whether Mr Vulis had actually received this letter. The answer to that was not known at this stage. Also, it was said that the cost of educating Maksat was very substantial, since he was at a US university, and was said to represent in total some 40% of SSGPO's education budget. Ms Coppens' note of this meeting also said that "UK jurisdiction and US jurisdiction - will never prove if corrupt activity"…"Local chief of police".

961. I do not think that at this stage, when it was agreed that Internal Audit should investigate further, it can be said that there was negligent advice, or stronger, in regard to the Education Allegation.

962. Reference is made to Dechert's Executive Summary of its Progress Report shown to the AC on 10 August, but collected at the end of the meeting. This Summary referred to the then progress on investigating the Education Allegation among other things. It stated that payment of government officials' children's education fees was a method of bribery. It would be a "red flag" to any prosecutor and was in the SFO's Corrupt Indicators. At the meeting, it was said that it had been suggested that Mr Vulis had authorised the scholarship and on the basis that he was likely to be seen as ordinarily resident here, it could be said that the authorisation had occurred in the UK.

963. As against this, it is said that he had still not yet been asked whether he did in fact authorise it, and that seems correct. Further, when, at a later stage, he was asked, he denied giving any such authorisation. I follow that but again, I do not consider that, as at 10 August, there was any negligent advice in this respect. I also followed the point that at this stage, the amount said to have been spent was something around US$40,000 which is a relatively small sum and moreover much less than the SFO's £1 million fraud threshold. But I do not think that renders it entirely irrelevant because this is not about an amount fraudulently obtained but a bribe to a public official.

(b) Raids and Self-Reporting

964. In summary, ENRC alleges that in this first period, Mr Gerrard negligently and indeed at least recklessly:

(1) wrongly advised or told ENRC that there was (at least) a real risk of a raid, when in truth the risk of any such raid was negligible;

(2) wrongly advised or told ENRC to give the SFO a "running commentary";

(3) failed to advise of the risks of self reporting or of giving a running commentary; and

(4) failed to propose or promote the best option for ENRC.

965. I deal first with the facts chronologically, then analyse this part of the claim.

Chronology

966. The discussion with Mr Depel on 7 January following the call with the AC included something about raids, as noted by Ms Coppens. This was then taken up in the post-meeting

discussion between Mr Gerrard and Ms Coppens when it was proposed to "walk Cary through the RAID procedure". Then, on 4 February, Mr Gerrard sent a one-page "draft raid procedure process" document. Prior to this, a lengthy document setting out how to manage a raid had already been sent although Mr Gerrard and Mr Depel agreed that this might not have been fit for ENRC's purposes. Mr Gerrard proposed a walk through of the single page document for ENRC's staff. The training itself was provided over a number of occasions thereafter. It included, for example, a detailed PowerPoint presentation by Mr Gerrard entitled Raid Training dated 29 June. Mr Ehrensberger said that Mr Gerrard described a raid as going through "your wife's underwear" and he recalled Mr Cochrane making reference to the same sort of remark being made to him by Mr Gerrard. Mr Gerrard also appointed a "wartime" PR person to deal with a raid. Substantial fees were charged by Dechert in respect of the raid training.

967. Mr Gerrard had also made a reference to the possibility of ENRC being raided in the context of reports about Iran and sanctions when he spoke to Mr Kowalewski on 12 January.

968. On 2 April, Mr Kowalewski sent a long email to Mr Ammann. It was highly critical of both Mr Gerrard and Mr Depel. It seems to have been prompted by a suggestion that Mr Kowalewski was very beholden to Mr Vulis because the latter had been prepared to give him a job in marketing in ENRC Switzerland. Mr Kowalewski said that this was untrue. In his email, he said that Mr Barker had received an email from PwC which had started the whole "Iran bonanza" and that Mr Gerrard was warning them about "international scandals, prisons, fines and God knows what else…". In an email of 6 April, Mr Kowalewski said that Mr Barker was in "panic mode". Some of this at least must have been due to Mr Gerrard. He had told Mr Barker at the 28 March meeting which discussed what became the 29 March letter, that if a regulator "came in" there would be great vulnerability on the part of ENRC. It was in the course of this part of the meeting that Mr Barker had said to Mr Gerrard that none of them (i.e. he and Mr Depel) were experts and they wanted to be guided about the right thing.

969. This last point is important because Dechert says that there are emails from Mr Depel and Mr Barker referring to the risk of a raid. Thus, on 18 April, Mr Depel emailed Mr Barker wagering that they would get a raid relatively soon. Later that day, Mr Depel told staff that he predicted a "shitstorm" and an SFO dawn raid before the summer was over. Mr Barker commented that he was fundamentally correct and they needed to be prepared. A further example is Mr Depel's email to Ms Zaurbekova of 2 July anticipating a raid by the SFO, possibly together with the FSA, in September. This was copied to Mr Gerrard. Mr Gerrard

and Mr Depel had spoken on numerous occasions prior to that date and there were three calls between them on 1 July. I think it highly likely that Mr Depel's view and that of Mr Barker reflected in these emails had been strongly influenced, directly or indirectly, by what Mr Gerrard had been saying about a raid. They were all working together at that stage. This was Mr Ammann's view and I think he was correct. Mr Gerrard was, after all, the specialist lawyer with experience of the SFO and the one who had proposed raid training. I do not accept Mr Gerrard's argument that the raid training done here was simply a routine operation of the kind done with many clients, in a vacuum, as it were. The context must have been the notion of a real risk of a raid. In any event, if Mr Gerrard did not think that a raid was a real possibility, then he should have sought to correct his client's impression.

970. As already noted, Mr Ammann himself said that Mr Gerrard frequently mentioned the threat of a raid from the SFO. He himself (correctly) thought that Mr Gerrard was exaggerating the risk but that did not mean that ENRC as a company could simply ignore what he said. Indeed, Mr Ammann said in his WS that Mr Gerrard had shouted at him that ENRC would get raided if Mr Ammann did not go along with his proposals.

971. Mr Prosper, too, said in evidence that Mr Gerrard was "walking the halls of ENRC" telling everyone to expect a raid.

972. Of course, all these individuals could have been mistaken or Mr Ammann, Mr Ehrensberger and Mr Prosper could have put their heads together to concoct a case against Mr Gerrard (not that this was put to them in those terms) but I reject these possibilities.

973. I now turn to some emails of 5 July. On that day, Mr Depel emailed Mr Ehrensberger saying he should get a briefing on the implications of the potential benefits of SR in the UK and it would be remiss not to consider this option. This was copied to Mr Gerrard who asked Mr Depel what this was in response to. Mr Depel replied that it was just a thought on his part and he wanted Mr Ehrensberger formally to think it through and "add heat to the board/exec".

974. In the meantime, Mr Ehrensberger had replied to Mr Depel, saying that he had just met Mr Findlay on the plane and "we discussed exactly that option". Mr Gerrard then forwarded the email to Mr Findlay. He said:

> "[t]his risks looking contrived. Also think that we risk losing control. Let's discuss."

975. Later that afternoon Mr Gerrard spoke to both Mr Findlay and Mr Depel.

976. An issue has been what the reference to being contrived was all about. In my view, the concern about contrivance for Mr Gerrard was that it might appear as if Mr Depel had been

recommending SR to Mr Ehrensberger, and Mr Findlay had done just the same thing, which showed that there was some stage-managed attempt to force that particular issue. If it was seen as such by for example, Mr Ehrensberger, then, potentially, "we" i.e. Mr Gerrard and Mr Findlay might lose control of the agenda with ENRC.

977. I reject Mr Gerrard's alternative suggestion that the "we" losing control was ENRC itself. When asked to explain this further in cross-examination, Mr Gerrard said that it would be ENRC "riding shotgun" while the SFO ran the investigation. Not only does this not make any sense, but it contradicts paragraph 90 of his WS where he said that the risk of losing control referred to Mr Ehrensberger deciding to ignore any advice which Mr Gerrard might give if Mr Ehrensberger thought (wrongly) that it had been contrived. It has also to be borne in mind that at this stage Mr Gerrard and Mr Findlay were very much working - and talking - together and Mr Gerrard was also close to Mr Depel. So far as this particular episode is concerned, I thought that Mr Gerrard was plainly lying in his evidence. It also reveals that at this stage, the notion of ENRC doing a SR was clearly in Mr Gerrard's mind.

978. Later in July, there followed a number of meetings between Mr Gerrard, Mr Depel, JD, Mr Ammann, Mr Kowalewski, Mr Ehrensberger, Mr Cochrane and FRA.

979. At a meeting with FRA on 14 July, Mr Gerrard had said that ENRC "may be walked into [the] SFO". In cross-examination he suggested that Mr Anderson had said this, not him. I doubt that very much. Mr Anderson would not have said something like this; Mr Gerrard tended to dominate such meetings and it is his sort of dramatic language. The note of this meeting also appears to have been made by Mr Anderson.

980. On 15 July, 2011, Mr Ehrensberger emailed Mr Gerrard thus:

> "… I just had a discussion with Jim Cochrane… about a potential raid vs a self reporting (as we discussed on a daily basis the last couple of weeks).
>
> Jim would like to talk to you to get your opinion from first hand, hence he will call you on you mobile shortly.
>
> We need to come to a decision ASAP whether we want to do a self reporting or not."

981. In my judgment, this was a clear reference to discussions which Mr Ehrensberger had with Mr Gerrard over the past couple of weeks. Mr Gerrard agreed that the focus was SR to stop a raid, but said that this was something which Mr Ehrensberger had raised, not him. I do not accept that. It is correct that in re-examination, Mr Ehrensberger said that he thought the discussions in the last couple of weeks referred to those with Mr Cochrane. In fact, I think he is wrong about that. The email reads as if it was referring to discussions between Mr Ehrensberger and Mr Gerrard, and Mr Gerrard certainly had been in discussion with others at

ENRC over this period. Indeed, this is supported by what Mr Gerrard said at paragraph 91 of his WS. In the event, it probably does not matter because the focus was nonetheless on the issue of SR, as against a raid.

982. On 25 July, Mr Gerrard told FRA that ENRC was now considering SR to the SFO in relation to corruption/compliance and he said this in particular:

> "Expecting a raid. Am saying to company you need a full investigation. SFO will know. Whether we sit tight and wait. When not if they get raided. Should go to SFO. Say a problem. Whistle-blower + review. Do a thorough investigation. Will keep you posted…report fully and put in processes. Being seriously considered. Issue is just want to report on Kazakhstan. Think they can manage the end result. More manageable than Africa. Africa difficult. Beat is new and largely unaware of the concerns."

983. As to this, in cross-examination Mr Gerrard said at first that he was merely reciting what everyone else was saying. Then, when it was pointed out (as is obvious) that the text shows that it was what he was advising ENRC, he said that this was simply one occasion which was inconsistent with what he was otherwise saying. I do not accept this. Mr Gerrard was here simply making things up in order to avoid the conclusion that this was his clear advice at the time. This was no doubt to try and maintain his stated case which was that he was not saying that there was a real risk of a raid or positively supporting SR, at any time prior to the SFO Letter.

984. In its Closing, Dechert suggests that there were emails from 24 July to show that it was the view of others at ENRC and that such emails were not put to Mr Gerrard. However, if Dechert thought that they should have been put to Mr Gerrard, then it should have re-examined him on them. Instead it chose not to re-examine him at all. This is a point which can be made in respect of a number of submissions made by Dechert to the effect that a particular document was not put to Mr Gerrard.

985. One then comes to the SFO Letter which of course did make a direct reference to the SR regime.

986. In the 1 August draft of the full Progress Report, never in fact delivered to ENRC, there was this reference:

> "**Dawn Raids by UK Regulators**
>
> 7.5 The possibility of a raid by a UK regulator remains, given recent publicity. Consideration should be given to self-reporting this matter to the Serious Fraud Office to reduce the likelihood of such a raid. Dechert has given comprehensive raid training to manage the risks of a raid should it occur."

987. In the event, it was removed from the final version. However, this was not because it did not represent Dechert's view. Rather, it was removed because of an instruction from Mr Gerrard that his team had to be "circumspect on how this reads" given an alleged "concern" that the

company might be "tipping people off re-: investigation". This explanation does not make much sense. If correct, then there should not have been any discussion of SRs or raids lest someone might tip off the SFO.

988. Dechert makes the point that at the AC meeting itself on 10 August, Mr Gerrard did not mention a raid. That is correct, although it is perhaps not surprising if he had wanted to remove the reference to a raid from the draft progress report. I do not accept that this shows that he had not previously been scaremongering. The documents referred to above show that he had.

989. On 12 August, Mr Gerrard told PwC that he was not advising ENRC to report the Education Allegation alone but that they should "throw [in the] kitchen sink" on Africa. He said that although not without risk, SR was the right thing to do and he could almost guarantee the right result if there was "full and frank disclosure". If it was less than frank it would be disastrous and would entail the massive disruption caused by an investigation. So, it was not as if Mr Gerrard was advising against an SR. He was advising against an SR which was not wide enough.

990. It is also worth noting that in making its points about the meetings on 10 and 12 August (at paragraph 259 of its Closing), Dechert is assuming that Mr Gerrard did not know yet about the SFO Letter or the prospect of a letter coming from the SFO. On my findings, however, he did. So there was, or would be, additional pressure on ENRC anyway.

991. Mr Gerrard said much the same thing internally on 18 August as he had on 12 August. It is correct that he said that SR would be better than a raid but carried huge risks. The note suggested that the risks were that the SFO might raid anyway but also that with SR, it would be important to offer up information and the area of investigation would be wider than what it was at the moment. That the thrust of his message was that the SR should be wide is supported by what he had told PwC, but also by his telling his team that the report would not just cover Kazakhstan but Africa as well.

992. I agree that Ms Black's note of this meeting of 18 August was likely to have meant that JD was saying that ENRC needed to respond to the SFO Letter, rather than self-report. Otherwise, the latter would go against JD's own later advice of 22 September which I deal with below.

993. I should add that it was put to Mr Ehrensberger that Mr Gerrard had advised that a SR was better than a raid but carried huge risks; he replied that he could not remember Mr Gerrard's words.

994. In any event, Mr Gerrard accepted in evidence that by September he was indeed presenting a binary choice to ENRC: either it does a SR or it would or would be likely to be raided. See, for example, his discussion with FRA on 20 September at which Mr Gerrard said "you get raided you're dead".

995. On 8 November, the Board decided to enter into the SR process and afterwards, Mr Ehrensberger wrote the 9 November Letter to the SFO. As to that result, and the fact that Dechert would be the lead lawyer in the SR process, Mr Gerrard emailed internally "hooray". He accepted in the Costs Proceedings that his strong advice had been to SR.

Analysis: introduction

996. It is important to remember that what was at issue was a raid, not the start of a criminal investigation or a s2 (or s2A) notice. In other words, the immediate execution of a search warrant under s2(4). This would require a belief on the part of the SFO that there were documents supporting the existence of a criminal offence at premises here, and that they could not be obtained through the usual notice procedure (because, for example, they might be destroyed if notice was given). But no offence had yet been identified. And there was no basis at that stage for the SFO to depose to a belief that documents might be destroyed, when ENRC was an established public company with City lawyers acting for it. Sir David, Ms von Dadelszen, Mr Gould and Mr Thompson all accepted that a raid was not in contemplation then (or later). Mr Thompson said that this would be blindingly obvious to any white-collar practitioner.

997. I also agree that the *Tchenguiz* experience would have left the SFO cautious about applying for search warrants unless properly justified, a point with which Mr Gould and Ms von Dadelszen agreed. Mr Gerrard's own view of the SFO was not complimentary; he thought it was "useless" and underfunded. He agreed that he did not think at any stage prior to the SFO Letter that ENRC would be raided. On that basis, his suggestions noted above that there might well be a raid were no more than scaremongering and on any view, completely exaggerated. This was a reckless breach of duty because he must have known that there was no real risk, not least because he said in cross-examination that he did not think there was.

Nor can DC4, which occurred on 26 September, assist Mr Gerrard here, given the findings I made at paragraphs 540-545 above.

Analysis: A "running commentary" to avoid a raid

998. This criticism is made here in the context of the period leading up to but not beyond the 9 November Letter. The thrust of Mr Gerrard's advice as to the approach to be taken in the SR process was that ENRC should provide the "kitchen sink" to the SFO and give a "running commentary" at the same time. He accepted the latter characterisation in cross-examination. However, he went on to say that it was necessary. He said he had previous experience of doing this which then satisfied the SFO that there was in fact nothing to report. On that occasion, he said that his client did a "full report". He went on to say that the SFO had had specific concerns here, but they would not articulate what they were. He said that if, however, they saw that the company was making an effort and if there was a good relationship with the SFO, the SFO would give hints as to where one should look to gauge its concerns. So it was necessary to keep the lines open by providing the running commentary.

999. I see all of that, and indeed the 2009 Guidance made clear that the SFO had to be satisfied at the outset that the company was genuinely committed to the process. It would also want to have regular updates on the investigation prior to the submission of the report itself. However, that was in the context of a company having first self-reported some wrongdoing. What Mr Gerrard was encouraging was, on the face of it, a lengthy process of investigation which would be shared with the SFO, prior to the company deciding whether or not to self-report at all, depending on whether a criminal offence was actually found.

1000. That process does not seem to me to be what the 2009 Guidance contemplated. The "shared investigation" referred to in the 2009 Guidance was the <u>further</u> investigation (if any) required by the SFO as one of the consequences of the self-report of wrongdoing having been made. See my discussion of all of this at paragraphs 139-147 above.

1001. I should at this point refer to arguments from some case-law made by the SFO to support the notion of pre-SR contact with the SFO as it were, and where information could be provided along the way so as to be something like a running commentary process.

1002. The first case is *SFO v Standard Bank* [2016] Lloyd's Rep 91. This involved the first application to a judge (Sir Brian Leveson, PQBD) to approve a DPA under that regime. This is of course different from the process contemplated by the 2009 Guidance. Indeed, it had only been recently established by the Crime and Courts Act 2013. The threshold for making a

DPA is met where the Director of the SFO is satisfied that there are reasonable grounds for believing that a continued investigation could establish a reasonable prospect of a conviction for, in this case, an offence under s7 of the Bribery Act. Under this scheme, a bill of indictment is preferred, but proceedings thereon are then stayed on terms.

1003. I was referred to paragraph 16 of the judgment which recites that staff had been concerned about the illicit withdrawal of large amounts of cash and JD was then instructed to report the matter to the SFO. JD was later instructed to produce a report which was also forwarded to the SFO. Under the DPA Code of Practice, credit has to be given for early reporting by the relevant company especially if, without it, the information might not have reached the prosecutor. I follow all of that, but fail to see how this affects the different procedure under and different terms of the 2009 Guidance.

1004. Next, the SFO relies upon the judgment of the Court of Appeal in the Privilege Proceedings at [2019] 1 WLR 791 at paragraphs 116 and 117. The former recited the public interest in companies feeling able to investigate allegations prior to going to the SFO without losing the benefit of privilege. The remedy for the SFO would be to not allow prevarication and delay when it became obvious that the company was not wholeheartedly reporting its conduct and making appropriate waivers of privilege.

1005. This part of the judgment came after the decision of the Court on the relevant part of the appeal at paragraph 114 and was dealing with how its reasoning might work in the context of DPAs. This was the context, all the more so, for paragraph 117 as well. This said that the company's conduct and extent to which it co-operated with the SFO needed to be assessed when considering whether the DPA is appropriate.

1006. Again, I see that, but fail to see how it assists on the question of the process under the 2009 Guidance even though of course the immediate context for the Privilege Proceedings was this case.

1007. Finally, I was referred to some observations of HHJ Rivlin in *R v Mabey & Johnson* 25 September, 2009. This case featured the AG's Guidelines on plea discussions in complex fraud cases issued on 18 March, 2009. Here, following civil litigation, an internal memo "which in no uncertain terms [spelt] out the company's guilt" was discovered and then disclosed to the SFO leading to the instant prosecution. Unsurprisingly, credit in sentencing was given for the company's decision to make a clean breast of wrongdoing following the discovery of incriminating evidence.

1008. In that case, there was a criminal investigation but had civil recovery been contemplated, then by its actions, the company here was clearly self-reporting criminal wrongdoing at the very outset. That is quite different from this case. So, yet again, *Mabey & Johnson* hardly supports a running-commentary approach in the context of the 2009 Guidance.

1009. I recognise that the SFO Letter not only made reference to the 2009 Guidance but also requested a discussion with ENRC at an early stage about its governance and its response to the allegations. I also recognise that there was OM1 and a number of DCs prior to the 9 November Letter. The SFO was thus willing to engage with ENRC prior to any self-report. It would no doubt also make use of whatever information it was given.

1010. But the fact remains that from the point of view of ENRC, an initial shared investigation of the running commentary kind was not what the 2009 Guidance was about. It had the capacity to become unstructured and ever-expanding, which is of course what happened.

1011. This is why the 9 November Letter was not itself a self-report. Had it been, then no doubt there would have been a "report" as such, setting out the internal investigations already done, the evidence and the conclusions about wrongdoing. That is the sort of material specifically referred to in the 2012 Guidance and in this regard, it was unlikely to have been a change from what the 2009 Guidance contemplated. It is also why the Board referred to establishing a dialogue with the SFO which could lead to self-reporting on the four "red flag" issues identified thus far. That what was being proposed by Mr Gerrard in the period prior to the 9 November Letter was something in fact different from the usual process contemplated by the 2009 Guidance is demonstrated by what actually happened subsequently; see the sections below on unnecessary expansion of the investigation and failure to determine scope, at paragraphs 1071-1349 below. As for the DCs, to the extent that Mr Gerrard had been acting without authority in respect of any of the DCs, the information he gave to the SFO could not be regarded as part of any legitimate running commentary even if a running commentary was otherwise appropriate. Where what he said <u>was</u> authorised, it did not take matters much further and in any event was sometimes repeated in an OM.

1012. In this context, Mr Rappo said in his WS that SR processes would quite often involve a lengthy "dance" in which a company would seek to assure the SFO that it was investigating matters fully and that the SFO should hold off starting a criminal investigation. A company or its solicitors would often provide the SFO with all updates or presentations about the investigations and possible criminal wrongdoing.

1013. However, he went on to say that if the process was to go anywhere there ultimately needed to be a written report of criminality, accompanied by relevant evidence. Mr Rappo felt that although ENRC had given presentations on Kazakhstan and Africa, it had not given any detailed written report evidencing actionable crimes committed by ENRC. This is what the SFO was waiting for. That does suggest that while there may be a pre-SR stage, it was not expected to be too protracted and Mr Rappo shared some of the frustrations of for example Mr Thompson. Indeed, that is reflected in the content of the Rappo Letter itself.

1014. In my judgment, the whole history of the contacts between ENRC and the SFO show how inappropriate and unnecessary the actual form of engagement between them was. It was not a conventional SR as contemplated by the 2009 Guidance. Mr Thompson himself said in his WS that when he was brought in, he was told that ENRC was being treated as already within the SR process. It was not, since it had not made an SR out of which a civil settlement could be reached. But it was treated as if it was already at the next stage i.e. the further investigation.

1015. Coupled with Mr Gerrard's failure to set the boundaries of this unusual process and his own desire to expand it (see below) it was bound to and did take on a life of its own. To some extent, of course, the SFO was prepared to go along with this. On any view, there was enough in the press and complaints by Mr Joyce and whistleblowers to suggest that ENRC was "dodgy" and some criminality might be found. Furthermore, once ENRC did engage and started to promise reports or other progress by particular dates, Mr Thompson and Mr Gould would then seek to hold it to its promises - and become frustrated when the promised progress did not materialise. But the fact that the SFO went along with this does not mean that Mr Gerrard was not negligent in suggesting it in the first place.

1016. All of that said, the fact is that until the later OMs, ENRC did not really tell the SFO very much in terms of detail, although much time was taken up in giving assurances about ENRC's commitment to the process etc. and at the end of the day, what Mr Thompson, for example, was really interested in was whether ENRC would produce an actual self-report which could then serve as the basis for a potential civil settlement.

1017. At this point, it is necessary to say something about what, in this context, the expression "full and frank" means. Obviously, if all it meant was that ENRC should be honest and accurate in its dealings with the SFO, that advice is unexceptional and it is appropriate. But in the context of paragraph 163 of the Particulars of Claim (as confirmed in ENRC's Closing) what ENRC is getting at is how Mr Gerrard used that expression to suggest that ENRC should

make the scope of its investigation very wide, and tell the SFO all about what such an investigation revealed, including suspicions as well as findings. And that this should be done via the running commentary process. That is not at all obvious as a duty on ENRC. I do think that Mr Gerrard used the expression "full and frank" as a mantra to encourage or advise ENRC to investigate and disclose widely, as can be seen from the growth of the internal investigation. So, the mere fact that, in a vacuum, Mr Thompson or Mr Gould would agree that ENRC should be full and frank does not say very much, unless it is in the sense used by Mr Gerrard. Equally, to ask rhetorically, as Dechert does, whether ENRC was suggesting some duty to be less than full and frank, misses the point as it ignores the actual context.

1018. It seems to me that there are two potential areas of breach of duty here. First, the alleged breach of duty constituted by adopting Mr Gerrard's own version of a running commentary SR. In my judgment, he was negligent to promote it because it had obvious pitfalls and was not within the 2009 Guidance and it is hard to see why any reasonable solicitor having Mr Gerrard's specialist expertise and knowledge would take such a course. By itself, and as a response to the SFO Letter, I would not go beyond saying that Mr Gerrard was negligent; he simply had a wrong-headed approach to self-reporting.

1019. However, the second element is advising the running commentary course of action (both before and after the SFO Letter) as a means of avoiding a raid. In that sense, it must have been given recklessly since Mr Gerrard knew or was at least reckless as to the fact that a raid was a not real possibility anyway.

1020. It is perfectly true, as Mr Gerrard pointed out, that the SFO did not commence a criminal investigation until after Dechert's retainer had been terminated, although a change of mood was obviously heralded by the Rappo Letter of January 2013. In that sense it can be said that the SFO had been kept at bay for a considerable time. However, I do not think that this affects the existence of the breaches of duty.

Analysis: failure to advise of risks of SR/running commentary

1021. Further or in the alternative, ENRC alleges that it was in any event at least negligent for Mr Gerrard to recommend that it enter the SR process, either with or without his running commentary, without explaining the risks.

1022. On 17 August, Mr Anderson spoke with Tony Shaw QC about the Education Allegation. He said that the safest course would be to stop any continuing payments under the scholarship and that if the SFO wanted to proceed, it would probably do so under s6 of the Bribery Act.

Mr Anderson mentioned the SFO Letter and its reference to self-reporting. Mr Shaw QC advised caution in approaching the SFO because they may wish to look at every operation. ENRC should instead focus on getting adequate procedures in place for the purpose of the Bribery Act. Here, Mr Shaw was talking about the SR process as contemplated by the 2009 Guidance as opposed to Mr Gerrard's running commentary variant.

1023. On 22 September and pursuant to the requests made by Mr Ehrensberger, JD produced two reports for ENRC. The first was on the "SFO's approach to Prosecutions and Self-Reporting". The second was entitled "Serious Fraud Office self-reporting regime". By now, of course, there had been the SFO Letter and there was the forthcoming OM1 on 3 October. The second report is the relevant one here. In my judgment, it provided a balanced and objective discussion of the 2009 Guidance and the pros and cons of SR. It pointed out that there was always the possibility that the SFO would end up prosecuting anyway. Also, there was likely to be a loss of control over documents provided to the SFO which could then be passed to other agencies or used in any criminal proceedings and some of those documents could be privileged or confidential. However, JD concluded that it was premature to advise on whether ENRC should engage with the self-report process or not. The immediate concern was the forthcoming meeting with the SFO, and how privileged and confidential documents could be protected.

1024. An earlier intimation of this advice from JD (but again without advice as to whether SR should now be engaged in) was in the preparation meeting of 30 August 2011, which is also relied upon by Dechert.

1025. In cross-examination, Mr Ehrensberger said that while Mr Gerrard had not been asked for a document of the kind produced by JD, he discussed it with Mr Gerrard at length and discussed the SFO's approach, with Mr Gerrard adopting a more "hands on" style. Mr Gerrard thought that the JD analysis was unnecessary although he agreed with it and thought it was all common sense anyway. But a deal could be done much more easily than following that advice, namely by actually knowing the people at the SFO and knowing how it worked. Mr Ehrensberger did not at the time have any reason to criticise those observations.

1026. However, there was no advice from Mr Gerrard in any clear form (and certainly none in writing) as to the risks of ENRC self-reporting. Mr Gerrard said he did advise the pros and cons but could not remember the meeting where he did this. In any event, such advice should have been given in writing. Further, given Mr Gerrard's extensive involvement in the whole question, he cannot absolve himself of the duty to give clear advice unless, for example, he

informed the client clearly that he agreed with the JD report and had nothing to add. But his own conduct suggests otherwise. He clearly had come down in favour of starting the SR process.

1027. A number of further points are made by Dechert here. First, it is said that at the AC meeting on 21 June, in answer to a question from SPJ, Mr Gerrard said that there was no legal obligation to self-report. Quite so, but that is hardly advice as to the risks if it did. Second, at paragraphs 91 and 92 of his WS, Mr Gerrard said that while he and Mr Ehrensberger had spent about 10 days discussing the pros and cons of SR, he himself was still lukewarm. Moreover, he did not think a raid was likely (although Mr Depel did) and there was nothing to self-report. He said that to report some criminal conduct, if found, was likely to lead to an SFO investigation and a conviction. But these points cannot be taken seriously in the light of my findings above as to what Mr Gerrard did say about raids.

1028. ENRC also relied upon what had been said at a meeting of the IC on 27 September with Mr Gerrard and Mr Anderson attending. At one point, the Education Allegation was discussed, other information having emerged including what appeared to be the creation of false documents and "people telling lies". Mr Ammann said that the investigation should now be closed. Mr Gerrard disagreed and said that no more scholarship payments should be made. Mr Vulis also said that the investigation should now be closed and remedial action taken. Mr Gerrard then said that one way to deal with it would be to voluntarily report it to the SFO. Mr Ammann said he wanted to close the investigation the next day which Mr Gerrard said was dangerous. Mr Ehrensberger said that they had to respect the SFO. There was then this exchange between Mr Gerrard, Mr Ammann and Mr Ehrensberger:

> "GA - Would like to close under certain [??] tomorrow.
> NG - Dangerous to close tomorrow.
> BE - We have to report to SFO.
> NG - Massively dangerous. Dangerous as it is. May want to crawl over everything you've done. We want to be careful."

1029. It is suggested that this shows that Mr Gerrard was saying that SR as a whole was massively dangerous. I do not think that one can go that far. First, if he really believed that after the so-called "watershed" dates of 10 August and 26 September 2011, it is hard to see how he went along with the Board's decision to engage with the SFO set out in the 9 November Letter (after which he had said "hooray"). Second, it looks as if he may have been referring to the danger of closing the Education Allegation investigation early, or reporting it at that stage when it had not yet finished. He did not deal with this passage in his WS.

1030. Dechert also relies upon the 18 August internal meeting. I have dealt with that above. It does not assist Dechert here.

1031. Reliance is also placed on the JD report itself to which I have referred. It did set out the pros and cons in general terms. But that report did not express any view as to whether or not ENRC should now embark on the SR process.

1032. Nor can Dechert seriously rely on the 2009 Guidance itself as absolving it of the need to advise ENRC as to the risks of SR. Indeed, that document itself emphasises the role of professional advisers.

1033. In my judgment, since Mr Gerrard clearly did advocate the SR process it was incumbent upon him to advise his client of the risks it presented to them. The odd remark here or there (even if intended to be a reference to risk) was not sufficient. Any reasonable solicitor in his position would have set out the risks clearly. He was negligent not to have done so.

Analysis: failure to propose a different course

1034. A final point made by ENRC concerns what the alternative to the running commentary would have been from the point of view of ENRC. This would go to whether it could be argued that whatever its defects, there was no other option, in particular after the SFO Letter. If there was another option, then ENRC says, further or alternatively, Mr Gerrard was in breach of duty in not proposing it.

1035. ENRC argues that it could and should have told the SFO, following the SFO Letter, that it would conduct or continue to conduct its own investigations to see whether there was any wrongdoing to report, at which point it would revert to the SFO. It could also give assurances about governance etc. as discussed at OM1.

1036. In response, Mr Gerrard said, first, that he was keeping the potential for an SR open by enabling ENRC to "stay in the game". But that does not make much sense. It was always in a position to decide to make an SR whether already in contact with the SFO or not. Mr Gerrard then said that the SFO would not have agreed to let ENRC go away "to investigate in a month of Sundays" because of the need to update the SFO. But the updating requirement is all in the context of a further investigation which might be required by the SFO after there had been an SR. Yet there was none here. Similarly, while the SFO Letter did refer to the 2009 Guidance, ENRC's actual response was not an SR but the running commentary. Finally, Mr Gerrard made reference to DPAs but first, they were not yet in force and second, there had to be reasonable suspicion of offending on the basis of admissible evidence.

1037. For all those reasons, this is a clear case of negligent breach of duty in failing to either suggest or at least consider the alternative approach of not engaging with the SFO through a running commentary, but instead telling the SFO that it was already investigating a number of matters with a view to deciding in due course if there was wrongdoing later to be disclosed. It is difficult to see that had this approach been taken following the SFO Letter that the SFO would immediately have felt able to launch a criminal investigation, let alone a raid.

(c) Potential Penalty

1038. Finally, in relation to this first period, ENRC also alleges that Mr Gerrard gave recklessly wrong advice about potential financial penalties. This is not in fact a pleaded head of claim nor does it appear in the Agreed List of Issues, or ENRC's Opening.

1039. Nonetheless, Mr Gerrard was cross-examined about two documents in this regard. I propose to deal with this allegation on the facts because it is material to how Mr Gerrard generally operated, but I will also deal with it as a free-standing breach of duty.

1040. At a meeting with PwC on 12 August, 2011 Mr Gerrard said that ENRC would be stuck with a heavy fine of maybe £50-100 million. This was in the context of him saying that it would not be a billion, and that one of his clients had had a £750 million fine. In cross-examination, Mr Gerrard did not at first accept that he was talking about ENRC but later he did. However, this figure for the fine was a hopeless thing to suggest; it was at an early stage and no particular criminality had been identified, let alone its seriousness or the level of any profit from it. He said that he had no idea how he had reached those figures but £50-100 million was nothing like what they were looking at, at the time. Nonetheless, the figures could only have come from him.

1041. Then, on 29 September 2011 Mr Gerrard told FRA that if "this goes down" it will be the "biggest fine in the UK". Mr Gerrard could not explain the basis for saying this. He then said that on the material he had the fine would be very significant. However this does not answer the point because there was no support for that assertion anyway, especially the suggestion that it would be the biggest fine in the UK. He also said at one point that this was HS's view and not his own. He then said that it would be much more reasonable if he could get a "s7" i.e. under the Bribery Act. Again, there was no basis for this assertion especially as he was talking about a fine and thus in the context of a criminal prosecution. But here, there were restrictions on the ability of prosecutors to agree in advance a particular fine, as was made clear by Thomas LJ in *Innospec*.

1042. Even if it was a civil recovery contemplated at that stage, it would be almost impossible to say what the settlement amount should be in the absence of evidence about the offences and any proceeds therefrom.

1043. It seems to me that these figures were just wild speculation on the part of Mr Gerrard and recklessly put forward since there is really no rational basis for them at all as he must have known. I think he probably just threw these figures out for dramatic effect and nothing more.

November 2011-June 2012

1044. ENRC's allegations in respect of this period can be dealt with more or less chronologically.

1045. On 11 November, 2011, Mr Gerrard told PwC that he had advised Mr Dalman as follows:

> "NG – MD asked how serious, 1 to 10. Said [to] 10.
> Been in vetting. Looking at you for some time.
> SFO staggered going to voluntary report.
> Consequences. Complete review. No evidence of wrongdoing.
> Best case civil settlement, next best case pleading + settling.
> Might be able to manage a DPA. Worst case we
> mislead them. They will then prosecute
> […]
> Guilty under S7already—Can't pass adequate procedures.
> Any [vagueness]—no adequate procedures. Told JD not
> good enough. Latest 12 months. If we go in w/
> offences can tick a lot of boxes. [First] one under
> Section 7
> Got to go into negotiation + show adequate procedures
> PwC— JD giving [same] [message] to company?
> NG— Don't have white collar/SFO expertise…
> SFO won't accept JD as not independent…
> …They are litigators…"

1046. There was no foundation in fact for almost all of this. First, it could not be said that ENRC's position was as serious as it could be i.e. 10, where no criminality had yet been found, or clearly found. Nor was there any evidence that the SFO was then "vetting" ENRC or that it was "staggered" that ENRC was going to voluntarily report.

1047. In evidence, Mr Gerrard agreed that he had not heard that the SFO was vetting ENRC, but said that this must have come from someone else, like JD. He suggested that the supposed source at JD was Glyn Powell who had joined the firm from the SFO, but when told that Mr Powell did not actually join until 2012 he refused to accept that this made any difference, saying that it was not known when he was recruited or when he decided to leave the SFO. Then Mr Gerrard said that it could have been from Mr Ehrensberger (although that point was not put to him). I do not accept any of that. This was Mr Gerrard speaking to PwC and I am sure that he was stating his views not what someone else told him.

1048. Equally, to say that ENRC was already guilty under s7 because it could not have had adequate procedures could not, to his knowledge, have been correct. No s7 offence had yet been committed and in evidence Mr Gerrard accepted this. Instead, he said that the question was about a lack of adequate procedures. But this is not a separate offence. The presence of such procedures is a defence to the s7 charge. That being so, he then did not accept that the note of what he had said was itself accurate. But there is no reason to suppose that the notetaker, Mr Anderson, took a wrong note here. This, again, was Mr Gerrard making things up on the spot. There was no reasonable basis for what he had said. It was inaccurate hyperbole and he must have known that. I think this is a reckless breach of duty.

1049. On 14 November, 2011, Mr Gerrard wrote to Mr Dalman, enclosing materials relating to the Bribery Act and said this:

> "The most relevant parts for you to focus on will be section 6 (Bribery of foreign public officials) and 7 (Failure of commercial organizations to prevent bribery) of the Act, and pages 8-31 of the MoJ Guidance. You will recall that section 7 of the Act creates a strict liability offence for organisations which can be held responsible for the actions of employees, subsidiaries, joint ventures and other third parties who perform services for or on their behalf anywhere in the world. If a bribe is paid, the only defence available for the organisation is to be able to prove that it had in place "adequate procedures to prevent bribery". Pages 20-31 of the MoJ Guidance sets out the Government's view of what comprises "adequate procedures".
>
> One final point is that jurisdiction under the Act is extremely wide. Section 7 in particular extends to any company incorporated in the UK and/or any company (wherever incorporated) which carries on a business, or part of a business, in any part of the UK. If an organisation is caught, the nationality of the individuals involved, and/or the location of the misconduct is irrelevant. The Serious Fraud Office ("SFO"), has said that in its view, the Act gives it extremely wide jurisdiction. For example, Richard Alderman has stated that where one company in a group is incorporated or operates in the UK, the SFO will claim jurisdiction over all companies in the group wherever in the world they are located."

1050. This advice was inadequate. First, s7 only applied to offences committed wholly after 1 July, 2011. Even though Mr Gerrard said that he had told Mr Barker 7 months earlier of the commencement date, Mr Barker had by now resigned and Mr Dalman had come in. In my judgment, Mr Dalman should have been told of when the new Act had come into force. Dechert says that there could have been continuing acts of bribery i.e. before and after 1 July, 2011. But WB1's allegations were in respect of earlier matters and the Africa acquisitions were earlier. There was later advice by Dechert but that was problematic, too: see below. It seems to me that this was not simply a question of advice which is "not comprehensive". In context, it was wrong.

1051. I am less clear that the letter exaggerated the SFO's jurisdiction. Taken as a whole, I think that Mr Gerrard did stress (just) enough the fact that the commercial organisation for the purposes of s7 is held liable for the bribery committed by others, provided they perform services for or on behalf of that commercial organisation.

1052. Subject to that, though, the inaccurate aspects of the letter do show a negligent breach of duty on the part of Mr Gerrard.

1053. On 17 January, 2012 there was a briefing to the SIC. It was attended by Mr Gerrard, Mr Anderson, Ms Black, Ms Irani, Mr Richards, and Mr Findlay. It was chaired by Mr Wilkinson. A note was taken by Mr Anderson. There was also a presentation from Dechert on the Africa side of the investigation. Among other things, Mr Gerrard said the following:

> "HS also said she would know what Gertler was doing. Make sure fully aware of cash in and out.
> Did we do all of those things? Did we check money in and out?
> Have you been wilfully blind. Biggest worry. I A reports expressed concerns. VH says other institutions have looked at it. If anythings happened its a problem for us.
> We inherit liability BA 2010.
> UK entity could easily be liable for sins of Kazakh or African entity. On our watch. If it is, and they can prove that, do we have appropriate systems + controls in place. Company guilty under bribery act. That is what we are trying to build at the moment…
> Pushed to demonstrate adequate procedures [re] bribery post July. Think stuffed. Should try.
> We might want to give it away. Bigger problem of wilful blindness
> Might agree to minor corruption, might agree to a section 7. Disappointing. Main job to ensure no bigger problem for board…
> They want to check whether board acted on wilful blindness point…"

1054. There are a number of inaccuracies here. First, it was not correct to say that <u>any</u> wrongdoing in Kazakhstan or Africa would automatically expose ENRC to criminal liability under s7. Nor could ENRC simply "inherit" liability. Second, there was no offence of wilful blindness as such, as already noted.

1055. In the cross-examination of Mr Gerrard on Day 22 at pages 114-125, he sought to explain what he meant by all of this. At some points he appeared to challenge the note itself. At others, he seemed to say that the fact that ENRC had evidence of concerns about Africa or Kazakhstan from the Internal Audit team or from HS's due diligence work on Project Moses, meant that there was or could be liability. In my view, all of this evidence was confused and unsatisfactory.

1056. This inaccurate advice on the part of Mr Gerrard was plainly negligent. The way he framed the advice was so scattergun that I think he did not really care whether it was accurate or not. He simply thought it right to put the wind up ENRC at this stage. That was reckless.

1057. There was then a meeting on 2 February, 2012. Paragraph 87 and 88 of the Particulars of claim plead this:

> "87. On 2 February 2012, Mr Gerrard met representatives of ENRC and Ambassador Pierre Prosper and Judge Stephen Larson of Arent Fox LLP to discuss the scope of the investigation that ENRC ought to try to agree with the SFO. Arent Fox LLP had been engaged by ENRC to advise on whether there had been any sanctions violations. There was a discussion as to whether the acquisition of Camec ought to be within scope of the investigation. Mr Prosper suggested that ENRC should attempt first to establish the SFO's position on such matters in order better to understand how to deal

> with the SFO. Mr Gerrard responded aggressively, saying words to the effect: "I don't appreciate having you guys [Pierre Prosper and Stephen Larson] parachuted in … you two fuckers [ENRC's representatives] parachute these guys in … this is my world".
>
> 88. Mr Gerrard then advised that: (a) "if we don't investigate everything ENRC will be raided"; (b) he did not "know how long [he] can hold [the SFO] off"; (c) "…if I don't deliver – and I've repeated this fucking hundreds of times – if we don't deliver fraud or corruption...we've got no deal"; and (d) ENRC would be better to admit to wrongdoing, even if there was none, to achieve settlement with the SFO."

1058. There is no note of that meeting. However, in his WS, at paragraph 146, Mr Ehrensberger said that he had organised the meeting to obtain clarity on the scope of the investigation and he wanted Mr Gerrard to explain what it was and why it was appropriate. Mr Vulis questioned why ENRC should be doing a SR if there was nothing to report. At paragraph 148 Mr Ehrensberger said that Mr Gerrard became angry about the questions which were legitimate, and then:

> "At one point he [Mr Gerrard] pointed his finger at Victor Hanna and me and shouted something to the effect: "you two fuckers have parachuted these guys [ie Arent Fox] in...". He then turned towards Judge Larson and Ambassador Prosper and continued shouting "...this is my investigation! Go back to the US, I'm in charge here...". These phrases stick in the memory because Mr Gerrard's language was so combative."

1059. At paragraph 149, Mr Ehrensberger said that Mr Gerrard's advice on scope was to the effect that "if we don't investigate everything ENRC will be raided" and emphasised the imminence of a raid, that he did not know how long he could hold off a raid by the SFO and that he had to "deliver" a report of fraud or corruption to the SFO in order to secure a deal. It had to report something, however trivial, to the SFO. Mr Prosper recalled much the same in paragraphs 39 and 40 of his WS.

1060. At paragraph 265 of his WS, Mr Gerrard accepted that it was possible that he used the words quoted in paragraph 87 and might well have said the words quoted in paragraph 88 of the Particulars of Claim. He suggested that, with the exception of what was alleged in paragraph 87, the meeting was cordial and ended amicably. Mr Prosper and Mr Ehrensberger, from their evidence, did not accept this characterisation. I accept their evidence here that Mr Gerrard was indeed becoming aggressive. I think that it was more than simply a forceful expression of his views. As Mr Prosper said, it was a meeting he would not forget, and he found it shocking when Mr Gerrard called his clients "fuckers". I also agree with Mr Prosper's view that it was not a matter of taking a different approach to the SFO because of the US background of himself and Judge Larson. It was all about defining the scope of the investigation. I have no doubt that this was something that would have irritated Mr Gerrard because he did regard the process as his own show.

1061. In cross-examination, Mr Prosper was taken to what he had said in paragraph 38 of his WS. There he recalled that Mr Gerrard said words to the effect that "I can make this go away for £50 million but if you don't follow my advice it could be £100 million". As before, there was no sensible basis for these figures especially when, as Mr Gerrard also said, it was not yet clear that there had been any wrongdoing.

1062. On 7 February 2012, there was a meeting with Mr Dalman attended by Mr Gerrard, Ms Black and Mr Anderson. Dechert produced a presentation dealing with the Kazakhstan side of the investigation. The note was taken by Mr Anderson, which showed that Mr Gerrard said the following among other things:

> "We advised that the board could end up incurring potential liability for sins of past. Any third party would ask why never got to the bottom of it…
>
> You asked me where we are. Scale of 1-10. This is 10. Sortable, yeah. Sorted worse. Will we get a bloody nose. Good result would be getting on to voluntary report program of SFO and achieving a settlement. Civil settlement. Independent chairman, achievable. Will have to prostrate yourself. Significant fine. Already [breaking] [law]. You can't show you have adequate procedures. Not taking into account Kaz or Africa. MD - Last board meeting said coming to an end + going well. NG - Going well in you haven't been raided. SFO staggered you walked in. Prepared to raid you. MD - Who? NG - The Company…
>
> For first time, getting a plan. 5 March is vital. If not on voluntary report. If not a raid + a criminal process. Evidence from Internal reports and [advisers]. Not legally privileged. All admit criminal offences. No ones going to do a deep dive. They may suspect worse has happened. We can be pragmatic in approach. Worst. Widespread. Did Halliburton. They confessed corruption. Narrow. Here all over the place…
>
> If we get on self report. Direct line to civil settlement. Convinced provided we tick boxes. Will require you to meet and do your bit. [Settle]. Unpleasant. Current director leaving in April. He is [???] convinced civil. Lead investigator know well. New guy a prosecutor. If we can't deal w/ the 5th we have a problem."

1063. Again, it seems to me that saying that it is at level 10, that ENRC would have to prostrate itself, that the SFO was prepared to raid it and that it was staggered that ENRC walked in, was all clearly unwarranted. There was no real basis for these assertions. Again, there was a reference to wilful blindness as if a separate offence. Also, Mr Gerrard's reference to criminal offences was confused. He said that documents would not be privileged because they would all admit criminal offences and then said there was a need to admit some wrongdoing, as if one had to find it. He also suggested that ENRC needed to be in a position to SR by 5 March because of Mr Alderman's impending departure, otherwise there would be a "problem". I can see why he would have preferred to deal with Mr Alderman rather than his successor, since he knew Mr Alderman well. However, it would appear to be unrealistic to expect ENRC to do an SR admitting an offence by then, especially as Mr Gerrard had previously advised that the investigation should be wide. In any event, as is clear from later

events, including the 5 March meeting itself (OM4) there was no immediate SR then, and the previous process continued.

1064. Dechert has suggested that at the meeting of 7 February, Mr Gerrard also advised of the various uncertainties in relation to the SR process, but I cannot see that. Indeed, the presentation said that a "next step" was to advise ENRC on engaging with the SFO.

1065. ENRC also relies on a speaking note sent to Mr Ehrensberger on 29 February, although in fact to be used by Mr Dalman in a forthcoming meeting with the Founders on 2 March 2012. The thrust of the speaking note was to recommend co-operation with the SFO leading to an SR. In other words, to continue the existing process on a "full and frank" basis. It was obviously intended to assist Mr Dalman in getting or keeping the Founders on board with the present process. Most of the note was accurate in terms of the SFO's powers and in comparing the civil settlement route with a criminal investigation. Indeed, Mr Dalman said that he thought it was a good document and summed up well the difference between the two processes. However, the problem with it was that apart from the question of cost, it gave no downside risk to the process particularly in the form in which Mr Gerrard had previously advised, and as ENRC was now proceeding upon.

1066. One of two notes produced to Mr Dalman on 4 May 2012 raised the concerns said to have been held by the SFO at that point. The final paragraph 6.2 of one of them said that the "Director" of the SFO was likely to have no hesitation in concluding that he had reasonable grounds to suspect an offence and to obtain authority to raid the company and individual premises i.e. a search warrant. As before, it is very difficult to see the basis for this conclusion at a time when ENRC was engaging with the SFO with City lawyers advising it. Even if this remark is to be read on the assumption that the existing process was abandoned by ENRC (or the SFO) it hardly follows that there would be a raid. Indeed, when the SFO did ultimately commence the criminal investigation in April 2013 it did not raid the company or its premises. The other note given to Mr Dalman emphasised the need to be "full and frank"; in context, this would be Mr Gerrard's sense of the expression which was not itself a duty on ENRC. See paragraph 1017 above. On 6 September 2012 Mr Gerrard had emailed Mr Dalman in the context of an earlier email from Mr Ammann about a case where the SFO had opened a criminal prosecution where there had been an SR process going on. Mr Gerrard pointed out how long a criminal investigation might take if the SFO decided to open one here. He also said that he could get the SR process finished here and perhaps a settlement within 6 months if parties gave him the access he needed. However, again, he did not advise

on the risks of his version of the process. Insofar as Dechert suggests that Mr Gerrard did here explain the risks, that is wrong.

1067. A point not emphasised by Dechert but which is worth noting here is this: by September, ENRC had been dealing with the SFO for some time, both through 7 OMs and the DCs. If ENRC was simply to withdraw at that point, it would obviously carry significant risk. But it would not necessarily have prevented ENRC from raising, even then, some sensible parameters on scope. All through this period, ENRC might have tried to do something about that, had the downsides of the SR process been consistently advised on. As for the alleged self-standing failure to decide scope, I deal with this below.

1068. At the 4 March AC meeting, Mr Gerrard said that the SFO had expressed concerns about wilful blindness on the part of the Board in respect of Camrose. Mr Ammann wanted written advice on the meaning of wilful blindness. However, Mr Gerrard said that he would do an oral update instead because of possible leaks or LPP not applying. Mr Ammann agreed but, as already stated above, there was no sound basis for taking this approach.

1069. At the AC meeting of 11 June, Mr Gerrard said that there would be wilful blindness only if there was fraud and corruption in Africa or documentation was wrong. The formal minutes noted that the meeting discussed whether there would be a report on wilful blindness from Dechert. Mr Gerrard's view was that this could only be done after it had been established what the Board knew and what actions had been taken. So now, Dechert was, in principle, prepared to put something in writing at least at some point. But Mr Gerrard went on to say that the SFO had <u>not</u> accused the Board of wilful blindness, yet earlier he had said that the SFO had serious concerns in this regard.

1070. I agree with ENRC that in this second six-month period, Mr Gerrard grossly exaggerated the risk of a raid, mis-stated ENRC's potential criminal liability in the way set out above, and continued to promote his version of the SR process without explaining the risks. There was no reasonable basis for his approach here. He cannot have seriously believed that what he said was true. His concern was to keep the process going by scaremongering on these points, where appropriate. On that basis, his advice must be regarded as having been given recklessly.

UNNECESSARY EXPANSION OF THE INVESTIGATION

Introduction

1071. The total amount of fees charged by Dechert, excluding disbursements, was £13.1 million. With disbursements, it was £13.5 million. With VAT, the total was £16.2 million. It will be recalled that (excluding VAT) ENRC claims that unnecessary fees amounted to £11.5 million. In other words, the necessary fees (including Dechert disbursements) exclusive of VAT, should have been around £2 million. It is important to see how and when the fees grew.

1072. The following is an extract from Appendix 11 to ENRC's Opening, the facts of which are not in dispute. The figures on the right are the cumulative total of Dechert's fees, as they rise each month or part of month. These figures are inclusive of VAT. Thus, by the end of 2011 the total fees were £1.6 million, by the end of 2012, they were £9.7 million, and by April 2013, they were £16.2 million.

2011	
26 April – 25 May 2011	£65,497.86
25 May – 7 June 2011	£133,916.04
Disbs only (26 May – 20 June 2011)	£140,972.54
24 June – 4 July 2011	£145,802.54
8 June – 29 June 2011	£215,461.33
15 June – 5 July 2011	£229,593.90
30 June – 20 July 2011	£293,186.63
21 July – 3 August 2011	£363,360.29
4 August – 16 August 2011	£450,554.69
17 August – 8 September 2011	£568,416.50
12 September – 18 October 2011	£634,856.24
6 July – 21 July 2011	£637,250.24
9 September – 7 October 2011	£741,663.26
8 October – 31 October 2011	£889,334.87
1 November – 18 November 2011	£1,105,267.19
Disbs only (1 November – 30 Nov. 2011)	£1,118,592.73
19 November – 8 December 2011	£1,314,773.18
9 December – 30 December 2011	£1,496,035.68
19 October – 31 December 2011	£1,625,200.80
2012	
3 January – 16 January 2012	£1,883,939.52
17 January – 31 January 2012	£2,204,382.70
1 February –14 February 2012	£2,519,762.74
Disbs only (3 January – 12 March 2012)	£2,574,536.78
15 February – 29 February 2012	£2,858,885.30
1 March –16 March 2012	£3,126,716.72
17 March – 31 March 2012	£3,386,713.94
28 March – 15 April 2012	£3,677,906.12
16 April – 30 April 2012	£4,020,455.18
Disbs only (13 March – 7 June 2012)	£4,152,639.79
1 May – 16 May 2012	£4,606,480.03
17 May – 31 May 2012	£4,988,364.55
1 June – 15 June 2012	£5,277,427.33
16 June – 30 June 2012	£5,579,793.37
1 July – 15 July 2012	£5,914,161.61
16 July – 31 July 2012	£6,295,957.27

1 August – 15 August 2012	£6,667,461.49
Disbs only (8 June – 17 September 2012)	£6,754,700.51
16 August – 30 August 2012	£7,129,739.51
1 September – 15 September 2012	£7,584,917.69
16 September – 30 September 2012	£8,070,616.61
1 October – 15 October 2012	£8,791,356.47
16 October – 31 October 2012	£9,701,369.55
2013	
Disbs only (1 January – 31 January 2013)	£9,747,663.55
1 November – 30 November 2012	£11,120,726.23
1 December – 31 December 2012	£12,034,762.04
1 January – 31 January 2013	£13,545,390.69
1 February – 28 February 2013	£14,922,492.45
1 March – 31 March 2013	£16,103,427.74
Disbs only (21 January – 28 March 2013)	**£16,213,507.41**

1073. I should add that on 18 January 2013, Dechert produced their costs estimate for the completion of the Africa investigation for the period January – April 2013. This came out at just under £3.6m and involved a further 1,754 Partner hours, 6,929 Associate hours, 1,007 Trainee hours and 6,719 Paralegal hours. In addition, there was a further £204,000 worth of work said to be needed to complete the Kazakhstan report in particular in relation to stripping.

1074. In addition, it needs to be recalled that the unnecessary expansion of the investigation alleged by ENRC does not only concern Dechert's fees but over £11 million worth of third party fees (for example, those of B2, Cyntel, KPMG, JD, AF and AG) and over £250,000 lost management and employee time.

Approach to the Expansion Issue

1075. It is important to note that there is essentially only one set of losses claimed as against Dechert (and in fact the SFO) in relation to a multitude of breaches. This is illustrated by the following paragraphs of the 2017 Particulars of Claim. These paragraphs show the interrelation between discrete breaches alleged against Dechert including the DCs, and the August, December, and March 13 Leaks, and those directly concerned with the conduct of the investigation itself:

> **"CAUSATION, LOSS AND DAMAGE**
>
> 179. Dechert's and Mr Gerrard's breaches of duty identified above caused ENRC loss and damage. The first three heads of loss identified below were a result of the investigation carried out by or under the control of Dechert being far more extensive than was reasonable in the circumstances. All eight categories of breach identified above caused the SFO to have wider or more serious concerns than was appropriate and/or caused ENRC to sanction more extensive enquiries than were required, which in turn caused or permitted the ever widening investigation. The fourth head of loss arises out of the sixth category of breach identified above, namely failure to protect ENRC's privilege.
>
> (1) Unnecessary legal fees
>
> 180. Dechert's and Mr Gerrard's investigations were of greater length and/or complexity than was necessary and/or otherwise required. The vast majority of the fees paid by ENRC to Dechert in respect

of work done in the period September 2011 to March 2013 were unnecessary. But for Dechert's and Mr Gerrard's breaches of duty, the work undertaken by Dechert and Mr Gerrard for ENRC would have been much more limited.

In particular:

180.1. Had Dechert and Mr Gerrard not breached their duties as set out above, then ENRC would not have agreed to enter into the process with the SFO as advised by Dechert and Mr Gerrard. Instead, ENRC would have sought to limit, so far as possible, the extent of work promised to the SFO to prospective work to: (a) improve ENRC's systems and controls; and/or (b) the completion of FRA's books and records review in Africa; and/or (c) a limited review of the due diligence associated with the Camrose and Camec acquisitions, to involve interviews with professional advisers, members of the board and senior management.

180.2. Further or alternatively, had Dechert and Mr Gerrard not breached their duties as set out above, they would not have continued investigations in Kazakhstan beyond October 2011.

180.3 Further or alternatively, had Dechert and Mr Gerrard not breached their duties as set out above, ENRC would have exited the Review Process and/or ceased to provide a running commentary on the investigation to the SFO and/or sought to limit the ongoing steps promised to the SFO to those set out in paragraph 180.1(a)-(c) above, prior to 27 March 2013, and at least in or about April 2012 (as pleaded at paragraph 158B.4 above), alternatively November 2012 (as pleaded at paragraph 158C.4) above…

(2) Unnecessary third party fees

184. ENRC had to engage third party law firms and/or other third party professional advisers to advise and assist on matters concerned with Dechert's wrongful conduct of its investigation (during the Retainer). Such law firms and advisers included Addleshaw Goddard, Arent Fox, Bridge2, Deloitte, FRA, Herbert Smith, Jones Day, KPMG, PwC, and The Risk Advisory Group, to whom ENRC paid very substantial fees. But for Dechert's and Mr Gerrard's breaches of duty, ENRC would not otherwise have incurred such fees and costs and/or not incurred them to the same extent because ENRC would not have engaged such third party advisers and/or the work and advice of such third party advisers would have been more limited in scope and duration…

(3) Lost management and employee time

187. Dechert's and Mr Gerrard's breaches caused significant disruption and/or delay to ENRC's business. In particular, ENRC's management and/or employees lost and/or wasted valuable time and work responding to and/or otherwise engaging with Dechert and Mr Gerrard (acting in breach of duty), including investigating and mitigating the effects of the problems caused by Dechert and Mr Gerrard. As a result, ENRC's management and/or employees were diverted from their normal work duties and/or diverted their work time which would otherwise have been spent on developing and/or promoting ENRC and/or the ENRC business and/or generating revenue for ENRC…

(4) Legal costs in connection with SFO proceedings

190. Dechert's and Mr Gerrard's failure to seek or agree terms of reference with the SFO has caused ENRC to become embroiled in litigation with the SFO about the status of various documents. The claim and appeal described in paragraph 152 above could have been avoided if ENRC had been properly advised and represented in relation to its dealings with the SFO. In particular, the dispute would not have arisen if Dechert had, at the outset, sought the SFO's agreement as to what information and documents would be provided by ENRC to the SFO during and at the end of ENRC's investigations, as to whether such information and documents would be commonly understood by ENRC and SFO as attracting privilege and as to whether, and if so when and to what extent, ENRC would be treated as having waived any such privilege.

191. ENRC claims as damages for breach of contract (against Dechert) and/or negligence (against Dechert and Mr Gerrard) such costs as ENRC may ultimately have to bear in connection with the SFO's claim, which could have been avoided by an early agreement to terms of reference."

1076. As for the distinct breaches in relation to the investigation, the pleaded case is that the Kazakhstan investigation was in every respect excessive so that it should not have endured beyond October 2011. So far as the Stripping Allegation is concerned, the essential point is

that absent different breaches, it would not have formed part of the investigation anyway. In relation to Africa, it is that the Camrose and Camec investigations should have been much narrower, essentially limited to a review of the due diligence conducted in each case. As for Chambishi, it should not have been included at all. Also, sanctions should not have been investigated beyond 5 March 2012 when they were said to be off the table.

1077. What I do not have is a particular list of each and every act of negligent advice alleged in connection with the expansion of the investigation. I can see that this may be difficult, especially given that in some ways, this is a broad allegation which is said to arise from Mr Gerrard's general approach. In addition, the expansion issues are bound up with questions of causation and loss in respect of other breaches as noted above. I am not, of course, considering the question of causation and loss in any respect so far as the claim against Dechert is concerned.

1078. What I have endeavoured to do below, therefore, is examine the chronology of each of the Kazakhstan and Africa investigations and draw some general conclusions therefrom in terms of any negligence. A more detailed examination may be necessary at some further point. The problem would have been more acute had I not made adverse findings against Dechert already in respect of almost all other matters.

1079. I also take account here of what I say about the separate subject of Dechert's dismissal at paragraphs 1406-1426 below.

The shape of the Investigation

1080. Here, two distinctions need to be made. The first is between (a) work resulting from WB1 prior to the involvement of the SFO and (b) work which was required thereafter. The second distinction is between (a) work done in relation to Kazakhstan and (b) work done in relation to Africa.

1081. On any view, the nature and extent of work carried out by Dechert changed significantly at different points. The original brief from December 2010 was to deal with the allegations in WB1 which concerned Kazakhstan only and then only in respect of the Farm and Procurement Allegations. The Iran Allegation arose from Mr Depel in January 2011. The Education Allegation came out of an IA report and was added in March 2011. Finally, came the Stripping Allegation via a different whistleblower in December 2011.

1082. As for Africa, this was already the subject of the books and records review conducted by FRA and started in early 2011. While FRA was in fact instructed by Dechert rather than by

ENRC directly, this was only because Mr Gerrard said that in this way, LPP could be maintained over FRA's work.

1083. There was then the SFO element of Dechert's work, following the SFO Letter of 10 August, 2011, and ENRC's decision to engage with it by sending the 9 November Letter. That engagement then brought about, apart from other things, the 8 OMs referred to above and again below.

1084. It then has to be remembered that the Africa side of the investigation was never actually completed, prior to the termination of Dechert's retainer, in the sense at least of delivering a report, whereas Kazakhstan did lead to a report.

General points about the expansion claim

1085. The core allegation is that Mr Gerrard unnecessarily expanded the investigation both in relation to Kazakhstan and Africa. There has been much debate about the scope of the investigations, but one has to use that term with care. It is one thing to say (for example) that the scope in relation to Africa included (at various times) the acquisition of Camrose, Camec and Chambishi. But that does not say very much itself about the extent or depth of the work to be performed in relation to them. Likewise, a review of ENRC's due diligence processes in relation to such acquisitions is not the same as re-doing the due diligence process itself after the event.

1086. Dechert's essential answer to this allegation is that the expansion of the investigation, and therefore its fees, was both necessary and justified, and Mr Gerrard was not expanding it simply to maximise billing. If it was a case of the latter, then this would obviously be a breach of the duty of good faith and to act in the client's best interests. However, even if that objective is not demonstrated, Dechert would still be guilty of negligence if no reasonable steps were taken to keep the investigation within appropriate bounds. The issue (at any rate at this stage) is not whether the fees charged were excessive for the work actually done. That is the subject or part of the subject of the stayed Costs Assessment. It is that most of the work done should not have been done at all.

1087. The fact that all the fees charged were paid, and that ENRC impliedly or expressly instructed Dechert to do most or all of the work are not, without more, answers to this allegation. That is because the allegation is that Dechert was (at least) negligent in advising (impliedly or expressly) that the work needed to be done.

1088. It is, of course, a fair point that it is very difficult to predict how much work an investigation will take, especially in relation to activities of a client in other jurisdictions and where the scope of the investigation can be affected by what is found and, so far as the SFO is concerned, by what it says it wants, from time to time.

1089. It must also be remembered that if work done was within the range of what a reasonable specialist lawyer in the position of Dechert would have advised to be done, this cannot be described as negligent. What I have to be satisfied about is whether the work done (or some part of it) was clearly outside any reasonable margin.

1090. Further, it needs to be remembered that there is now no real case made against ENRC that it deliberately obstructed or delayed the Dechert investigation. As Dechert put it in closing, on Day 45, it does not have to go as far as showing obstruction because it was all about the sheer difficulty of the task facing Dechert. I see that, if and where Dechert's time was taken up with, for example, numerous attempts to obtain access to data or information or having enquiries answered. But for the most part, as it seems to me, the issue is more about the extent of the work that was done and whether it was really necessary, as already noted. There are some points made about obstruction on the part of, for example, Mr Hanna in the separate contributory fault issue but that does not arise at the moment.

Context

1091. There are some important contextual matters here. First, ENRC itself was vulnerable to persuasion if not pressure from Mr Gerrard to permit him to conduct the investigation as he wanted it. There was a greater willingness of ENRC to contemplate or approve the type of engagement it actually had with the SFO and the work done supposedly for the purpose of that investigation, as a result of wrong advice given by Dechert on related matters such as criminality and risk of raids. I have discussed these already at paragraphs 927-1070 above.

1092. Second, the discussions of scope and what the SFO said it wanted from ENRC at the various OMs have to be seen in the light of the numerous DCs surrounding them and Mr Gerrard's conduct in relation thereto. While there was ample publicly available and other material to lead the SFO to regard ENRC as a potential target, the August and December Articles and all the DCs where I have found Mr Gerrard to be in breach of duty must have contributed significantly to the SFO taking a jaundiced - or more jaundiced - view of ENRC, especially as the engagement progressed. When Mr Gerrard said (as he frequently did) that something was what the SFO expected, that was either exaggerated or true, but if true, it was due at least in part to his own wrongdoing.

1093. Third, Mr Gerrard also unreasonably failed to define or seek to define with the SFO the scope of the investigation so far as the SFO's involvement was concerned. See paragraphs 1325-1350 below.

1094. Next, it has to be recognised that one additional matter which ENRC had to take into account, and which could not necessarily be laid at Mr Gerrard's door, was that once it engaged with the SFO, there might be matters which needed to be disclosed because the SFO was likely already to have some information about them. It would not be in ENRC's interests to allow a situation to develop where the SFO could legitimately ask why ENRC had not itself disclosed a significant matter. However, it would have to be a matter that was of real interest to the SFO, which was likely to be in relation to bribery and corruption, not, for example, frauds on ENRC.

1095. Fourth, there is no doubt that for the most part, Mr Dalman went along with what Mr Gerrard suggested. He said in evidence that he thought he was committed to the investigation and "to carry it forward in what he saw was the best interests of ENRC his client". However, that is not necessarily inconsistent with the investigation in fact being unnecessarily expanded. At the end of the day, in my judgment, Mr Dalman was guided by Mr Gerrard, whom he regarded as the expert. Moreover, of course, Mr Dalman did not know of Mr Gerrard's wrongful conduct in relation to the DCs, the August, December or March Leaks, and the Depel Interview. In addition, the contemporaneous documents show occasions when Mr Dalman also thought that Mr Gerrard was stepping out of line.

Dechert's Overarching Points

1096. I should deal here with Dechert's overarching points raised against the notion of any unnecessary expansion insofar as not dealt with above. These are set out at paragraphs 383-403 of its Closing.

1097. The first point concerned Mr Dalman's approach of "investigate everything". I refer here back to my observations about him in paragraphs 1095 above. It is also said that Mr Dalman offered no criticism of Dechert's approach to the investigation. But as the documents show that is not entirely accurate. Further, the documents do not actually show, overall, that Mr Gerrard's approach was subservient to Mr Dalman. That is because Mr Dalman was guided by Mr Gerrard and even then, sometimes pushed back. And as for his judgment that Mr Gerrard always had the best interests of ENRC in mind (which, objectively, I do not think he did) that would not itself prevent a finding of negligence.

1098. Next, I accept that there were elements of what the WB1 investigation entailed and what the SFO wanted, which were not specifically about a particular allegation; rather they were concerned about ENRC's good governance and in particular its oversight or otherwise of SSGPO or its Africa operations. But even here, there had to be a limit. Further, as will be seen in relation to Kazakhstan, when ENRC wanted to deal with some governance-related points internally (which could still be reported on) Mr Gerrard was resistant.

1099. Next, I turn to JD. I accept of course that they were involved though not engaged for the original WB1 work and as time went on, they played less of a role in the SFO-related work. Again, one has to recall Mr Gerrard's conduct here; see paragraphs 509-517 above. As for AG, it will be seen that there came a point when Mr Simpson positively had to remind Dechert that it did not have *carte blanche*. See paragraph 1203 below.

1100. It is said that if Dechert was in breach of duty then AG must have been, too. That does not follow. There was not one joint team of AG, JD and Dechert, all with equal responsibility for the investigation. Dechert was the firm essentially directing it or advising as to its scope, not the others, though they sometimes interjected. However, even if, for example AG was in breach of duty in failing to control Dechert sufficiently, that does not negate any breach of duty on the part of Dechert. Perhaps it was thought, ultimately, that AG was not exercising sufficient control. After all, its retainer was terminated along with Dechert's.

1101. There is then the point made that after the SFO became involved, the investigation was driven to a significant extent by the SFO's own concerns and suggestions. To some extent, that is true but then Mr Gerrard contributed to that state of affairs. And it is not clear that this was always so. After all, the SFO was pushing for the promised Kazakhstan report at an early stage. Moreover (see below) it also indicated that it understood the need for proportionality especially in relation to costs. But Dechert never (except on one or two occasions) sought to engage with the SFO specifically on limiting the scope and it made no representation about cost. That is surprising because it, of all parties, was aware of how they were spiralling.

1102. I do not dispute the extent or seriousness of some of the further information that came out of the investigation as it was progressing. This was true in particular of procurement and the activities (at least at first blush) of Ms Zaurbekova. However, it does not follow that these were matters for the SFO, at least not in any great detail, since again they essentially concerned possible frauds on ENRC, not instances of bribery and corruption. It may have been a different story for Mr Hanna I accept, but in fact he only came into the picture relatively late on.

1103. As for Dechert being prepared to use ENRC's internal resources wherever possible, that is indeed what Mr Gerrard had said in the initial letter of 29 December, 2010 (see paragraph 1111 below). However, it was not long before that principle was departed from, as the documents referred to below will show.

1104. While it is true that Mr Gerrard did say that the Farm investigation should be brought to an end, the trouble is that he then revived it later, as the documents will again show.

1105. I also agree that OM3 was designed to be a scoping meeting. But it is not clear how much was really achieved here, and in any event, the depth and the extent of the work done rapidly increased over 2012.

1106. I do agree that on Kazakhstan, Mr Gerrard did seek to keep what the SFO wanted to learn to the activities of SSGPO as opposed to all of ENRC's operations in Kazakhstan. However, this was pretty much an isolated example and it did not prevent the work on Kazakhstan from expanding greatly.

1107. Reference is also made to Mr Gould wanting the company to wipe the slate clean and to be told by its legal advisers what that meant. However, first, that is very general. Second, it does not follow that Mr Gerrard, as the adviser, gave ENRC correct advice on this.

1108. I agree with Dechert that the essential elements of the Africa investigation (in the end) became Camrose, Camec and Chambishi. However that selection was not a trouble-free process as the documents below will show. Furthermore, again, it is not the high level scoping that is an issue. It is how the exercise was undertaken.

1109. Finally, in relation to both Kazakhstan and Africa, I have found it more convenient to approach them in a strictly chronological fashion.

Kazakhstan: Chronology

1110. At the AC meeting on 27 December 2010, the AC said that it viewed WB1 with the utmost gravity and it was agreed that a swift and thorough investigation was essential. Thereafter, Mr Gerrard was introduced.

1111. On 29 December, DLA produced a scope of works. It said that in some cases, ENRC's own trusted people could be used to keep the costs low and keep the work in-house. It was estimated that DLA's own fees would be £168,250 plus VAT with the caveat that an accurate estimate at that stage was notoriously difficult. Forensic assistance was estimated to cost a further US$150-250,000 plus expenses.

1112. There was an initial call with the AC on 7 January 2011. Among other things, Mr Gerrard said that Mr Kowalewski had said that he did not think it was in ENRC's interest for his department (IA) to do the investigation. However, Mr Barker confirmed to Mr Gerrard and Mr Depel on 11 January 2011 that the original scope would be retained whereby DLA would oversee the work and IA would do the "heavy lifting". The draft investigation plan from DLA sent on 14 January did not reflect the significant involvement of IA. It just said that there should be a balanced team "relying where we can on ENRC's internal resources (e.g. IT, Audit and Compliance) but adding appropriate external skill sets". The final version of the plan was dated 17 January and now it said "the best team to undertake this will be as guided and assisted by DLA". At the AC meeting on the same day, Mr Ammann said that it was essential to establish the facts especially because of prior reports, namely those of HS, PP and Mr Vulis. Mr Gerrard said this investigation had to be far-reaching and tenacious. Mr Vulis agreed that it needed to be thorough and conclusive.

1113. In his letter to Mr Ammann dated 28 January, Mr Gerrard outlined a scheme whereby IA would first see if there was any truth to the three allegations in WB1. These were that SSGPO had purchased second-hand and poor quality equipment and it had purchased equipment at hyper-inflated prices (i.e. the Procurement Allegation), and that a director of SSGPO owned a farm which used or maintained equipment at SSGPO's expense (i.e. the Farm Allegation). If there was some truth to any of these allegations, then a more extensive investigation would be needed.

1114. The possibility that there may have been sales by SSGPO to Iran, in breach of sanctions, came into the picture in January 2011 as a result of a point raised by Mr Depel (i.e. the Iran Allegation).

1115. IA made initial findings on 11 February, 2011. It said there was nothing supporting the allegation made in WB1 concerning the Farm nor was there any evidence of breach of Iran sanctions. It found that abuse in procurement was possible, but there was no indication of any malign intent. However, there should be an examination of the contracts on site. DLA contacted IA over this report and asked some further questions.

1116. As a result of an IA report produced in February, a fourth allegation emerged. This was the Education Allegation referred to in paragraphs 959-963 above.

1117. In his letter dated 11 March, 2011 Mr Gerrard said that he had further concerns. On Procurement, these related to an incomplete set of contracts and appendices (where, for

example, there appeared to be a 36% price increase between that contained in the contract and a later addendum), unexplained significant payment increases, concerns as to the tender process and some purchases of equipment. He suggested a large number of extensive further steps here. One further concern was whether technical advice, that a particular type of crusher purchased by SSGPO had technical characteristics different to those offered by competitors, was correct. The appointment of a technical expert was suggested to see if the original view was correct and also if the equipment supplied was new or second-hand.

1118. On Iran, while Mr Gerrard had said that there was no evidence of direct trade links, this could not rule out indirect trade links and this should now be investigated. As for the new Education Allegation, he said this should be independently reviewed. He did not suggest further steps in relation to the Farm at that stage. At the end of the letter, Mr Gerrard said that a total of £140,000 worth of fees had been billed and a conservative estimate for fees going forward for the next 4 months would be £300,000.

1119. Drafts of this letter had previously been sent to Mr Kowalewski and Mr Ammann, among others. When reviewing a draft, Mr Kowalewski made the point that on the question of Iran, he had by then received an instruction from DLA asking him to review all sales contracts of SSGPO for 2009-2011 and collect all supporting documents including contracts, invoices, transportation documents etc. He reminded Ms Coppens that the actual allegation on sanctions and Iran related to 2011 only. Also, if he was going to obtain all the documents now sought, that was a task that should be done not only for SSGPO but other operations in Kazakhstan which would then be out of scope. To review and collect documents for 2009-2011 would drain IA's resources further and derail his audit plan. In her reply, Ms Coppens agreed that the Iran Allegation related only to 2011 but "we think it is important to broaden the investigation to the two preceding years to gain a complete picture." And that Mr Gerrard would explain this at the AC meeting on 17 March. She also agreed it would be better to broaden the ambit to all operations rather than just those of SSGPO but it made sense to start simply with SSGPO.

1120. On 15 March, Sir Ken Olisa wrote that he was disappointed by the 11 March letter, finding, for example, that it was badly structured. He wanted some comfort at the AC meeting that Mr Gerrard was up to the job.

1121. In fact, according to Mr Kowalewski, the 36% price increase referred to in the letter of 11 March amounted to a difference of US$10,000 over a total value of US$305,000 and the supplier chosen had given the lowest estimate.

1122. At the AC meeting on 17 March, it was noted that the Iran Allegation had actually arisen in the first place due to a misinterpretation of a simple enquiry. It agreed that DLA should do a detailed action plan for the Education Allegation. On Procurement, it was agreed that a narrow focus on hyper-inflated prices, second-hand goods and corrupt payments was more likely to bring about results. On the Farm, it was agreed to interview the SSGPO accountant and DLA would produce a plan to progress the investigation and give an updated fee estimate.

1123. It was suggested to Mr Ammann that his stress on IA doing most of the work was mistaken because this would lead to a resource problem. It is true that Mr Kowalewski referred to resources when commenting on the draft of the 11 March letter. But overall, in fact, there was no resource problem and IA was offered the services of Deloitte to assist it if necessary.

1124. Some of the background to DLA's 29 March letter has already been dealt with in paragraphs 948-955 above and I have referred to the section on "Potential Consequences of Failure to Fully Investigate". It recommended, again, a large number of further steps. For example, in relation to Iran, copies should be obtained of relevant documentation from SSGPO so that ultimate end users could be identified and this should be provided to DLA. DLA's costs estimate was now £300-£400,000 plus disbursements. This would be without a written report.

1125. At the 1 April meeting, DLA's recommendations were reviewed. There were concerns that the investigation lacked structure. As already noted, it was decided that once the work plans from DLA were made available, they would be reviewed by TW. Mr Ammann had dinner with Mr Marsh of that firm the previous evening and had indicated his frustrations over DLA's plans for the investigation, which he felt were costly and disproportionate. According to Mr Marsh, Mr Ammann said that he was incensed.

1126. On 4 April, DLA wrote to Mr Kowalewski in relation to its investigation plans following the 1 April Meeting. It set out a large number of requests for information and attached a summary of actions points for IA. On 6 April, Mr Kowalewski emailed Mr Ammann pointing out that the letter said that he should give to Dechert the contact details of the relevant personnel at Deloitte and Mr Gerrard would manage and instruct them. Mr Kowalewski questioned whether this had really been decided at the 1 April meeting. This was particularly in the light of the fact that he had said that he had serious concerns about Mr Gerrard's credibility especially after he had asked Mr Kowalewski to review all contracts and all transportation documents. Mr Gerrard also gave the impression that certain actions had been agreed with Mr Kowalewski when they had not or misrepresented what had been discussed at

the AC. He referred here back to the 36% price increase matter. In reply, Mr Ammann said that IA could bring in Deloitte to assist, but they would be under Mr Kowalewski's supervision.

1127. The DLA work plans were produced as attachments to a letter dated 7 April, and then reviewed by TW. I have already referred to parts of the TW report on criminal sanctions (see paragraph 952 above). The report said that, provided that the 4 issues were independently investigated on discrete bases all in accordance with DLA's plans and with focused information gathering (as opposed to a much wider exercise) and that any enhanced procedures would be implemented, then the AC would have acted properly. A widespread forensic examination would be unnecessary and disproportionate in the light of the costs of so doing. But on data-gathering, that depended on the risk of data destruction or impropriety in the meantime and whether there might be only one opportunity to gather the information.

1128. The TW report was considered by the AC at the 22 April meeting, which concluded that DLA's approach was satisfactory and Mr Gerrard should continue the work. It was also said that the draft work plans were good. In his WS, Mr Ammann said that his focus was now on getting the work plans approved without delay. Mr Gerrard's impending move to Dechert at this time was also noted in the meeting.

1129. Dechert places reliance on the early endorsement of a thorough investigation into WB1 and equally the endorsement of the work plans by the AC on 22 April, 2011. I see that, but at the same time, Mr Gerrard himself still saw this as a relatively confined exercise. The problems, in the main, came later. After all, at this stage, the latest costs estimated (from 29 March 2011) were still relatively modest, some £300-400,000 for DLA's fees.

1130. Dechert also criticised Mr Ammann for not referring in his first WS to that meeting and the approval of the work plans. When that omission was put to him, he said he forgot. But this question was based on a false premise. Even on Day 8 itself, when this suggestion had been put to him, it was later accepted by Dechert that in fact both his first and second WSs had referred to this meeting and the approval of work plans. Other examples of criticisms put to Mr Ammann which were erroneous are set out in appendix 2B to ENRC's Closing.

1131. At the 31 May AC meeting, Mr Pickworth reported that the Iran investigation was now closed. As to the Education Allegation, Deloitte had interviewed some personnel and it seemed that the policy had been changed in 2010 to admit to the scholarship scheme children of non-employees. Subject to checking that point, the investigation would be closed. As to

the Farm, he said that no evidence had come to light of a Farm belonging to the SSGPO manager and although the purchase ledger showed that tractors had been acquired they were used by the plant and there was no evidence that resources had been diverted outside of SSGPO. It was expected that the Farm Allegation would soon be closed. This was subject to a clear opinion from Dechert on the results of that investigation. The Procurement Allegation was ongoing although it had been established that where purportedly new equipment had been bought, it was indeed new. The meeting also noted that this was the third time that an investigation had been carried out at SSGPO and it was therefore essential that this review was comprehensive and conclusive. However, it also discussed the need to ensure that future investigations were cost effective and proportionate.

1132. Mr Ammann said that following the 31 May AC meeting, Dechert was asked to produce a report by 9 June explaining, for each item, whether it could now be closed off and if not, why not. No written report was done but there was a conference call on 10 June. Mr Jobson said that 56 desktops had been imaged in Kazakhstan. It was not practical simply to do a search of the servers there because local law would have required the permission of every employee which would have been a huge task. The review of the imaged data was due to take place in the UK but now could not because of legal restrictions on access to geological data so it would have to be done in Kazakhstan. It was agreed to do keyword searches on the Farm and Education Allegations. On Procurement, Mr Kowalewski said that there was no evidence of hyper-inflated prices or of misdescription of goods purchased.

1133. There was also the trip to Kazakhstan in June. During that time there was the "false office" incident and the beginnings of the enquiry into a subsidiary company called Servis. Mr Gerrard's note to Ms Williams of 10 June explained how it came about. Mr Gerrard had already decided to investigate Servis as a result of calls with IA and Deloitte and it seemed to operate out of the same registered office as the Farm company. When in Rudny, they tried to gain access to the Servis office but could not that day; however, the Vice-President of SSGPO said that they could return the following day and access the desktop computers. But when they returned, they were shown to an office on a different floor and which appeared to have been falsely set up and was in fact inactive. By the end of 6 June, Mr Findlay was working on further queries from Mr Gerrard about Servis, along with questions about Ms Olga Rahmannuya, who was working full-time as SSGPO's Chief Accountant but who also appeared to be the accountant for the Farm.

1134. At the AC meeting on 21 June, a full report was given on the trip to Kazakhstan. Mr Gerrard said that, having re-read WB1, he now had concerns about the RTS and the transport companies mentioned in the PP report. Mr Gerrard said that the next steps should be to finish the Kazakhstan IT data review, find 5 or 10 suppliers not based in Russia or Kazakhstan to review in respect of procurement, and continue the investigation into Servis, along with the Farm and Education Allegation. There was not much detail here about exactly what was left to do on the latter. Much more time was spent discussing the trip to Kazakhstan and Servis.

1135. There was a further AC meeting on 13 July. Mr Gerrard's note said that the focus would now be on Education as this was one of the areas that could be more speedily dealt with. However, on 14 July, Mr Ammann emailed Mr Gerrard about the draft minutes produced. He said that the minutes should also include that:

> "… The investigation should be limited to the whistleblowers allegation and…new findings should be considered as a new investigation and goes through our investigation policy first before we do further investigations. We have do avoid that this investigation never finds and end…"

1136. Mr Gerrard then forwarded this email to Mr Findlay with the comment "Interesting. Start of the close down!" This would seem to show Mr Gerrard's antipathy to Mr Ammann. As already noted, it was not put to Mr Ammann that he was in fact obstructing the investigation which, if anything, seemed to be the tenor of Mr Gerrard's remark.

1137. Notwithstanding Mr Ammann's email, Mr Gerrard had been setting in train various enquiries through Mr Anderson with Mr Findlay on all of the matters including Servis. Even if he had not understood Mr Ammann's point until after those enquiries were made, it does not look as if the instruction to do the enquiries had changed.

1138. On 26 July, Mr Gerrard set out the fees for the "next phase" of the investigation including the making of verbal reports to the AC, now at an estimated cost of £160-£200,000 per month.

1139. On 4 August, Mr Anderson sent an email dealing with Ms Rahmannuya, Procurement and a security company which appeared to have a connection with someone referred to as "Razmat" in WB1 which alleged that he had received kickbacks. This individual was in fact Mr Rozmat Tazhibaev.

1140. The next AC meeting was on 10 August. This was the day after the August Article. It will be recalled that the full version of the progress report which had been drafted for this meeting was not shown at all. The executive summary requested by Mr Ammann was circulated, but then picked up at the end of the meeting. Along with the Farm, Education and Procurement Allegations, reference was made to additional matters which included the security company

and Servis. At the meeting, Mr Ammann said that he wanted the WB1 report closed by 1 September. He said that the allegations concerning Servis had not been in WB1 and the priority was to close that investigation. The Servis issue could be investigated later. Mr Gerrard made points about obstruction to the investigation by SSGPO and the AC could appear to be looking the other way if a thorough investigation was not allowed to proceed.

1141. On 17 August, Mr Ammann emailed Mr Gerrard to say that the WB1 investigation needed to be finished before any other investigation was done, and there needed to be a clear understanding of what Dechert would do, and what ENRC (through IA) would do.

1142. Dechert agreed to produce a new workplan, and an 8-page draft was submitted on 2 September. The Farm was still included at pages 3-4 with extensive and detailed investigative work still to be done. Mr Kowalewski analysed it and made numerous comments, including that it dealt with irrelevant matters, matters which had been completed or matters which were out of scope. The draft was amended and then discussed by the AC on 8 September. At that meeting, Mr Ammann said that the investigation into subsidiaries was not within WB1 and should be taken back to "ourselves". It could be done later. It was also said (again) that the focus was on Farm, Education and Procurement; other issues would be considered once the WB1 issues were dealt with. On the Farm, the focus should be on whether SSGPO employees or equipment had been used there. Mr Kowalewski said that there was certainly nothing in the suggestion that tractors had been inappropriately used, but Dechert would review this. Dechert agreed to refine the workplan to concentrate on employees and equipment. On Education, 70,000 documents had responded to a keyword search and it was possible that false documents had been created. A further version of the plan was produced on 16 September.

1143. On 23 September, Mr Anderson raised a query about the agricultural activities of SSGPO since it appeared that Ms Rahmannuya's file said that she had worked in SSGPO's "agricultural sector" in 1996-1998. Mr Kowalewski said that this query was way out of scope. Mr Gerrard disagreed saying that he did not know that SSGPO had an agricultural department and it might be very relevant to WB1. He also wanted the SSGPO internal telephone directory. Mr Kowalewski retorted that he still thought it was out of scope especially if the enquiry was to go back to 1996-1998 and also related to subsidiaries (like Servis). Mr Gerrard then said that the subsidiaries had not been scoped-out but they were on the backburner for now. While the directories may have been in the list of queries about the subsidiaries, Dechert's interest in them extended across all areas of investigation. He also

said that Mr Kowalewski was not being asked to verify matters going back to 1998. He was to explain what agricultural capability SSGPO had at that time or had going back no more than 3 years. As to this, first, the explanation for the dates was different from what Mr Anderson had said earlier, and second, the phone directory enquiry seemed to be being pursued just for the sake of it.

1144. At the meeting on 28 September, on the Education Allegation, although there was no evidence of bribery and that aspect should be closed, Mr Gerrard said that they should continue to look at the false documents which had arisen in the context of that investigation. He also said that Servis 8, one of the subsidiaries, had supplied DIA (a police department) with food. He said it was not an issue but should be looked at, whether one liked it or not. It was decided that the relevant SSGPO personnel who had made statements about the Education Allegation should be interviewed by the investigation team but with Mr Vulis present. Originally, Dechert had proposed 26 people to be interviewed, 23 of whom related to the Education Allegation. Mr Ammann asked Mr Kowalewski to discuss the plan and the number was ultimately reduced to 12 interviewees on Education and one interviewee on something else.

1145. As to the Farm, Mr Gerrard said that it could be closed subject to nothing emerging from a review by Mr Kowalewski who was doing a keyword search for words including "Farm", "food supply", "EU", "European Union", "Belgian" and "Sowing", which were very generic and were likely to throw up many responsive documents.

1146. As to Procurement, Mr Gerrard said that vendor audits were necessary because of ENRC's adequate procedures obligations. But this is difficult to see if what was happening was not bribery under the Bribery Act, but an internal fraud on ENRC.

1147. Mr Ammann said that he wanted the investigation closed by 31 October. On 4 October, Mr Anderson said they were nearing the end of the investigation on WB1.

1148. At the AC meeting on 7 November, Mr Gerrard said that while no SSGPO equipment was found in use at the Farm, a small number of employees were. He also said there should be a discrete investigation into the transfer of the company which owned the Farm, namely Novotroitsk-2008, to Mr Tazhibaev, on the basis that WB1 made a separate allegation about him getting kickbacks.

1149. Mr Gerrard also said that one of the interviewees on the Education Allegation, namely the Head of SSGPO's Foreign Economic Relations Department, had said that an English-

speaking marketing specialist was required, should there be a change in the relationship with plants based in Iran. Mr Gerrard said this reference to Iran was "concerning" and should be investigated further. He had apparently not sought clarification from this interviewee at the time. He also said that there were some red flags surrounding the purchase of some high value cars and it was agreed that IA should investigate. Mr Gerrard also brought in again Servis and Servis 8 and it was agreed that IA would obtain relevant financial data in connection with canteen services. On Procurement, Mr Gerrard said that there should be a vendor audit of SSGPO's largest CIS and non-CIS suppliers.

1150. Perhaps unsurprisingly, Mr Ammann came back on these points in his email dated 9 November. He said that Mr Gerrard had said previously that the Farm Allegation should be closed because no company equipment was used by the Farm, and therefore who owned the farm (i.e. possibly Mr Tazhibaev) was irrelevant to the WB1 allegations. He said that Mr Gerrard had now come up with new items to investigate and had therefore changed his mind in the 7 November AC meeting. To obtain clarity, Mr Gerrard should now prepare a list of open items to be agreed by everyone on the basis that "every investigation has to come to an end".

1151. That list of open items came in the form of Dechert's letter dated 24 November. Paragraph 9 contained a long list of further work on the Farm, including (arising from a previous different whistleblower allegation) that Mr Turdakhunov's driver, a Mr Pomiluiko, had purchased a guesthouse from a subsidiary of SSGPO at an undervalue. On the Farm otherwise, Mr Gerrard advised that there should be a review of all transactions with companies associated with Mr Tazhibaev to see if they were bona fides. Further, because the CEO of one of the subsidiaries, a Mr Vitoshko, had taken his personnel file with him when he left, Mr Gerrard wanted to know whether there was a policy at SSGPO which allowed staff to do this.

1152. Dechert also advised that there should be external reviews of all transactions with Kostanaishen, a construction company, including all procurement processes, all emails of individuals involved, a physical inspection of all goods received from it and then an examination to see if there was documentary evidence to support the purchase of goods from it. This was partly in the context of US$4 million paid by SSGPO to the company between 1 January, 2010 and 31 January, 2011 and also illegal beef sales. At least some of this work was subsequently done.

1153. On Education, Mr Gerrard advised that those persons who were to be interviewed but who were not interviewed on the last trip should now be interviewed. On Procurement, because of

the work involved in doing the vendor audit, he thought that FRA should assist IA. He then recommended a further investigation into outsourced services. On Iran, he recommended an email search in the light of the comments of the interviewee referred to above. He also said that there should be investigations into the cars and other individuals named in WB1.

1154. The 24 November letter was sent the same day as an AC meeting. On the guesthouse, Mr Vulis and Mr Kowalewski both said they knew about it. It had been sold to the driver at a proper price but in any event the sale had been reversed. Mr Gerrard's response was to say that he was still concerned because the fact remained that it had been bought by the driver, the purchase had been reversed and there were a number of questions raised by compliance that had not yet been answered. Again, in my view, this is an example of Mr Gerrard simply pushing to keep open or opening new lines of investigation. Although not stated in Mr Anderson's minutes, Mr Anderson's notes record Mr Ammann saying again that they should close WB1 first, and anything else would be a new investigation.

1155. On 28 November, a further set of steps was sent by Mr Anderson to Mr Ammann including another visit by IA to Rudny to deal with the vendor audit, one of Mr Tazhibaev's companies and information on the policy about employees taking personal files away, and service companies.

1156. At OM2 on 30 November, Mr Gerrard told the SFO that the Kazakhstan investigation was ongoing and that "other red flags may come out" but he had not seen any substantive evidence confirming the allegations yet.

1157. On 8 December, the AC met again. Mr Gerrard made reference to other farming-related matters though, by now, not the Farm Allegation itself. There were also matters arising out of three of the main suppliers. Mr Ammann said he wanted the investigation team to work towards a deadline of the end of February 2012. Dechert was to go back to Kazakhstan at the end of the year.

1158. However, on 12 December, a new matter arose which was the "stripping" allegation and this had to be added to the Kazakhstan investigation agenda.

1159. OM3, on 20 and 21 December, was mainly about Africa and did not go into much detail. I agree that Ms von Dadelszen's list of matters which the SFO expected to be investigated, prepared in advance of OM3, is important. It was no doubt affected by the recent December Articles and Mr Gerrard's own communications with the SFO about them. Indeed, Dechert actually relies on what was said in the December Articles as a significant factor. However,

since I have found that it was Mr Gerrard who instigated the relevant leak, this can hardly assist him. All of that said, at the same meeting, the SFO said that it expected that ENRC could produce a report by the end of February 2012. In the event they agreed with Mr Gerrard that what should be done by then would be a presentation on Kazakhstan. But that timeline does suggest that the exercise had to have some limits.

1160. On 9 January 2012, Dechert began to investigate a further whistleblower email passed to them by Mr Depel concerning the delivery of an air-separation plant to SSGPO ("the Manufacturer WBE"). This had not yet been raised with SIC.

1161. On 17 January, 2012 there was a new retainer letter for Dechert, since it would now be taking instructions from the newly-formed SIC. It met for the first time that day. There was a Dechert presentation on each of Kazakhstan and Africa, though mainly about Africa. Mr Gerrard said that on Kazakhstan, completion was not far away, some 2-3 months. However, at the same time, he raised the issue of the guesthouse, the cars and a question about the sale of ferromanganese to SSGPO. He said there needed to be interviews with SSGPO's Head of Control in London, a further trip to Rudny to interview 10 employees and image another 30+ computers, and to deal with the new allegations about stripping, and also about construction, and the Manufacturer WBE.

1162. At the 2 February AC meeting, and mindful of work still to be done, Mr Gerrard said that the Education, Farm and Iran Allegations should be closed. This was the same day as the difficult meeting involving Mr Prosper and Judge Larson. See paragraph 1057 above.

1163. On 7 February, there was a briefing to Mr Dalman who had just taken over as the non-executive Chair of the Board. I have already referred to parts of this briefing at paragraphs 1062-1064 above. Mr Gerrard told Mr Dalman that there had been no evidence of corruption on the Education Allegation. However, he raised the question of false documents, saying that the "SFO will be all over us. At the very least, falsification is a criminal offence." No doubt it was, but I fail to see how falsification in Kazakhstan, without more, could have constituted a criminal offence here.

1164. On 10 February 2012, PwC sent a note to Mr Ehrensberger. They suggested that going forward, Dechert should simply work on the Stripping Allegation with everything else being done internally. Mr Ehrensberger forwarded this to Mr Gerrard. At an internal meeting on 17 February, Mr Gerrard said that a number of people were "briefing against us - a lot of panic setting in now". In the light of the PwC note, he said that "we need to justify continued

investigation". This is not necessarily a suspicious comment. But it is again an example of others associated with ENRC questioning the extent of work on Kazakhstan still going forwards. The note also records that the Farm investigation was closed, there was no evidence of corruption on Education and no evidence to support exports to Iran, but Procurement was ongoing along with stripping and red flags.

1165. In Mr Gerrard's recorded January 2012 call with Mr Findlay, he said that the forthcoming trip to Rudny was both to tie off certain areas of investigation, including stripping and construction, and also to open them up. Mr Findlay observed that this exercise would never get done by the end of February and Mr Gerrard agreed. He had previously said that "the date's hurtling closer" if there was not an appropriate response on 5 March, being the next planned OM, namely OM4.

1166. At OM4 itself, on 5 March, it was noted that the SFO appeared to accept that the Iran, Farm and Education Allegations were closed and the focus was on procurement/stripping. On this occasion, when the SFO suggested that there might be a wider investigation on procurement, for example into ENRC's own direct operations in Kazakhstan as opposed to SSGPO, Mr Gerrard did push back on this. However, the full Kazakhstan report still had to be done by June. At this meeting, Mr Dalman was introduced to the SFO. Mr Gerrard said that he was about to go to Kazakhstan and would be reporting back on the trip as agreed, with an exact date to be confirmed.

1167. A number of points arise as to OM4 in this context. First, Ms Black prepared two notes, one long and one short. Only the shorter one was produced to Mr Ehrensberger. This was said to be misleading, or at least incomplete because it did not recite the fact that the SFO said it did not want a "global investigation" about Kazakhstan. On analysis, I do not think that there is anything in this point. What was meant by global investigation here, I think, was a general investigation into all of ENRC's operations in Kazakhstan including ENRC Kazakhstan. The point was that, while this was not being sought right now, the SFO would need to be satisfied that the issue with SSGPO was no more than one bad apple and perhaps a sample review of other activities would be enough. I think that this point was actually picked up by Ms Black in paragraph 5 of the shorter note. What in fact was more relevant here is what the SFO had said at OM3 about proportionality and cost. See paragraph 1101 above.

1168. However, a separate issue was whether certain matters had been confirmed or agreed as set out in paragraphs 9, 10 and 19 of the shorter note. Mr Prosper made the point that these

paragraphs should refer to what Dechert had been proposing rather than what the SFO was requiring. But he also said that the SFO had spoken of a proportionate approach. This may or may not have been a reference to the "global investigation" remark. Mr Gerrard responded that there may have been two conceptions of proportionality. Mr Richards also made a number of points on the shorter note. In the end, I do not think that much turns on the points Mr Prosper made here.

1169. It was in this meeting that the question of the Kazakhstan report as a "litmus test" was referred to, according to Dechert. Mr Prosper said that he did not recall any references to "litmus test" and it is true that this is not in any of JD's notes or those of the SFO. But it was certainly treated by everyone at Dechert as having been said. For present purposes, I assume that it was.

1170. Dechert argues that effectively, this meant that the process of doing that report would be scrutinised and would be important when the SFO considered other matters, for example Africa. I see that, but, especially against a deadline of June, I do not see that this justified Dechert continuing with a policy of allowing new investigations to start up or older areas of enquiry being restarted. It is hard to see that the work done to date would not satisfy the SFO, once compiled into a report, on any view.

1171. I agree that by this stage, it may have been very difficult for ENRC simply to reverse out of the process of engagement with the SFO altogether. However, the main point here is not that, so much as controlling the work which was being done. Dechert also places emphasis on the fact that after OM4, or certainly OM5, work on the Kazakhstan report was effectively done, bar stripping. Yet, as will be seen, Mr Gerrard still kept raising further matters, for example, the company called Aluminium of Kazakhstan JSC ("AoK", as described at paragraph 1191 below) or in my view prolonging the finalisation of KPMG's report on stripping by disputing whether KPMG should have been doing the exercise at all and when it did, engaging in an extended dispute about the relevant area of stripping.

1172. Yet again, it has to be emphasised that, especially once the Iran matter had been disposed of and the fact that there was no evidence of corruption on Education (whatever else there may be), at worst there were simply frauds on SSGPO itself.

1173. In this context, it is worth recalling the mention of excavators in DC12 which took place on 14 March. It is very hard to see why mention was made of them then, because, as it later appeared, this was no more than a suspicion.

1174. At the AC meeting on 14 March, Dechert gave June as the date for the final report on Kazakhstan.

1175. However, on 20 March, Mr Depel suggested there might be a question of Iran sanctions evasions in relation to sales of ferrochrome via Switzerland and then parties in the Middle East and then ending up in Iran. Mr Gerrard said that it should be investigated although Ms Gonzales thought this was "too far-fetched" and could "create even more issues" with the client. At the AC/IC meeting on 4 April, Mr Gerrard referred to this new sanctions issue. As at 17 April, this matter was still being pursued according to Ms Coppens' notebook for that date. Mr Ehrensberger was asked to look at this.

1176. On 20 April, Mr Gerrard said to Mr Ehrensberger that Dechert was a little over a month away from completing the investigation. By the end of April, Dechert said there was no further point arising in relation to Education. By 2 May, Mr Ehrensberger had asked Dechert to set out the steps necessary to close the investigation and report to the SFO. By his email dated 2 May, Mr Gerrard sent a very detailed and extensive list of further steps, prior to which he had said that the deadline was the end of June. The further steps included approval by Mr Ehrensberger of search terms then to be applied to an email review and some more documents to be obtained from SSGPO. He also wished to interview two other persons as a result of the interview by then conducted with Mr L'Huillier, the Vice-President of Operations of ENRC Kazakhstan. One of the new interviewees was a representative from Michigan and another was a Ms Kalevich, former head of procurement in Kazakhstan now working in Brazil. A telephone interview with her was proposed. Experts on stripping had been instructed and it was proposed that they accompanied Dechert to Kazakhstan where the stripping interviews would be done.

1177. Dechert also wanted a further technical expert to examine items of equipment. One of the tasks here was to investigate the age of an excavator in the context of the Manufacturer WBE. A second was to confirm if prices paid by SSGPO for excavators were reasonable where it appeared that one excavator had been purchased which might already have been owned by it. A third was to do a site visit to see if excavators listed as owned by SSGPO were the ones actually working on site. Thus it was expected that in total, the experts would be needed for 5-6 days. It will be recalled that Mr Gerrard had already mentioned an excavator to Mr Thompson at DC12.

1178. The final trip to Rudny was planned for the week commencing 21 May which would include the experts, FRA representatives and Mr Findlay. Individuals suspected of procurement

wrongdoing were to be interviewed and this process was said to be necessary in order to satisfy the SFO that there had been a thorough review. It was said that after this trip, a presentation would be made to ENRC, then the report could be produced to the SFO and if the SFO was satisfied, a civil settlement would be discussed. Of course, in order for there to be a civil settlement, there would have to be some criminality.

1179. On 23 May, Mr Gerrard (through Ms Coppens) asked Mr Ehrensberger to give further information about Project Narnia (this was the alleged sale of ferrochrome from Russia to Iran) and a copy of legal advice on this thought to have been given by AF. He also wanted a copy of Mr Depel's formal grievance about his suspension (knowing of course that Mr Depel had now been interviewed by the SFO) and who at ENRC was undertaking the investigation into what Mr Depel was alleging. Finally, Mr Gerrard said he wanted a copy of ENRC's communications with the FSA concerning related party transactions. Mr Ehrensberger wrote to Mr Dalman to say that he was concerned that all of this would be detrimental to the aim of keeping the investigation narrow, so as to resolve the SFO issue as soon as possible. I am sure he was right in that observation. Project Narnia had in fact received numerous legal opinions in the past, saying there were no sanction breaches. Mr Ehrensberger was concerned that Mr Gerrard would still want to investigate matters independently. Equally, with Mr Depel's grievance, which was being dealt with by AG from an employment point of view, the concern was that Mr Gerrard would want to investigate all of Mr Depel's broad allegations. As for the FSA, this was a regulatory matter only and not concerned with any fraud or corruption issues being then discussed with the SFO.

1180. I cite this exchange at some length first because it seems that Mr Ehrensberger's objections were sound, and second, because it is a very good example of (at best) Mr Gerrard simply not knowing when to stop. This is in the context of a promised report to the SFO in a week's time. Anyone reading the contemporaneous documents would conclude that meeting this date was an impossibility. If the process behind the Kazakhstan report was a litmus test, that would surely include its timely delivery.

1181. Mr Kowalewski sent an email agreeing with all of this. He added that Mr Gerrard should finish Kazakhstan and Africa first and anything else to be investigated did not need him. He was already using two sub-contractors, presumably B2 and FRA. He also added, somewhat presciently, that "NG cannot investigate CD [Mr Depel] case as they made an impression that they were/are buddies and there would be a risk that the investigation wouldn't be objective."

1182. In the meantime, Dechert was still working on the Farm Allegation. On 7 June at a meeting with Mr Kowalewski Mr Gerrard said that he had "stumbled on" more information about the Farm. He also reported endemic fraud and corruption on procurement and stripping in particular.

1183. At the AC meeting on 11 June, following the visit to Rudny, Mr Gerrard said that the Farm issue had "popped up again". At the IC meeting also on 11 June, he repeated what he had told Mr Kowalewski on 7 June. The IC agreed that Mr Gerrard should set out his observations for the CEO of SSGPO, who was responding with proposals including remedial action. It was (still) expected that ENRC could report back to the SFO in June to discuss remedial action. On 13 June, Mr Gerrard said that a further visit to Rudny was necessary to establish the extent of the stripping fraud.

1184. At OM6, on 18 June, Mr Gerrard said that he was almost in a position to present on Kazakhstan in the near future with a report shortly thereafter. The presentation would be in late June/early July.

1185. On 20 June, Mr Gerrard wrote thus to Mr Dalman:

> "We have been considering further the investigation into SSGPO. On mature reflection, we have concluded that the better approach is the one that you and Terence suggested. We propose drawing up a presentation which takes into account all the work done so far and then arranging a meeting with the SFO. Any further investigation and/or review to determine the quantum of the stripping fraud and/or the culpability of SSGPO management can be done subsequently.
>
> We have come to this view because we do not believe we will receive documents from SSGPO in time to undertake a June visit to SSGPO, which will in turn delay the SFO meeting. This is no reflection on Felix as he has been assisting us in obtaining documents from SSGPO. We would advise that every effort still be made to obtain the outstanding documents.
>
> With the above in mind, I would like to contact the SFO to agree a meeting in early July at a mutually convenient date. This will give us time to circulate and agree the Kazakhstan presentation prior to any SFO meeting.

1186. This makes it clear that Mr Dalman, as well as others, had been seeking to keep the investigation focused.

1187. On 5 July, Mr Anderson raised (again) the question of Iran sanctions in the context of Project Narnia. Mr Ehrensberger explained that a lawyer had previously advised that there was no breach.

1188. At the SIC meeting on 9 July, it was agreed that a follow-up trip to Kazakhstan should be done by Dechert shortly, but that was not possible. Mr Gerrard said that the intention would be to report to the SFO on the basis of where matters stood as at 20 June. There was, by now, a draft presentation to the SFO (OM7 having been fixed for 20 July).

1189. On 18 July, Mr Gerrard told the SIC that the Kazakhstan report would be ready in a couple of months.

1190. At OM7, on 20 July, the SFO agreed that the Farm and Education Allegations were not examples of bribery or corruption. On Iran, Mr Gerrard said that he had now got to the bottom of this and no contracts in breach of sanctions had been entered into. On Procurement, he said this was another example of a fraud on the company. Stripping was outstanding, but work would be completed within a month of obtaining certain documents.

1191. On 23 July, Dechert started work on a draft report. On the following day, Dechert was made aware of a lengthy whistleblower email dated 9 May from an employee at an ENRC subsidiary called AoK which had been sent internally at ENRC. The whistleblower alleged embezzlement and corruption and financial irregularities at the company involving its Vice-President. In its update letter to the SIC of 30 July, Dechert referred to these allegations, which by then were being investigated by IA and said that Dechert should oversee that investigation on the basis that the SFO had been told that IA were able to deal with other issues that might arise.

1192. The 30 July letter also said that a review of London data showed that Ms Zaurbekova, ENRC's CFO, had some connection to one of the stripping companies called Improm. It had been incorporated by her son who was going to use it as the corporate vehicle for his spaghetti-making business. In the end, he sold the company to one of his former classmates. Dechert had also commenced research into stripping at ENRC Kazakhstan which found irregularities which meant that the company may have committed false accounting.

1193. On 2 August, at the SIC meeting, principally concerned with Africa, Dechert again raised questions about aluminium sales to Iran in 2010. The 6 August timeline envisaged that the Kazakhstan report would be delivered by 14 October.

1194. Also in August, further work was done on stripping. Dechert also did work on AoK and said that it should supervise IA here.

1195. At the 13 September 2012 SIC meeting, clarity was sought as to Dechert's involvement in the AoK investigation. Mr Gerrard said that his team did not want to do the investigation itself but they were overseeing the investigation and that this approach had been agreed with the SFO. In fact, it is not clear that it had been, as there is no mention of it in the notes from OM7.

1196. On 14 October Dechert told AG that the first draft of the Kazakhstan report had been completed although with only an interim report on stripping.

1197. At the 16 October SIC meeting, Mr Gerrard yet again raised the question of sanctions. He referred to previous reports given by TW and AF on one matter (Project Narnia) and said he was still awaiting copies of those reports and also said there were possible further sanctions issues as well.

1198. Mr Dalman said that Nick Blackwood of PwC had informed him of a further whistleblowing allegation, namely that Ms Zaurbekova may be defrauding the London office of US$20 million. It was recognised that even if this was found to be a malicious email, it needed to be investigated which could mean a short delay in completing the report to the SFO.

1199. On 17 October, Mr Simpson emailed Mr Gerrard, with reference to the English and Russian names of a particular individual. He wanted an email search of the mailbox of someone else and in particular anything going to or from JSC Aluminium or its President Mr Ibragimov. He said that if anything were uncovered, ENRC would want it dealt with initially as part of internal disciplinary procedures. Mr Gerrard wrote back asking where Mr Simpson's instructions were coming from and who was in the loop in relation to ENRC's desire to deal with this internally. He added that "I am afraid I will also need a full briefing as to your information and suspicions."

1200. Mr Gerrard then wrote to Mr Dalman on the following day, forwarding Mr Simpson's email to him. He said that he was very concerned that he was not in the loop and that, "If we want to screw things up with the SFO then this is a great way to go about it". He said that they were in the middle of a criminal investigation, and if there were disciplinary issues Mr Gerrard had to determine whether there were criminal acts or implications and if so, he would advise the issue come under the Dechert investigation. He added that "amongst other things, Addleshaws will not be seen as independent by the SFO." It is not clear to me why the SFO would not see AG as independent.

1201. Also on 19 October, Ms Coleman wrote to Mr Gerrard saying that she understood Mr Simpson had explained the basis of his request in an email to Mr Anderson. Mr Dalman had told her that this was to remain a company employment issue under the Project Mallard remit until further information was available. At that point, if appropriate, the Dechert team would be involved. She struggled to see how this could affect the self-report status when there was

currently nothing to report and no suggestion that the issue had anything to do with issues in the SFO investigation. It had no bearing on the Improm issue or comments relayed by Mr Blackwood. She then reminded him that she was still waiting for replies to earlier emails from her on privilege and confidentiality issues.

1202. Mr Gerrard wrote again to Mr Dalman saying he needed to discuss this and other issues. It was relevant to the SFO matters for reasons they could discuss. He added that, "The mere fact that neither Clarissa nor Alistair can see it rather confirms my concern and that I will need to raise some rather awkward issues with you first" before speaking with Mr Simpson.

1203. On 23 October Mr Simpson wrote a long email to Mr Gerrard which needs to be recited in full:

> **"ENRC**
> Clarissa made contact to tell me that she had had an email from you which questions my authority to have asked Dechert to carry out the search I requested recently. This leads me to believe there may be some confusion as to my brief, the Addleshaw Goddard brief, the role of acting Deputy General Counsel and the Dechert brief.
> **DECHERT**
> I understand this to be, within the scope of instructions given from time to time by or on behalf of the Company, to carry out Investigations into matters which have been brought to or come to your attention, with a view to delivering a Report on behalf of the Company to the SFO in relation to any possible criminal activities. I know that your advice on what should be investigated, how and by whom, is both valued and respected; not least because of your vast experience in such matters, but, as I understand it, there is no carte blanche to run the Investigation without accountability.
> You are aware of my view that, in part due to the permanent overhang of your Investigation, and the delay in getting on and interviewing key executives, the Management of the Company is dysfunctional. In my view, what we all need to avoid is any feeling or impression that the Investigators are running the Company rather than simply the Investigation.
> I was encouraged that your agreement to Internal Audit carrying out the investigation into the Whistleblower Allegations concerning the Aluminium Company in Kaz, signified a recognition that we have to draw the line somewhere.
> **ACTING DEPUTY GENERAL COUNSEL**
> Simon Zinger had been diverted almost exclusively to SIC matters and left on short notice. AG agreed to temporarily fill the gap at short notice and Clarissa Coleman was seconded in with Louisa Caswell to assist her. She has secured delegated authority on terms which I believe she is comfortable with enabling her to liaise with and, whenever appropriate, instruct Dechert on a day to day basis so as to ensure that it is able to carry out its role to the Company's satisfaction.
> **ADDLESHAW GODDARD**
> Our firm is carrying out a number of assignments in the ordinary course of business, some of which are likely to have no bearing on or relevance to the Company's voluntary report to the SFO – including a number of employment related matters.
> **MY ROLE**
> This is a fairly wide brief but specifically includes monitoring Dechert's performance of its role (where I hope you will have experienced a fairly light touch), and giving strategic advice to the SIC and to Mehmet in his capacity as Chairman of the Company. It was absolutely implicit in this role that I would have access on demand to any documentation which I considered it appropriate to ask for whether from Dechert, the Company or anyone else, which is why I have been able to fast track the supply of information (all shared instantly with Dechert) on those matters I identified months ago as requiring scrutiny (Todal, CCC, Comide, Sabot),If you feel you need an express written authority from the Company to Dechert to deal with my document requests I will get it to you.
> I am happy to share with you the fact that, in my role, I have identified a list of executives who, in my opinion, would need to go and have tendered appropriate advice to the Chairman and shared that with the Chairman of the AC. I regard it as vital that the shareholders, the other stakeholders and the SFO

> realise that there is a determination to change the culture from top to bottom. As important, we need to get to a point quickly where the Company is being run by its Management.
> On that last point you will recall that at the last SIC meeting I registered my view that the debate we were having about a further $25M being injected into Metalkol/Comide demonstrated the dysfunction caused partly by the Investigation. It should have been a decision for the Managers.
> By the same token the suggestion which was recently relayed to me in confidence, that there may have been something irregular concerning the education/employment of the GFD's stepson, is a matter which in my view needs to be looked into by the Company without delay and if there were anything, and it went beyond an internal disciplinary issue, then it should be discussed with you and your input sought and considered.
> Now that you hopefully have a better understanding of the scope of my role, I trust you will accept that your repeated demand to be told from whom I have received instructions might be viewed as inappropriate. My instructions are to see what evidence there is to substantiate the allegation. In the interests of saving costs I asked Dechert to carry out the email searches, which I communicated to you last Wednesday. I trust Dechert have completed that exercise as requested. Please tell me by return whether anything has been found which might substantiate the allegation.
> I think you are aware that the Chairman, for his own protection, has asked me to co-ordinate the initiation of a Disciplinary Procedure based on the two issues that have already been identified. He agreed with me, however, that we would defer that for a very short time to see what evidence there may be to substantiate the allegation. An immediate response from your firm is therefore imperative."

1204. It is worth noting here that AG had effectively been in place in its monitoring role since about July, having been so instructed by Mr Dalman and the Board. Mr Dalman himself had said it was to ensure that the investigation remained focused. Further, (although Mr Dalman was not asked about it) it seems very unlikely that it was written without his knowledge and approval because it was to some extent instructing Dechert to get in line. In the earlier letter of advice from AG to Mr Dalman dated 12 October (which he was asked about) Mr Simpson set out a number of areas of concern so far as Africa was concerned which he was not understating. He was not limiting his observations to the subject matter of a report on Africa to the SFO and had much to say on the necessary changes to ENRC's governance. But it is worth noting that he also expressed concerns about the timing of the Kazakhstan report for the SFO, and he was addressing this issue with Mr Gerrard. I also interpose here Mr Dalman's evidence that in the summer of 2012 he had instructed Ms Coleman to take over the role of making the notes from the SIC meetings because he was not happy that those taken by Dechert constituted a faithful record.

1205. Notwithstanding the effective strictures contained in AG's email of 23 October, Mr Gerrard wrote to Mr Dalman the following day. He said that the new matter concerning Ms Zaurbekova should be considered together with other issues concerning her. He also said that on a partly connected topic "and currently causing inefficiency, confusion and duplication", Mr Simpson had just written to him (i.e. the email just cited) and said that he would like a meeting that day with Mr Dalman.

1206. Also on 23 October, Mr Gerrard told Mr Wilkinson that he anticipated having an update meeting with the SFO in a maximum of one month's time. He also said that he understood that KPMG would now be instructed directly by ENRC on stripping, which was confusing since FRA had already got up to speed and yet were not asked to assist. He said he was concerned that by instructing KPMG wholesale, this "may undermine the perceived ability of ENRC to investigate this and other matters." He also said that on the PwC whistleblowing allegation, it is unclear who at ENRC was instructing Mr Simpson on a separate matter, which was the alleged payment by ENRC for the education of Ms Zaurbekova's stepson. Mr Simpson had yet to give him a full briefing despite Mr Gerrard having asked for it the previous week. He said that whistleblowing reports calling into question Ms Zaurbekova's honesty could have an impact on the Stripping Allegation and Improm.

1207. The above communications in October are an example of what appears to be Mr Gerrard's continued insistence on running his project with as little interference as possible especially from other professionals. Where necessary, he would call into question whether the SFO would regard them as independent. So far as KPMG and AG were concerned (albeit that Ms Coleman had been brought in as Deputy General Counsel) these are both external firms. I think Mr Gerrard was exaggerating when he said that it may appear to the SFO as if ENRC could not itself deal with these matters. One is inevitably drawn to the conclusion that what Mr Gerrard was really saying is that in truth, the only entity which was independent and which the SFO would regard as independent was Dechert itself. If that was so from the SFO's point of view, then it is likely that that view was significantly coloured by what Mr Gerrard had been saying in the DCs of which, of course, Mr Dalman and AG, among others, were not aware.

1208. At the 30 October SIC meeting a number of matters were discussed. Mr Wilkinson noted that KPMG had been instructed to conclude the stripping investigation in order to speed things up. Mr Anderson said that Dechert planned to meet with Mr Urazov the shareholder in Improm in Almaty. Mr Dalman queried why this issue was being raised again and Mr Anderson said that it was due to concerns about links between Improm and Ms Zaurbekova. Although Mr Wilkinson said that ENRC was trying to keep to the principle of IA doing investigations as they relate to Kazakhstan going forwards, the Dechert team explained why an independent investigation was necessary. Whether this issue could be contained would depend on the outcome of the interview with Mr Urazov. AoK was also raised and Mr Wilkinson again said it was important to stick to the principle of dealing with this issue in-

house. He said that Ms Coleman should run the AoK investigation in conjunction with IA then reporting to Dechert with the aim of it being finalised by January 2013.

1209. By the time of this meeting, the first draft of the Kazakhstan report had been produced and Ms Coleman praised the Dechert team for the huge amount of work that had gone into what was a very detailed report. There then followed a discussion about some changes of emphasis in it. Once the final draft had been approved it was anticipated that it would be delivered to the SFO in early December.

1210. On the PwC whistleblower report concerning Ms Zaurbekova, Mr Wilkinson said that it had been agreed that PwC would investigate this. He wanted to get the matter dealt with as soon as possible and for ENRC to start taking ownership of investigation issues. Mr Gerrard noted his concern that the SFO may not see PwC as independent since they were the auditors being asked to deal with allegations concerning the CFO. While, again, I think that Mr Gerrard's motive in raising this was to get more work for Dechert, he probably had a fair point about the perception of PwC which in fact did come up at OM8.

1211. On 2 November, Mr Gerrard met with Tess Forge from AG (who was seconded to ENRC), and PwC. He said that he wanted to report the PwC whistleblowing allegation to the SFO. He proposed that Dechert should work alongside PwC to form a joint investigation. He said that if PwC did it alone, then ultimately Dechert would be asked to redo the investigation themselves.

1212. OM8 on 28 November was mainly about Africa. However the Improm issue was raised and also the PwC whistleblowing allegation. Mr Thompson's note said that PwC was going to determine if the allegation was malicious. If it was not, then Dechert would investigate. In fact, Mr Gerrard is noted as saying that Dechert would be overseeing anyway. In the Dechert file note, Mr Gould said that he was concerned with the fact that the same person linked to Improm was the subject of the PwC whistleblowing email, and that PwC itself, as ENRC's auditors, might have something to gain by saying it was malicious. That was when Mr Dalman said that Dechert would be investigating in any event. It was also agreed that the full Kazakhstan report (including stripping) would be aimed to be delivered to the SFO by 15 January and ENRC would inform the SFO of its delivery status by 7 January. Mr Gerrard made the point that before any civil settlement on Kazakhstan could be considered, culpability and quantum needed to be addressed.

1213. By the time of the SIC meeting on 24 January, it was clear that there were disagreements between Dechert and KPMG on the latter's draft report. At the meeting KPMG said that it stood behind its report and would go to the SFO itself if required. If Mr Gerrard was uncomfortable with the report he would have to go back to the SIC at the beginning of the week commencing 31 January. Mr Gerrard said that he did not think the report would be wrong, but Dechert had to sign it off as an addendum and therefore it had to be scrutinised.

1214. On 26 January 2013, Mr Anderson gave comments internally to Mr Wiggetts on the draft KPMG report. These included that there was no mention that the investigation was under the supervision of Dechert and that the sample of responsive documents reviewed was not statistically significant. It also said that for the west side of the Kachar site, KPMG did not have enough information from SSGPO to produce its own model. They therefore calculated a volume for this area from the SSGPO Auto CAD model.

1215. On 17 February, Ms Coleman said that the final Kazakhstan report was to include addenda (including the KPMG stripping report) should be lodged with the SFO by 28 February. On 21 February Mr Wiggetts responded by saying that there were a number of issues which would hold up the provision of the final draft report. These included differences on stripping, finalising the section on Improm and Ms Zaurbekova, and further matters arising on procurement. Ms Coleman repeated that the report had to be delivered to the SFO by the end of February. Mr Gerrard responded that they needed to consider the position rather than "blindly following deadlines". He added that "There are very real risks as to how the report will be received in its present state."

1216. As to the disagreement between KPMG and Dechert over stripping, the main point by now was that, while KPMG considered that 500,000m^3 of stripping had been paid for but not done, Mr Gerrard said that the figure should be 2.5m^3. This was because he was using the figures of an expert instructed by Dechert, namely Mark Prichard from the consultancy PGW & Associates ("PGW"). On 21 February, Mr Coffey had emailed Ms Coleman to say that Mr Gerrard was "trying to strong-arm KPMG to move to Mark Prichard's view." If the matter was not resolved, the relevant area quoted in the Kazakhstan report itself would not marry up with the figure in the KPMG report addendum. He raised this with Mr Dalman and Mr Wilkinson. By 25 February, this issue had still not been resolved.

1217. In the event, the final report was sent to the SFO on 28 February. It did not identify any criminality by ENRC. It also confirmed that Mr Vulis did not authorise the Education payment.

1218. The relevant chapter in the main body of the report at paragraph 359 referred to Dechert's mining expert, namely PGW, saying that the relevant area was 2.5m^3 which would give rise to a "lost value" of US$4.9 million. It then said that KPMG's view was that the area involved was around 400,000m^3 giving a lost value of some US$800,000. It added that in addition, there were differences between KPMG and SSGPO as to the amount of excavation in the area in question which was worth US$9.1 million and there was further work regarding topsoil which KPMG could not confirm amounting to US$8.2 million.

1219. KPMG's own report, as the addendum, explained why it considered the area of stripping paid for but not done was 500,000m^3 and why it rejected the higher figure from PGW.

1220. Because of later events, there was no substantive response from the SFO to the Kazakhstan report.

Kazakhstan: Analysis

General

1221. In my judgment, the documents referred to above show clearly that Mr Gerrard seemed unable to take a proportionate view on any part of the Kazakhstan investigation. The Iran, Farm and Education investigations were closed and re-opened several times. While it can be said that some new information arrived, or there was, in theory, a new line of enquiry, the continued follow-up on these points was unreasonably excessive given that, at the end of the day, the Farm and Procurement Allegations involved frauds on and not by SSGPO. As for Iran, this was in reality, a very short matter where no wrongdoing was found and as for Education it was established relatively early on that there was no actual bribery.

1222. The documents also make clear that Mr Gerrard resented any other professional becoming involved in what he regarded as his own project and in the end, was more or less saying that unless Dechert had a significant role in whatever was being considered or investigated, it would not be acceptable to the SFO. To the extent that the SFO actually took that view, this was in large part, because Mr Gerrard had himself fostered it.

1223. In its submissions, Dechert points to AG's praise for the Kazakhstan report along with Mr Dalman's. That is correct, but it is not the point. This is not a complaint about the quality of

the report, it is about the size of the exercise that produced it. AG's email to Mr Gerrard of 23 October is very telling in this regard.

1224. As these documents also show, Mr Gerrard tended to plough on regardless of criticism and in some cases clearly started a line of enquiry without permission.

1225. Although Mr Gerrard had originally proposed a clear and confined approach in the letters of 29 December 2010 and 28 January 2011, in truth this was never followed. I agree that, given the TW Letter, one cannot say that the work plans then proposed and reviewed were themselves negligently advised. But in fact, they were relatively modest at that stage and so were the costs estimates. The last estimate given on 29 March 2011 for this work was £300-400,000 plus disbursements.

1226. It is true, of course, that the Kazakhstan investigation started before the involvement of the SFO. But once the SFO was involved, the imperative on Kazakhstan was then to do a report for the SFO. The focus was then (or should have been) on what would have been relevant to the SFO. That is clear from the documents. It was particularly so in view of the various promises made to the SFO as to when the report would be delivered. The key matters concerned possible bribery and corruption. It is not that any matter of internal fraud would not be of interest to ENRC. It is that they would not disclose any relevant wrongdoing to the SFO.

1227. At the same time, Dechert suggested on 4 October 2011 that the investigation was shortly to end, on 14 March that the report would be produced by June (which was communicated to the SFO), then at OM6 that there would be a presentation in late June/early July with the report shortly to follow, then on 18 July that the report would be ready in a couple of months, then on 6 August that it would be delivered by 14 October. Mr Gerrard was so intent in leaving no stone unturned that it probably irritated the SFO given the number of deadlines that came and went. Indeed, both Mr Thompson and Mr Gould said that what they needed at the end of the day to take the matter further was a report.

1228. I would also refer back to the observations which I made in paragraphs 1137, 1146, 1154, 1171, 1180, 1200 and 1207 above.

1229. It is also clear from the chronology that on numerous occasions ENRC made the point that the investigation was too unwieldy and/or unnecessary.

Farm

1230. This was closed, or nearly so, on several occasions, i.e. 31 May, 28 September 2011, 2 February and 5 March 2012, but did not finally end until 20 July 2012, being OM7.

1231. Although the investigation here should have been confined to the wrongful use of SSGPO employees and/or equipment, Mr Gerrard opened new areas, for example the ownership of the Farm company, sale of the guesthouse, illegal beef sales, ENRC's own agricultural departments, Mr Tazhibaev's other activities, or other new farming matters "stumbled" upon, as raised on 7 and 11 June 2012. There was also a word search which was very generic and bound to lead to many responsive documents.

1232. The amount of work which Dechert advised should be done in relation to the Farm was plainly and unreasonably excessive.

Procurement

1233. Procurement, of course, was in the end, the substantial part of the investigation. Equally, something had to be done about Ms Zaurbekova, once the whistleblower information about her arose, because she represented a direct connection with the UK.

1234. However, it did not follow that every strand of every item investigated had to be undertaken by Dechert. While Procurement arose out of WB1 initially, and before the involvement of SFO, I cannot see how the amount of work done could be justified for the purpose of the report to the SFO which presumably took as long as it did to deliver (and when earlier promised deadlines were not met) because of all the work involved in it. If some of the work done was not directly related to the SFO but only for ENRC's internal governance considerations, then the report for the SFO could presumably have been delivered earlier.

1235. It is correct that in the end the report contained 10 chapters on Procurement. They certainly showed that there had been purchases through unnecessary intermediaries, competitive processes not always being followed, and overpriced second-hand equipment. However, at an early stage, it had at least been established that there were no hyper-inflated prices or misdescriptions of goods purchased or second-hand equipment being purchased as new. The point was that once the SFO became involved, the focus should have been on what was important to it. Yet fundamentally, this allegation had always been about internal fraud. In theory, any aspect of procurement wrongdoing could be said to flow from WB1, but that was not the focus once the SFO became involved.

1236. As already stated, it is very hard to see why the detailed vendor audit was really required. Mr Gerrard later advised investigations into outsourcing services for example Servis and canteen provision. I agree that the SFO said that its main focus on Kazakhstan was procurement, but even if the extent of its interest had not been influenced wholly or partly by Mr Gerrard, it still does not follow that all of the work done on procurement was justified. Nor can it be said that all of this was required because of the need to show adequate procedures. This was nothing to do with bribery.

Iran

1237. In truth, this was a short point raised initially by Mr. Depel. The evidence by March 2011 was that there was nothing in it. Although it had been reported as closed by 31 May, it was later reopened on the basis of one remark made by an interviewee. Once that had been dealt with, it was reopened again because of a yet further suggestion from Mr Depel. It was still on the agenda at 7 July 2012. While the SFO were told there was no breach of sanctions, Mr Gerrard raised the issue yet again on 16 October.

1238. Once more, the work which Mr Gerrard advised to be done on Iran was plainly excessive.

Education

1239. On 31 May, it was decided that the Education Allegation should be closed, subject to checking that the scholarship policy had indeed been changed in 2010 to permit children of non-employees to qualify. Following the production of 70,000 documents for review, on 2 September it was said that there could have been false documents produced. Importantly, on 28 September, Mr Gerrard said that the question of false documents should be continued to be looked at even though there was no evidence of bribery. He maintained that position to Mr Dalman in February 2012. It seems to me that he was scaremongering then. It is not that false documents were not an important issue; it is that they did not alter the fact of the absence of a corrupt payment. I think that the investigation into the documents and the extensive interviews of employees was unnecessary and plainly so.

Stripping

1240. ENRC accepts that this is a matter that had to be investigated once it arose in December 2011 but in my view, Dechert should have let KPMG get on and investigate it instead of challenging that assignment (disingenuously in my view) and then disputing some of KPMG's conclusions. This was important because that argument then held up the production of the Kazakhstan report.

Other matters

1241. In addition to the above, there were other matters upon which Dechert became engaged which were clearly out of scope or unwarranted. These included AoK, the question of the FSA and related party transactions and the false office, seeking to become involved in the matter on which Mr Simpson had emailed Mr Gerrard on 17 October 2012 and also the question of the education of Ms Zaurbekova's stepson.

1242. I agree that there was obviously a problem of obstruction in Rudny especially in relation to the false office. But the problem here, as indicated in the documents, is that Mr Gerrard became somewhat obsessed with it.

Conclusion

1243. In my judgment, no reasonable specialist solicitor in the position of Mr Gerrard would have allowed the exercise to become as unwieldy and large as it ultimately did. Mr Gerrard was therefore negligent in expanding the investigation unnecessarily. By how much, is not a matter for this trial.

1244. The next question is whether Mr Gerrard was reckless. I think that he was, in the sense that as the documents show, he just kept on going and did not appear to weigh up in any real sense the proportionality of what he was doing, as opposed to invoking the "full and frank" mantra and what he said the SFO wanted. He simply did not care. However, even if (contrary to that finding) his conduct here was not reckless but merely negligent, his reckless conduct in relation to raids, SR process and related matters, and the DCs all contributed to the investigation becoming unwieldy for the reasons already given. Even if only negligent in respect of not reasonably controlling the exercise, it does not affect the findings of recklessness in respect of the other allegations previously dealt with.

Africa: Chronology

Africa

Introduction

1245. As noted above, FRA was already undertaking a general "books and records" review for ENRC which included aspects of its Africa operation. I have discussed how Dechert's role increased following the SFO Letter in paragraphs 509-518 above.

1246. As with Kazakhstan, there are a number of contextual matters to be borne in mind:

(1) The Africa investigation process was of course running alongside the Kazakhstan investigation; with the latter, there had been concerns expressed about the way in which Dechert were dealing with it, as already noted;

(2) Much is made by Dechert of the evidence of Mr Dalman, showing that he fully agreed with all aspects of Dechert's approach; however,

  (a) the documents show that this was not always so;

  (b) Mr Gerrard continually told Mr Dalman that the approach taken by Dechert was what the SFO expected and Mr Dalman was heavily reliant on Mr Gerrard;

  (c) Mr Dalman had no knowledge of the relevant DCs;

(3) Essentially, the documents tell the story;

(4) To the extent that the evidence of Mr Gould and Mr Thompson is relied upon to support the notion that a "kitchen sink" approach by ENRC was what was required, one has to treat that evidence with some caution; they rejected the allegations of impropriety made against them particularly in relation to the DCs which I found to be established to a significant extent; further, part of their defence of these allegations included going along with Mr Gerrard's narrative as to what the SFO wanted and what was legitimate for him to tell them.

The Subject of Africa

1247. While it is correct that the subject of Africa was brought up by Mr Gerrard at DC4, it would be naive to suggest that the SFO would not focus on it, especially as the DRC was a jurisdiction where bribery and corruption was rife. It was also the jurisdiction where ENRC's acquisitions had attracted considerable negative press and other attention already, and of course Mr Joyce had been active in that regard. The real issue concerns the specific subjects of Camrose, Camec and Chambishi. The Camrose acquisition was probably the most controversial and there is no dispute that it was on and remained on the agenda for the SFO all the way through. The position is somewhat more nuanced in relation to Camec and Chambishi. But even with Camrose, there is the issue (as with Kazakhstan) as to how extensive and detailed the investigation should be.

Chronology

1248. At OM1 on 3 October 2011, Mr Richards said that ENRC's initial review concerned a number of jurisdictions including "of course, DRC". However they were not seeing evidence of systematic or endemic problems. That remark reflected the view of FRA at the time.

1249. On 4 October, Ms Territt sent to Mr Ehrensberger a draft scope for review in relation to Africa. This had been drawn up by Dechert. On 7 October at DC6, it will be recalled that Mr Gerrard said that there were "lots of red flags" and "lots to tell".

1250. The Board Meeting of 18 November required FRA to investigate certain red flag areas and agreed that ENRC should now engage with the SFO, as it then did with the 9 November Letter.

1251. A further draft report from FRA on 15 November concluded that the red flags indicated control weaknesses but not criminality. However, they would review them further to satisfy themselves that the relevant dealings were legitimate and recorded appropriately.

1252. Just before OM2 came DC8 where Mr Gerrard said that the emphasis would be on Africa and he had concerns about his own position. At OM2 itself, Mr Gerrard said that ENRC had concerns about operations in Africa which had raised a number of red flags. He said the primary emphasis of the review was the assessment of the red flags. Mr Alderman said that there was no point in the company doing it without the SFO pointing it in particular areas. Its interest would then be to see how deeply the company digs into those areas. Mr Alderman also said that costs was a matter which ENRC could speak to the SFO about. It was aware that the cost of the investigation must be proportionate to the risk of any bribery and corruption. There appeared to be a lot of high risks here. But if there were issues on costs, ENRC could come back to the SFO. He went on to say that the SFO expected an enquiring approach. However bad things looked, the SFO would not be surprised at what ENRC dug up. It was agreed that Mr Gerrard would meet with Ms von Dadelszen and Mr Thompson in December to discuss scope.

1253. In early December, Dechert discussed FRA's work plan and met with HS to discuss matters including Camec and sanctions. There then followed DC9, DC10 and DC11. Among other things, DC10 went into detail on Africa with Mr Gerrard referring to Camec, Camrose, Mr Rautenbach and UN sanctions breaches. It will be recalled that Ms von Dadelszen's list of discussion topics for OM3, prepared after DC10, included those matters.

1254. OM3 followed on 20-21 December. At that meeting, it was agreed that ENRC would look at sanctions, Camec and Camrose and FRA would do further work on red flags. On Camrose, Mr Thompson said that the SFO did not want ENRC to redo the due diligence done prior to the acquisition, but ENRC would need to see (using Mr Thompson's note) that it had been done in a reasonable and not reckless manner. The JD note refers to seeing if ENRC had turned a blind eye to any unlawful conduct. The loan to Camrose from ENRC came up and the SFO said it wanted to know if it was in fact a "soft loan" to the DRC government and whether it financed Mr Gertler. It was noted that when Mr Gould arrived at the meeting he said that ENRC was "on a clock". It was agreed that by 28 February 2012, when it was expected there would be the next OM, ENRC should make a presentation which would demonstrate real progress in relation to sanctions (in particular in relation to Camec), due diligence on Camec and Camrose, further red flag work by FRA, corporate governance (essentially by reference to any blind eye knowledge of due diligence issues on the acquisitions) and whether any prior public disclosure requirements may have been broken. On thresholds, the SFO said that for something to be reported, it needed to be more than suspicions on issues but it did not need to amount to clear evidence of criminal conduct.

1255. Dechert makes the point that Mr Ehrensberger accepted in cross-examination that the SFO had made it perfectly clear what they required in terms of scope and when appropriate and necessary, Mr Gerrard pushed back at this meeting to suggest to the SFO that the requirements were too extensive. That is true. However, what Mr Ehrensberger went on to say at this point is worth noting (Day 6/154-158). He said that he disagreed that by this stage there was no problem over scope. What work was actually needed to meet that scope was much more difficult to define. He went on to say that it was fair to criticise Mr Gerrard for failing to establish the scope because it was up to the company and its advisers to define (by which I think he meant concretise or specifically detail) the work required by the scope. He felt that in the absence of guidance, Mr Gerrard was suggesting that everything be investigated. He said that it was right to criticise Mr Gerrard for the fact that although the SFO said that it was not necessary to re-do the Camec due diligence, that was effectively what they did on Mr Gerrard's advice. I agree with him about that.

1256. Although Dechert shared an initial work plan with JD and FRA on 4 January 2012, it was not sent to ENRC at that stage. The next day, Mr Ehrensberger wrote to Mr Gerrard about a forthcoming meeting, saying that he would like to discuss the scope and process of the review involving Camec and Camrose. He said that it had to be "a highly focused review"

rather than a "never-ending broad approach". Despite the work already done on a plan, nothing was sent to Mr Ehrensberger until 29 March. In the meantime, Mr Gerrard obtained from Mr Kowalewski, various IA reviews on Camec, Camrose and Chambishi and he asked for information on Camrose's IT assets in advance of a trip to the DRC planned for February.

1257. Dechert produced a presentation to the SIC Meeting on 17 January. At page 18 it said that the next steps would include a review of pre-and post-acquisition documentation, processes and advice to the board, interviews with advisers, board members, management and other relevant parties. Mr Gerrard also told Mr Wilkinson on the same day that the SFO would expect ENRC to look at every payment in relation to Africa. The timeline for Africa was 12 months and so Mr Gerrard did not expect it to be finished that year.

1258. At a meeting with Mr Richards and Mr Ehrensberger on 14 February, Mr Gerrard said that a very considerable amount of information (detailed over 3 pages) in relation to Camrose/Camec IT and data would be needed before the next meeting, i.e. OM4. However there was no work plan yet as such. JD expressed their concerns about this to Mr Ehrensberger.

1259. Mr Gerrard then sought extensive information from JD and HS. His request of JD dated 31 January was to provide a CD of all documents in the Camrose data room (i.e. what had been available for due diligence prior to the acquisition) and documents set out in a 23-page list of categories. Mr Richards thought that this request for documents was "totally over the top to me". He said he would email Mr Ehrensberger to say that this was a very extensive list although they would provide it unless told to the contrary. He would also tell him that he was not clear at first blush why all this was relevant and would suggest to Mr Ehrensberger that he gets an update on the work being done and what the aim was.

1260. Mr Ehrensberger later commented to Mr Gerrard that this seemed an excessive list. Mr Gerrard replied to say that the SFO had asked ENRC to explain the due diligence done on Camec and Camrose and these were the documents from those exercises. They had to review all of the documents in time for OM4. He said that this was "the bare minimum we can get away with". But it is far from clear to me that all of the actual documents needed to be themselves reviewed in order to determine whether the due diligence processes were reasonable and not reckless. Otherwise, one was indeed beginning to redo the due diligence. By the end of March, Dechert had obtained 28 files from HS, 17 from ENRC and 23 from JD.

1261. There was a meeting between Mr Pickworth and Mr Gerrard with the SFO on 20 February to discuss various matters including whether the DRC report could be delivered only after the buyout of Mr Gertler's share in Camrose. But Mr Gerrard also mentioned Chambishi even though that was not then on the table. His note of the meeting back to Mr Ehrensberger does not mention this.

1262. By 29 February, Dechert had assembled a draft presentation for OM4. Mr Richards observed that the slides contained a "detailed recitation of every single issue so far identified… even where the company's investigation or review is at a very early stage" and presented a "substantially negative image". He also suggested that the reference to Chambishi should be removed as that issue should be reviewed and considered by ENRC first, before making a decision whether it should be referred to the SFO. Meanwhile, the transactional bibles for Camec and Camrose were obtained from HS. At OM4, Chambishi was not mentioned.

1263. I also agree that Ms Black's long note of OM4 stated that Mr Thompson's position was that sanctions was closed "subject to the finding of anything which raised additional matters of concern." But that caveat was not in Mr Thompson's note nor in Mr Richards', nor in Ms Black's contemporary handwritten notes. It is correct that Mr Prosper initially did not confirm that it was said. He said that was because he did not have confidence in Dechert's note-taking. In fact, having been shown in re-examination some other notes which did not have that caveat (like the ones mentioned above) but rather referred to reviewing the correspondence with the Treasury, he said that he did not believe that the alleged caveat had been made by Mr Thompson. I agree that Mr Thompson did not make that caveat.

1264. On 16 March, Mr Ehrensberger approved in principle an in-depth investigation by FRA into Camec subject to seeing the detail. Although ENRC has suggested otherwise, that was in fact accurate. On 29 March, Mr Gerrard sent out a detailed work plan on Board awareness, London red flags and Camec deep dive, with Camrose to follow. I agree that these work plans, especially in relation to Camec, overlooked the fact that the SFO had said that the proposed approach should be proportionate and that due diligence was to be looked at for reasonableness rather than being redone, and ENRC itself had asked for a focused investigation. Mr Richards and Mr Ehrensberger both agreed that the work plan produced was "way over the top" and Mr Richards said that it was "baffling in a number of respects".

1265. On 12 April, Ms Black sent an email to Mr Jobson setting out the very extensive information needed about IT storage and retention facilities within the ENRC global group. The

information was set out over 24 pages. It was all about data relating to the acquisition of the Camec and Camrose groups and Chambishi. It was what, according to Dechert, the SFO expected them to see, secure and review.

1266. On 13 April, Mr Gerrard wrote directly to Mr Ehrensberger to explain why all the extensive information was needed, namely that it was necessary in order to demonstrate real progress on Africa and London to the SFO.

1267. On 18 April, after Dechert had emailed Mr Ehrensberger to see if he had any comments on the workplan previously emailed to him, he said that he did not understand the proposal in a number of respects or what purpose some elements would serve. He said he would send a report about this later in the week. Unfortunately, he never did and Dechert did not chase initially, but started work. In one email, Ms Black said that she had asked Mr Gerrard whether they should chase Mr Ehrensberger and he said to leave it.

1268. On 23 April, Dechert presented to Mr Ehrensberger on the outcome of OM4 on 5 March. They said that other than Camec and Camrose, it was not precisely clear what the SFO wanted ENRC to look at.

1269. On 30 April, there was a presentation to Mr Dalman. It noted that Dechert had yet to hear back with Mr Ehrensberger's report, so in that sense, they were chasing. In fact, it seems that on 27 April, they asked JD to assist in getting a response from Mr Ehrensberger. They said that they did need to have the data from the Africa server which, contrary to what they were first told, had not already been backed up in Zürich.

1270. Dechert then made a presentation to the SIC on 9 May. Much of its content was the same as that presented to Mr Ehrensberger and Mr Dalman. Although not mentioned in the presentation, Chambishi was also raised, according, for example, to Ms Black's note. Mr Dalman is noted as saying that the focus was now going to be on Camrose and Chambishi and then the report to the SFO. Mr Gerrard said this was a sensible way forward. Thus, Camec was off the agenda. That Dechert understood this is evidenced by Ms Black's email to Mr Hanna dated 10 May. It asked him to ignore that part of the "Board Awareness" workplan that concerned Camec, "given our discussion yesterday".

1271. On 9 May, there was DC13 discussed at paragraphs 642 - 648 above, where I found both Mr Gerrard and Mr Gould in breach of duty.

1272. Somewhat surprisingly, and according to Mr Thompson's note, at OM5 on 10 May, which was Mr Dalman's first OM, he reported that on Africa, they would focus on Camrose, Camec and related party transactions, which was in fact Chambishi, it having been selected at the SIC the previous day. Mr Gerrard's manuscript note does not refer to the companies by name but it does refer to three transactions, one related party and two others. It is not clear why Mr Dalman said this. This was the same day as DC14. I dealt with OM5 in that context at paragraphs 649-655 above. While I did not there find any pre-agreement as such with Mr Gerrard to make the relevant observations, I did find that at least in part, what was said was based on what Mr Gerrard had previously told Mr Thompson and/or Mr Gould.

1273. Also on 10 May, Dechert sent the Camrose workplan.

1274. By 13 May, Dechert had yet to hear from Mr Jobson about the information requests although by then, Mr Hanna had agreed them. Camrose's document, email and accounting servers needed to be imaged and secured. Mr Jobson replied asking if Mr Ehrensberger had yet approved all of this, some of which needed to be described more specifically. Ms Black complained of the delay and Mr Jobson retorted that he had previously said that they needed Mr Ehrensberger's approval. Actually, at least until 30 May, it looks as if Mr Jobson had not told them to get Mr Ehrensberger's approval.

1275. In the meantime, Dechert was still working on sanctions, even though (as they had recognised in Ms Black's email of 2 May) this issue had been closed out at OM4. Dechert's Project Kitchen report of 4 May had raised the point that Dechert had discovered that Mr Prosper had been acting for Mr Rautenbach who was identified as a suspect in an SAR on the Camec acquisition. Mr Prosper had apparently been acting to get Mr Rautenbach delisted in the US as a sanctioned individual (he had previously been sanctioned in the EU but was no longer such). Dechert thought that this led to a conflict of interest between ENRC and Mr Rautenbach and thought the SFO would take the same view. It was Mr Prosper who had presented to the SFO on the sanctions issue at OM4. His name had also come up as part of the London red flag review in relation to a suspect payment to a consultant. Insofar as that point itself led to additional proportionate work on sanctions, I do not think that Dechert can be criticised for it and the point it made was a fair one.

1276. On 21 May, Dechert produced revised work plans including on Chambishi and lists of search terms that were to be agreed by SIC. As to those search terms, Mr Findlay had questioned whether ENRC had consented to this exercise being done. Mr Gerrard replied that "as far as

we are aware" they had the authority to run the Africa search terms on the London server data which was held by B2. Mr Findlay checked with Mr Ehrensberger who said he had not seen a list of the Africa search terms so Mr Findlay held off. Ms Coppens then raised this with Mr Dalman on the basis that copies of the search terms had been provided to Mr Ehrensberger and Mr Hanna on 8 June, and Mr Hanna had approved the search terms with some amendments, which were circulated on the 21 May. All of that was in fact true. Dechert then sent agreed next steps on 8 June.

1277. Dechert's information requests continued to refer to Camec. By way of example, on 7 June, Ms Coppens asked Mr Hanna for the names and employment location of those working in 12 different departments relating to the Camrose group, Chambishi and the Camec group (itself consisting of 10 companies) and said that an image of all relevant Camrose, Chambishi and Camec data needed to be taken. This was copied to Mr Ehrensberger. He replied to say that he had thought that at the last SIC meeting, it was agreed not to review Camec as it related to sanctions, which had now been taken off scope. Ms Black responded to say that while Camrose and Chambishi remained the priority "the SFO may insist that the Camec review is also completed." They also needed to ensure that they had data relevant to any red flag payments from within the Camec group which require further work. However, in my judgment, that is an example of the "kitchen sink" approach rather than a focused one. At this stage, Ms Black was not relying on anything that Mr Dalman had said at OM5.

1278. Mr Ehrensberger wrote to Mr Dalman about this email trail. He said that:

> "… Despite the fact that we agreed to review Camrose and Chambishi, Neil feels obliged to review everything, including Camec-just in case. This is a massive expansion of the agreed scope which will not only cost us a fortune but it also has a significant impact on the timing of the Africa review; basically, it turns the whole exercise to an open end investigation. I'm not sure that's what you want, or at least the instruction must come from the Special Committee and must not be decided by Neil on his own.…

1279. He also pointed out that the search terms relating to Africa for the London server sent by Mr Findlay were so broad and general that there would be thousands of hits, most of them completely irrelevant. He added that so far as Chambishi was concerned, all they had to review was one red flag, namely whether they paid too much to the seller which was a related party. They had received two opinions, from Credit Suisse and Lazard, to indicate that they had not. He added that he had seen this pattern before with the SSGPO investigation and added this:

> "If you don't set clear boundaries to Neil he feels free to broaden his investigation to an extent which is damaging for the company, both in terms of cost and, moreover, time. I can't imagine that's what the SFO would expect from us, especially since the former director Alderman stressed the principle of proportionality."

1280. Meanwhile, on 6 June, Mr Zinger had been appointed Deputy General Counsel. He had an initial meeting with Dechert on 15 June. Ms Black said that on the scope for Africa, this had been narrowed down to Camec, Camrose loans and funding, due diligence on acquisitions, Board awareness and red flags. She said that Dechert had told the SFO that they would look at Camrose, and Chambishi because of related party transactions. There had also been a report in relation to Camec focusing on sanctions issues and Treasury Compliance.

1281. Mr Ehrensberger returned to the topic of Camec in his email of 16 June, asking Dechert why it was still insisting on its inclusion.

1282. OM6 followed on 18 June. Mr Zinger attended alone for ENRC. This meeting had been arranged at short notice on Friday 15 June. The precursor was DC15, and then the 18 June Letter dealt with at paragraphs 723-750 above. All of that now needs to be read in this context, too. It is important here because I found that the effect of Mr Gould's and Mr Thompson's breaches of duty, among other things, was to "put the wind up" ENRC.

1283. In the SIC meeting which followed, Mr Gerrard said that the SFO had made it very clear that Camrose, Camec and Chambishi were all within scope and they wanted to track the whole transactions.

1284. On 19 June, Mr Zinger said he was still unclear as to the scope of the Camec part of the investigation; perhaps it was just Board awareness, process and disclosure, with sanctions off the table.

1285. On 22 June, Mr Zinger initiated the Zinger Protocol, noted in paragraph 752 above, whereby if Dechert wanted to communicate with other law firms, IT specialists etc it had to go through Mr Zinger first. The same applied to communications with any ENRC employee. He also said that there should be no discussion or other unilateral contacts between Dechert and the SFO, and he had to be involved in any such contact.

1286. On 25 June, Dechert produced a workplan for all three companies. This was discussed at a meeting on 29 June. Mr Zinger questioned how Dechert could support a wider investigation and review of documentation not specifically linked to related issues. Mr Gerrard offered to put a scope document together even though Dechert had already put forward a master plan. Mr Zinger said that he had compared the workplan with minutes of previous SFO meetings and presentations and could not see why Dechert was not more tactical in its approach. Mr

Gerrard explained that he knew how the SFO operated, what they expected and what they meant when they said certain things. Mr Gerrard then said that Dechert could take a narrower view of scope but it was "with risk" and Dechert could do it as long as it was not misleading the SFO. This should be discussed at the SIC.

1287. At this meeting, Mr Zinger took his own note because he was very concerned about it. He then wrote expressing his concerns about scope to Mr Gerrard on 3 July. He said that the scope of the mission described in the workplan was very wide and beyond the scope of what was required. He sent a document describing the scope as he saw it. Mr Gerrard responded by saying that Mr Zinger's amendments made him concerned that Mr Zinger was at odds with Dechert's understanding as to what the SFO was expecting, as to the scope of the review. He added that such a significant narrowing of the scope ran the very real risk that the SFO would lose confidence in ENRC's ability to produce a full and frank report. The consequences would be the withdrawal of the civil process and the commencement of the criminal investigation. He said that if Mr Zinger had any doubt as to what is expected, they should seek urgent clarification from the SFO. He added that Mr Zinger's amendments "may have been driven by those instructing you."

1288. Mr Zinger responded by saying that his views were his own following his review of the minutes and presentation materials. While they had different views, he wanted to see if Dechert might support it and it could mean being more forceful with the SFO to define the specific issues and explain why certain issues were just not relevant or why ENRC was comfortable about them. He looked forward to discussing this further. In the event, it is not clear that the SFO was approached to define more specifically the scope of what was wanted.

1289. Mr Dalman was questioned about that exchange of correspondence. He agreed that Mr Zinger wanted to reduce the work plan and then he (Mr Dalman) stepped in and set a plan for the future. That is a fair point although again, we see from the documents that Mr Dalman did not always take Mr Gerrard's side.

1290. Mr Zinger had confirmed on 6 July that the Africa data relating to the relevant custodians had been imaged and was now in Johannesburg. Mr Wiggetts then asked whether this was a full forensic image or an off-line copy, and whether the whole server had been imaged or just the part relating to the list of primary custodians who had been identified. The reason for imaging the Africa data at all was set out (for example) in Mr Wiggetts' email to Mr Zinger of 27

June. It is illuminating to see what the justification was for obtaining material on the Africa server, as set out in the final section of this email:

> "My understanding is that the data present in Bryanston for the primary custodians we identified for you last week has now been imaged / secured in South Africa by a local company employee but under the supervision of an independent third party specialist who will be able to provide a certificate confirming the process undertaken if this is needed. My understanding is also that the image has been deposited with the company's South African lawyers, Bowman Gilfillan in an escrow account for safekeeping. Our understanding is that it is not possible to take an image of the whole of the e-mail enterprise vault but that individuals' e-mail accounts must first be extracted and then imaged which is why we are securing by custodian at this stage. Can you please confirm to us the name of the third party who verified this process and also ask Bowmans to confirm that they are now in receipt of the data?
>
> My understanding is that the image taken for the primary custodians will go back to all data for those custodians on the e-mail / document and accounting servers for the period from 1 January 2010. We still believe that the company should be imaging from 1 January 2009 just in case there is any relevant e-mails on the Africa servers only in relation to the 2009 Camec transaction, whilst recognising that they will be limited as, again, the primary people involved in the acquisition of Camec were London or Zurich based.
>
> We will provide you tomorrow with a list of those whom we see as "secondary custodians" who relate primarily to the post acquisition red flag issues and whose data we would also ask to be secured / imaged with independent verification of process and deposited with the company's local lawyers.
>
> We are unable to identify any further potential custodians of potentially relevant e-data which may be on the South Africa server until such time as Africa HR is able to respond to the e-mails sent to Beat earlier and forwarded to Victor asking for information regarding who made up part of local management teams and where they were located so that IT can identify where their e-mail accounts are located.
>
> There is a further issue in relation to Chambishi where our understanding is that potentially none of the local data is located in Bryanston but may be located still in Zambia. Can further investigation please take place as to where this material is located so that this too can be secured.
>
> I acknowledge that in respect of all of the above points, the reality will be that a substantial part, or perhaps all, of the correspondence and documentation relating to the acquisition process may be located on the London or Zurich servers because that is where those primarily involved in the transactions were located but it is important that the data is secured for now in case it is discovered from the review of the London-Africa data that there were active participants with African locations and where it is thought necessary to run search on agreed search terms across an agreed set of e-mail custodians."

1291. The last paragraph indicates that the review of Africa data was unlikely to be useful and so was an unrealistic exercise but to be done "just in case".

1292. At the 9 July SIC meeting, it was decided that as Mr Ehrensberger was not independent of the Africa review, he should not attend further meetings unless asked, and the same went for Mr Hanna. It was agreed that all three companies were in scope. Mr Gerrard advised that the SFO would expect ENRC to review how each acquisition came about, due diligence and valuations in respect of each acquisition including any independent valuations which the Board had requested, the source and destination of the acquisition monies and any loans made by ENRC which the SFO had described as "soft loans". Also the entire London, Zürich and South Africa servers should be copied. If Dechert had access to the documents and data,

Mr Gerrard said that they could complete the Africa review and verbally report to the SFO by 1 December provided they had ENRC's full co-operation.

1293. On 10 July, Mr Zinger confirmed that the entire server in Africa had been imaged not just in relation to relevant custodians, and it was a back up copy not a forensic image.

1294. There was then OM7 on 20 July. Mr Dalman and Mr Zinger both attended. Mr Gerrard said that Dechert had not yet looked in detail at Camec or Chambishi. I agree that after this meeting, Mr Dalman praised Mr Gerrard, having told the SFO that the company was willing to "throw resources at the investigation and anyone who posed an obstacle would be suspended". Mr Gould said he was very reassured by this. But again, Mr Dalman was heavily reliant on Mr Gerrard and did, in the end, change his view.

1295. In its letter on Africa dated 30 July, Dechert raised the point again about Mr Prosper in relation to sanctions. Given that he had himself assured the SFO in this regard, Dechert wanted to review the advice given and check the factual scenario. In itself, this does not seem unreasonable. They also raised the issue of Shawn McCormick who was a consultant to ENRC who had received the payment from AF said to be suspicious. I agree that the question of Mr Prosper's acting for Mr Rautenbach did justify some further enquiries, but these were pursued at too great a length.

1296. Dechert presented to the SIC meeting on 2 August the points made in its letter of 30 July. The SIC agreed that the African data, located in Johannesburg could be re-imaged. This was to be done by FRA on an urgent basis. Dechert had said that this time, it wanted a forensic image. This was apparently because with a live copy it was not possible to see if any deletion software had been applied.

1297. According to the ENRC file note dated 12 October, when Mr Adonis arranged the original backup copy he was not told it had to be a forensic image which would have required the services of an external provider. However, the new image was, in the event, another off-line copy and the same as the original save that the new one ended in April and not May 2012.

1298. Another example of referring to SFO expectations was when Mr Gerrard was informed that in respect of the promissory notes issued on Camrose, JD was asked to deal with enquiries from the UKLA and the information provided should be forwarded to Mr Gerrard. Mr Gerrard immediately wrote back to Mr Zinger saying that he was "staggered" that JD was instructed to investigate this matter and given access to the IT. He asked Mr Zinger who had

instructed JD, adding that "the SFO have a very real sensitivity as to who is being involved in the investigation". Mr Zinger responded that this had been a long-standing UKLA related-party transaction review, and JD were not themselves interested in it.

1299. As for the imaging, Dechert's original list of primary custodians numbered 28, there was then a secondary list of 31 and the third was all 800 custodians. The costs of collecting the data ranged between £45,000 and £63,000 depending on the group of custodians chosen and that was before reviewing the data.

1300. On 6 August, Dechert sent a timeline suggesting that the Africa report would be finished, or at least the presentation on Africa for the SFO would be done, by 1 December at the latest.

1301. On 16 August, FRA provided an analysis of the Metalkol bank statements. It showed 5 withdrawals of varying amounts in cash totalling $35 million in January/February 2011. These were then deposited in a Swiss bank account said to be for the purpose of the KMT liquidation.

1302. It will be noted that a few days later, on 20 August, at DC17, Mr Anderson relayed this to Mr Gould. Mr Gerrard says that at this meeting, it was agreed that ENRC could report on Africa by April 2013.

1303. By the SIC meeting on 13 September, Mr Zinger had said that he was leaving ENRC. Mr Gerrard said he would have to raise that matter, together with the Mr Prosper/Mr Rautenbach issue, with the SFO, and in connection with Metalkol, they would need to interview as many people as possible.

1304. On 4 October, there was DC18, in which Mr Gerrard again mentioned the $35 million cash payment. On 23 October, Dechert produced the interviewee list consisting of 19 people, all on Africa. They included Mr Ehrensberger and Mr Prosper. Mr Ehrensberger was interviewed on 31 October and Mr Prosper, along with Judge Larson, were interviewed on 24 October. The latter was the subject of a formal complaint by AF. Judge Larson wrote on 1 November to say that the interview was unprofessional and discourteous. There were 6 lawyers from Dechert on the interview and they presented Mr Prosper and Judge Larson with a large ring binder with hundreds of documents in it of which they had been given no notice. They were then often asked about particular phrases used in those documents. Many of the

documents had not even been drafted by them. It was said that other interviewees had been subjected to the same treatment.

1305. Over October and November, others were interviewed and Dechert continued to seek and review large numbers of documents with additional custodians being added.

1306. At OM8, Mr Gerrard told the SFO that the London, Zürich and Africa servers had been imaged (it seems that the SFO did not take the point that it could only have forensic images), that there had been 16 meetings and calls and they had reviewed about 220,000 documents. Dechert said that it anticipated concluding the investigation by the end of March.

1307. It seems that the reason why so many documents had to be reviewed is because there had not been suitably focused search terms. In evidence, it was pointed out to Ms Coppens that the use of generic words in one case had produced 1 million hits. She said that Dechert would never have left it as it was. I agree that ultimately, obviously, they did not review 1 million documents but they only proposed refinements to the search terms after B2 had brought the matter to the attention of ENRC on 21 June. The point is that in relation to what were only certain aspects of the acquisition transactions, 220,000 documents in total seemed an extremely large number to review.

1308. In relation to interviews, some interviewees were interviewed more than once; for example Mr Ehrensberger was interviewed 6 times. By late November, 60 had been interviewed.

1309. On 28 December, Dechert gave an updated investigation timeline which contemplated more searches and more electronic and hardcopy document reviews and the completion of "preliminary" interviews by 31 January 2013, with more to follow and the presentation to the SFO by the end of March. The costs estimate given at paragraph 1073 above from January 2013 is an indication of just how much extra work it was said still needed to be done.

1310. Also, on 7 January 2013, Mr Anderson told Mr Kowalewski that the SFO had been informed that there would be follow-up visits to the entities already reviewed as part of the books and records review, including more in Africa. He went on to say that the list should be expanded to cover other entities in Africa and then entities outside it, as the SFO was expecting a global books and records review. Other places would include China, Brazil, Mozambique, Mongolia and the Seychelles. It is not clear at all that the SFO was expecting this. Further, if all of that was to be done, it is impossible to see how a report could be delivered by the end of March.

1311. As at 11 February, Dechert said it had completed the interviews of 20 individuals and another 22 remained. On 15 February, Dechert submitted a roadmap document for each of the Africa investigations including new tasks and new work streams, like a review of Camec funding and loans at the time of the acquisition. A brief examination of the work plans shows how many lines of enquiry were still being pursued in great detail, with yet more interviews including Mr Ehrensberger again. Once more, it is impossible to see how this work could be completed and a report produced by the end of March. That was in addition to getting out the Kazakhstan report by the end of January as required by the Rappo Letter. The number of electronic documents reviewed by the end of March was in total over 505,000, with 296 files of hardcopy documents.

1312. Interspersed with this activity were DCs 23 and 24, each highly damaging to ENRC. It led Mr Thompson to think that there was "real substance" to Africa and there were further details provided to him in DC24 about the "corrupt" $35 million and the "bemusing" promissory notes.

1313. There was then the highly damaging remarks made to Mr Rappo in DC25, including the references to criminality and bribes.

1314. One further point concerns the allegedly suspicious use of encrypted BlackBerrys. On 14 February, Dechert set out a workplan following meetings which it had had with Protector Services Group ("PSG") on 4 and 6 February. This workplan opened up extensive further lines of enquiry with a plan to interview (in some cases again) Mr Hanna, Mr Vulis, Ms Zaurbekova, Mr Jobson and others. In fact, at the meeting on 4 February Mr Jones of PSG explained that the provision of BlackBerrys was to allow for encrypted emails to be sent for the (legitimate) purpose of avoiding leaks to the press.

1315. On 27 February Mr Carroll of Dechert gave the results of a visit to PSG's offices. He said that there was very little of relevance in the 210 emails he reviewed though this was not the totality of the potentially relevant emails. He added that the BlackBerrys were only used for a short time after they had been supplied. Furthermore, some ENRC personnel already had the Hushmail software which allowed for email encryption before they got the BlackBerrys. Despite that, he suggested 6 priority pieces of work for PSG and another 3 for ENRC.

1316. In fact, at paragraph 35 of her WS, Ms Coppens cited the use of encrypted devices as being one of the clearest examples of ENRC causing the conduct of the investigation to be

obstructed. When it was pointed out to her that Mr Ehrensberger did not even have one, Mr Hanna had hardly used his and they had been supplied for the above legitimate reason, she pointed out that she had not attended the PSG meeting. Her account of why it was nonetheless necessary to embark on this workstream and why she failed to mention in her WS the fact of little or no use of the BlackBerrys, I found very unsatisfactory.

Analysis

1317. On the assumption that both Camec and Camrose were part of the investigation for SFO purposes, leaving to one side how Camec came in after it had been taken out, I do consider that Dechert was really re-doing the due diligence on these acquisitions, not simply assessing its reasonableness or otherwise.

1318. It is therefore very difficult to see why it was really necessary to obtain images of the Africa data when, given that these were acquisitions by ENRC, one would expect the relevant data would be in London or Zürich.

1319. On Camrose, there was the additional matter of the loans and whether any of them were "soft" and the question of the promissory notes. They obviously took some time to investigate but it was not a huge task in my view. Nor was doing the further work on sanctions in the light of Mr Prosper's connection to Mr Rautenbach.

1320. As for Chambishi, it is correct that ultimately the SFO wanted an assurance that there had been no illegal activities on the acquisition. However, this was essentially a concern about a purchase from a related party where in fact there had already been two independent valuations.

1321. I also agree with ENRC that the amount of documentation reviewed and the number of persons interviewed were plainly excessive.

1322. Overall, and as with Kazakhstan, it seems to me that Dechert, and in particular Mr Gerrard and those he was directing, had again lost any sense of proportion in the Africa investigation. That is even taking into account that it was, of course, of far more interest to the SFO than Kazakhstan. And as with Kazakhstan, Mr Gerrard was able to get away with it because of his explanation that whatever he recommended was what the SFO would want, together with his encouragement of the SFO to take a dim view of ENRC anyway, by reason of the DCs. None of that is to say that the three acquisitions in particular did not pose real issues to be investigated. Nor that any particular line of enquiry could be said to be theoretically irrelevant if one had infinite resources and all the time needed. But that was not the case here-

there simply appeared to be no limits to what Dechert thought should be done, remarkably, given the Rappo Letter and a March deadline approaching.

1323. In my judgment, therefore, the extent and depth of the Africa investigation was expanded unnecessarily by Mr Gerrard. Since it was allied to his bad faith in relation to the DCs and warnings of raids etc I take the view that he simply did not care whether he was acting within reasonable bounds or not. Indeed if anyone at ENRC challenged his view, he more or less decided they were an enemy of the investigation. Yet despite that, Dechert did not really pursue its case of obstruction at the trial. Finally, and as with Kazakhstan, even if there was not recklessness (which I have found) Mr Gerrard was undoubtedly negligent.

FAILURE TO DETERMINE SCOPE OF THE INVESTIGATION IN RELATION TO THE SFO'S CONCERNS

Introduction

1324. The issue here is not whether, as part of his Core Duty, Mr Gerrard had a duty to take reasonable steps to ascertain from the SFO the scope of its concerns. Rather it is whether in fact he did so.

1325. This claim has to be considered against the backdrop not only of the DCs but also the findings I have just made in relation to Mr Gerrard's wrong advice and expansion, set out in paragraphs 927-1323 above.

1326. As with those matters, it was particularly important to obtain a structure for the investigation (which included ascertaining the SFO's concerns) because, as I have already said above, this was not a "usual" SR process started off by a report of criminality made by the company. There was greater potential for uncertainty and confusion, in my judgment, doing it this way round.

Willingness on the part of the SFO to discuss its concerns

1327. It does appear that the SFO was in principle open to dialogue about scope or at least the extent of that openness. Albeit dealing with the "usual" SR case, the 2009 Guidance (itself referred to in the SFO Letter) made that clear in paragraphs 11-13 thereof, cited at paragraph 143 above. This included the extent of any data collection exercise.

1328. At an early stage the SFO did indicate to ENRC that it would be willing to have such a dialogue. See what Mr Alderman said generally at OM2 and what Mr Thompson said in relation to due diligence at OM3.

1329. In her evidence, Ms von Dadelszen said that the SFO would have been amenable to agreeing areas of concern that Dechert needed to address. Mr Thompson also said in evidence that the SFO did not expect ENRC to "boil the ocean" and early engagement was intended to focus the investigation. Indeed, of course, OM3 was itself intended to be a scoping meeting. Further, at that meeting, Mr Thompson actually said that in the context of the Kazakhstan report, he wanted ENRC not to over-burden the SFO.

1330. Further, a willingness to discuss the scope of its concerns was shown by the SFO when it agreed to take sanctions off the table at OM4. Importantly, it was Dechert's note that (wrongly) added the caveat that Mr Thompson did not in fact make (see paragraph 1263 above).

Mr Gerrard's actions or omissions in relation to the scope of SFO's concerns

1331. As with the claim on expansion, one needs to be careful when discussing scope. To ascertain, for example, that the SFO was interested in Africa or even, later, that it wished the investigation to focus on Camec, Camrose and Chambishi, does not tell one very much about the nature and extent of what it was that the SFO wanted ENRC to address and in how much detail. And when it did descend to more particular concerns, for example due diligence (see OM3 discussed at paragraph 1254 above), Dechert seemed to ignore the distinction made by Mr Thompson between a review of due diligence and re-doing it. Or, had there been a real doubt in Mr Gerrard's mind about what was required, the obvious course was to revert to the SFO.

1332. It is true, as Dechert point out, that Mr Gould said that he had had a number of discussions with Mr Gerrard at high levels of generality. But that did not help to focus the investigation "on the ground" as it were. And while Mr Gerrard sometimes sought Mr Gould's view on how a particular meeting had gone, this did not involve detailed questions of scope. Equally, Mr Thompson said that he was communicating with him so that Mr Thompson knew roughly what was coming and Mr Gerrard could understand something of the SFO's position. However, first, that is still in very general terms and second, he is there referring to the DCs, where as I have already found, the focus was not actually on establishing scope.

1333. Dechert further contends that there were detailed discussions on scope at OM1. Apart from indicating general areas of concern (see Mr McCarthy's note) I am not sure that that is a fair reflection. However, I would not criticise Mr Gerrard specifically in relation to that meeting. It was more of an introductory session in my view and it was later agreed (at OM2) that there should be a specific scoping meeting anyway, i.e. OM3.

1334. Dechert also cite the meeting on 26 September 2011, i.e. DC4. However, I have essentially rejected Dechert's case on that meeting; see paragraphs 520-545 above. That is also true of the meetings prior to OM7, namely DC10 and DC11.

1335. At OM3 itself, the intended scoping meeting, there was relatively little on Kazakhstan where it was more of an update. Either then or later, there would have been an opportunity to agree something more specific.

1336. The main focus of OM3 was Africa. Here, there was at least a list agreed. But (a) the due diligence concern (a review only) was, as already mentioned, either ignored by Dechert or not understood so that clarification should have been sought and (b) either then or later, clarification could and should have been sought as to the extent of investigative work, for example on data in Africa, which was needed and whether forensic images were required at all.

1337. In the context of OM3, in one respect it is correct that Mr Gerrard pushed back. See paragraph 1255 above. In that context Dechert relied upon Mr Ehrensberger's evidence on scope but that needs to be seen in its proper context as set out, again, in paragraph 1255 above.

1338. As for OM4, this was the other specific occasion where Mr Gerrard pushed back on scope (together with Mr Prosper) on Africa. See paragraph 1166 above. However, there were still uncertainties. For example, it was ENRC which put in its slide presentation that issues arising included "acquisitions by ENRC in Africa including Camec and Camrose". But the scope of that was not clear, although I agree that, ultimately, the SIC resolved the matter and then Mr Dalman unfortunately confused the picture somewhat. See paragraph 1272 above.

1339. Dechert then relies upon the call between Mr Gerrard and Mr Gould on 9 May, 2012. This was DC13 but again, one needs to see what the context is as I found it there, and indeed in relation to DC14 and OM5 itself. See paragraphs 642-655 above. None of this really assists Dechert here.

1340. As to OM7, it is said that Dechert obtained a specific confirmation on scope as set out in its Slide 3 as to what had previously been agreed. However, this included the reference to due diligence which was not fleshed out.

1341. There are some wider points here. First, given Mr Gerrard's willingness to let the investigation expand, it is perhaps hardly surprising that he did not make any reasonable efforts to contain it by reference to ascertaining the SFO's concerns. Second, and on any

view, there was a particular need to do that here, not just because of the nature of the exercise, but because Mr Gerrard kept making promises as to the delivery of the Kazakhstan report and then progress reports on Africa which were difficult if not impossible to meet, as the evidence shows. Third, and especially in 2012, the costs were rising enormously. See paragraph 1072 above. He would, in my judgment, have been perfectly justified in going back to the SFO and seeking some sort of limit on the work to be done, on the grounds of time and costs. I am afraid that I do not think this was uppermost in Mr Gerrard's mind given the fees which Dechert was collecting (and would expect to collect) in the meantime.

1342. Moreover, it is not as if ENRC itself was somehow *sub-silentio* encouraging Mr Gerrard to be passive on these points. All the way through, various people including Mr Ehrensberger, Mr Ammann, Mr Richards, Mr Zinger, Mr Simpson and even Mr Dalman were expressing their concerns as to the runaway nature of the investigation and costs or at least the need for a focussed investigation. It cannot be said that Mr Gerrard was not alive to the point. Nor was the situation helped by the fact that, in the later stages, Mr Gerrard was in my view too close to Mr Gould to act effectively to keep in check the SFO's views on what should be done.

1343. In the light of the above, in my judgment, Mr Gerrard plainly did not take reasonable steps to ascertain more precisely what the scope of the SFO's concerns were. I think he was at least to some extent conflicted by his own self interest. If he was reckless in relation to expanding the investigation then it follows that he must have been reckless in not seeking to define the SFO's concerns. But in the alternative, he was plainly negligent.

1344. There is an allegation by ENRC in relation to the question of "red flags". I regard this as a subsidiary point. It is not something which needs to be made out in order to establish breach of duty in relation to ascertaining the SFO's concerns as I have now found.

1345. However, in relation to this particular point it is largely a matter of context. Thus, for example, when the SFO said at OM3 that it wanted FRA to work further on the red flags already raised, that was not objectionable. On the other hand, for Mr Gerrard to raise them in the DCs and without authority is clearly a different matter.

1346. As to Mr Rappo's evidence about the "dance" process, I have dealt with this in paragraphs 1012-1013 above. Really, this is all about the reasonableness and extent of the "full and frank" concept employed by Mr Gerrard. It does have limits, as explained in paragraph 1017 above.

1347. Also, the question of how the red flags are to be disclosed is important. It is one thing for a company to decide, after careful consideration, that it is a sensible and appropriate course to disclose a red flag - it may even be a trust-building measure. It is another if the disclosure is not thought through or is in reality just part of an unnecessary running commentary process. The evidence of Mr Dalman, cited in part by Dechert here, illustrates the point:

> "Q. And that all the disclosures that we see over various meetings […] and we have looked at some examples on 5 March and there are other examples on 20 July and 28 November which we will come to in a moment, come to a bit later those disclosures of at least red flags within ENRC, full and frank disclosure of those matters was in your view and as far as you were concerned, that of the board, in the best interests of ENRC?
>
> A. In general, yes. On specifics, every red flag I wanted investigated before it became reported, because you can't report every single red flag , because when you are in emerging markets, you are going to have a lot of red flags . So we wanted to have some focus and scope in various topics that we wanted to discuss with SFO that whatever we decided in the board, it would be full and frank."

1348. Equally, on the question of trust-building, it is instructive to see the whole of Ms von Dadelszen's evidence on the point, some of which Dechert referred to:

> "Q. …And taken as a whole and looking at it now, addressing what you see now and how you think about it now, it is fairly obvious is it not that telling Mr Thompson those things about his concerns about the client's willingness to be full and frank couldn't have been in the client's interests at that point. Do you agree?
> A. I think that is one view. As I said earlier , I think also that alternative view that Mr Gerrard was trying to build a rapport or what he might perceive as a close relationship with us whereby he thought that we would trust him and in terms of making a statement like that, he was trying to sort of give us confidence that they would be -- he would encourage them to do the sort of fullest self report that they could.
> Q. Right. But I think you would agree, would you not, that a solicitor can't build rapport at the price of his own client's interests ?
> A. I think that's right. I think -- I mean, again, I am not a defence practitioner but I would have thought that one would ordinarily discuss that strategy with one's client in advance of adopting it."

1349. Accordingly, the position on red flags is much less straightforward than Dechert contends. It does not affect my findings on the failure to determine the scope of the SFO's concerns.

FAILING TO PROTECT ENRC IN RELATION TO PRIVILEGE

Introduction

1350. ENRC contends that Mr Gerrard negligently failed to take steps to protect ENRC's privilege in connection with its engagement with the SFO, or at least to advise as to what steps should be taken. It is common ground that the only step which Mr Gerrard did take was to write the letter to the SFO dated 12 December 2012. This has already been set out at paragraph 788 above. This was in relation to what was thought to be the imminent delivery of the Kazakhstan report and was confined to that matter. Mr Gerrard took it upon himself to write at that stage.

1351. ENRC says of this letter that it was too little and too late, because by then, the SFO had been given much information in the DCs and OMs that preceded it since October 2012. It may also have been less disposed to be flexible on this issue than at an earlier stage. Mr Gerrard should have advised ENRC as to the possibility of agreeing some terms of engagement with the SFO at the outset, on the assumption that the engagement contemplated by the 9 November Letter was going ahead. Mr Gerrard should then have sought to obtain it.

1352. As it happens, apart from Mr Gerrard's unauthorised contacts with the SFO in the DCs, some of which would have attracted privilege, it is not clear that overall, much information properly covered by LPP was communicated. However, enough was communicated to the SFO to enable it subsequently to seek reports, which it knew had been commissioned by ENRC (for example the FRA red flags), in the context of the criminal investigation, when using its s2 powers against ENRC. What that led to, ultimately, were the Privilege Proceedings. That is when the SFO claimed that the information and documents which it knew ENRC had and which had been referred to in some of the DCs and OMs between December 2011 and March 2013, were not privileged. If that was right, then s2(9) of the 1987 Act did not apply. The SFO contended that there were no adversarial proceedings (criminal or civil) then in progress or contemplated, and if there had been, the relevant documents were not generated for the sole or dominant purpose of conducting such proceedings. Although ENRC ultimately won on this point in the Court of Appeal, it contends, effectively, that none of this debate would have arisen if a system for dealing with any documents or information which were privileged had been agreed with the SFO at the outset. Hence, ENRC claimed by way of damages such costs in the Privilege Proceedings as it has been unable to recover.

1353. Dechert denies in its entirety the claim as to a failure to protect ENRC's privilege.

Existence of a duty

1354. There can be no doubt that a solicitor, when dealing with the SFO on behalf of a client which involves the voluntary submission of information and perhaps documents has a duty, as part of the Core Duty, to advise as to how privilege may be lost or how it may be protected. It is a fundamental point which arises where there is engagement with an authority like the SFO.

1355. I do not think that Dechert rejects that as a proposition of law. However, its first point is to say that no such advice was in fact necessary here because of what DLA and then JD had already advised. As for DLA, in its letter of 21 April 2011 (although there is a version dated 19 April as well) it dealt principally with the question of how to ensure that when potentially

privileged documents are created, this is done in such a way as to ensure that they are indeed privileged. It was not concerned with what to do about documents which were privileged in relation to subsequent engagement with the SFO. All DLA observed was that both types of privilege could be lost if confidentiality was lost. Similarly, both types of privilege could be deliberately waived, for example by self reporting to a regulator. That is true but it does not amount to advice as to how to deal with the point in relation to the SFO. So this does not assist Dechert.

1356. In fact, Dechert now places its principal reliance on the report from JD dated 22 September, 2011, already referred to in paragraph 1023 above and entitled "SFO Approach to Prosecutions and Self-Reporting". The main passages are as follows:

> "**SUMMARY**…
>
> There are therefore significant risks inherent in engaging in the voluntary disclosure regime including the loss of privilege and confidentiality in the documents that must be provided to the SFO as part of the process. Further, unless specific agreement is reached to the contrary, the SFO will have considerable freedom to use the documents disclosed including to share them with other law enforcement agencies (here or abroad). Whilst, in principle, limitations can be agreed in respect of the documents disclosed, as a matter of practice, the Company is unlikely to be able to get the SFO to accept all the desired limitations…
>
> **THE POTENTIAL RISKS**…
>
> "3. there is a real risk that of losing privilege and confidentiality in any documents it discloses to the SFO in the course of complying with the voluntary disclosure regime.
>
> **Loss of Control over documents**…
>
> As set out below, engagement with the self-reporting procedure carries with it a very real risk of loss of privilege and confidentiality in sensitive documents. Whilst, as set out in Section F below, this risk can be managed to an extent, it cannot be eliminated.
>
> **RECOMMENDATIONS**…
>
> At this stage, we would not recommend that any documents be disclosed to the SFO prior to the establishment of a formal position between the Company and the SFO. In the event that disclosures are made either as part of the self-reporting process or otherwise (and, if otherwise, such disclosure to be assessed based on the specific circumstances at the time), ideally, the Company should seek to exclude privileged documents from the scope of any disclosure and to agree strict limits on how the SFO may use any other documents disclosed to it. It is too early to advise specifically on these disclosure issues and what approach the Company should adopt. We will advise you further after the initial meeting."

1357. Two points may be made here. First, JD did not advise that there was no point in seeking to engage with the SFO on privilege. Second, it said that it was premature to advise at that stage (which was prior to the 9 November Letter) and further advice would be given. In the event, of course, Dechert assumed the dominant role in relation to SFO engagement. For those reasons, I do not think that this report absolves Dechert from its own duty to advise about privilege.

1358. Accordingly, Dechert did owe the relevant duty.

Breach of duty

1359. Mr Gerrard did not give any or any proper advice on the question of privilege. Saying in evidence, as he did, that the client was fully aware that privilege (other than basic legal advice privilege) was always likely to be lost is not an answer. Moreover, his own view was not quite so categoric, since he did in the end seek agreement from the SFO on the question of privilege in the 12 December Letter. Had he thought the SFO would have had no truck with something like this then there would have been no point in sending it.

1360. As it turns out, the 12 December Letter was not a hopeless thing to do. Mr Gould, Mr Thompson and even Mr Rappo initially thought there might be something that could be done. See, in particular, Mr Rappo's email to Mr Gould and Mr Thompson dated 18 December where he commented on the 12 December Letter. He said that while ENRC was not in fact in the SR process, since no criminality had been reported, they appeared to be engaging in a genuinely proactive manner. He then outlined the options for the SFO including accepting the report as privileged (or refusing to) or getting ENRC to sign a s72 agreement. He also added this in paragraph 3:

> "…-Although we are never likely to use the "report" as it will contain hearsay evidence and commentary, we will want to use it to get further information in, we may need to disclose it to any defendants in any later prosecutions, and we may need to disclose it to MLA [mutual legal assistance] authorities."

1361. He then said that he had already discussed with Mr Gould some amendments to the draft s72 agreement Mr Gould had prepared. Mr Thompson's own comment was to say:

> "… The basic position is that without the Dechert material we currently have very little other than supposition and, more importantly, there appears little chance of us getting much in the way of evidence from the usual channels.
>
> The proposal is not without risk, as Dick correctly highlights, but by keeping the criminal route open for individuals [i.e. as opposed to the company] and taking a robust line on any Part V points, a defensible outcome could be delivered."

1362. Mr Gould had produced a detailed report along the same lines.

1363. While, in the end, Mr Rappo, with the approval of Sir David, took a much stronger line against ENRC (see the Rappo Letter set out at paragraph 801 above), it cannot be said that it was inevitable, so there was no point in trying. Ironically, had the 12 December Letter been sent months earlier, before Mr Rappo became involved, it might have got somewhere. I am not dealing with causation and loss here, just with the suggestion that the exercise was bound to fail. Indeed, on timing, the 12 December Letter was in any event sent far too late since it was on the eve of submitting the Kazakhstan Report (although in the end delayed further anyway). This is shown by the fact that the day after the 12 December Letter was sent, Dechert was already chasing for an answer.

1364. Moreover, in my view, Mr Gerrard should have advised as to, and at least considered, making a more general approach to the SFO at the outset on the status of the privileged information which might be communicated. Or at least he should have considered this in the course of the extant discussions with the SFO. The need for this was heightened by the fact that this was not a "usual" SR process where an initial report was given showing criminality, and there then followed a further investigation which might - or might not - be able to be safeguarded on questions of privilege. Here, the whole process was unstructured, especially given the "running commentary" approach of Mr Gerrard.

1365. The truth is that, as Mr Thompson recognised in his email of 18 December, there was little that the SFO had to go on that was of substance without the Dechert material. True it was that any agreement on privilege, whether by s72 or otherwise, could be subject to external scrutiny (i.e. judicial review) but if it was adopted after a clear, rational and reasoned process, it is hard to see that it could have been successfully challenged. Dechert also takes the point that in any event, the claim goes nowhere because there is no logical connection between breach of duty and the Privilege Proceedings. I do not think that one can go that far. Had it been possible to agree some early and clear protection on privilege to cover all the communications with the SFO, then that might have at least reduced the scope for the arguments which later arose and were then litigated. I say no more than "might" since I am not dealing with causation and loss here. I am simply explaining why the notion of early engagement on the question of privilege was not necessarily pointless or could have no benefit.

1366. A further argument, made by Dechert in its Opening, is that any attempt to engage with the SFO on privilege could be taken by the SFO as ENRC not co-operating. This is hopeless in my view. Indeed, that was clearly not the view of the SFO when the 12 December Letter was written.

1367. For all of those reasons, I consider that Mr Gerrard was negligent not to have (a) given proper advice to ENRC about the possibility of protecting privilege with the SFO at an early stage and (b) then considered possible approaches to the SFO and some form of agreement going forwards. Whether, had he done so, the SFO would ultimately have played ball and if they did, it would actually save ENRC anything, is not for me to decide at this stage.

WRONG ADVICE ABOUT BRINGING DOCUMENTS INTO THE UK

Background

1368. Clearly, by the time data had been extracted from Kazakhstan and Africa and documents collated "on the ground" in those jurisdictions, as it were, a very considerable number of documents were brought into England for and as part of the investigation.

1369. Once they were here, they were then susceptible to a s2 Notice as against Dechert and/or ENRC.

1370. Had those documents not been brought here but had stayed in Kazakhstan and Africa (assuming there were not already copies here) then, if they belonged to ENRC subsidiaries which had no presence here, the SFO would not have been able to serve a s2 Notice on such subsidiaries. To that extent s2 is not of extra-territorial effect. See the decision of the Supreme Court in *R (KBR) v SFO* [2021] UKSC 2.

1371. However, the SFO was in theory able to serve a s2 Notice on ENRC in respect of documents which it held, albeit in overseas locations. It could also, as against ENRC here, seek such documents held by an overseas subsidiary, for example, SSGPO. S2 is broadly stated. As Lord Browne-Wilkinson put it in *Re Arrows No 4* [1995] 2 AC 75:

> "Section 2(3) of the Act of 1987 does not expressly limit the documents in relation to which production can be demanded to documents which are in the possession or under the control of the recipient of the notice. But it must be clear that, if the recipient of the notice cannot, directly or indirectly, procure the production of a document he must have a "reasonable excuse" for not producing them."

1372. If, in reality, ENRC could in fact obtain or require documents from the subsidiary, then it would have to produce them to the SFO. There would be no reasonable excuse under s2(13), assuming there was no local law prohibition against moving them (as there had been in Kazakhstan so far as geological data was concerned).

1373. That said, ENRC points to evidence given to the effect that in the absence of documents being produced as part of a self-report or otherwise brought here, the SFO thought that it would not really have much material to go on. I have referred to such matters in paragraphs 1360-1362 above. Yet further, Mr Gerrard, at least initially, in his evidence accepted that prosecuting corruption abroad was "notoriously difficult".

1374. On that basis, ENRC alleges that Mr Gerrard negligently failed to advise it as to the risks of bringing documents into the jurisdiction in the event that there was no settlement and a criminal investigation started.

Analysis

1375. As with privilege, I do not think it can be doubted that at least once the SFO became involved, there was a duty on Mr Gerrard to consider the question whether it was advantageous to bring documents in from abroad. That would need to be considered from a legal perspective but also a practical one too, because of ENRC's engagement with the SFO.

1376. Mr Gerrard did not provide any or at least any considered advice on the question. He just assumed that the documents should be brought in without more. The 29 March 2011 DLA letter advised the collection of electronic data from Kazakhstan and this was set out in detail in the 5th workplan of 7 April, 2011 which dealt with data collection. Also, page 21 of the 5 March 2012 Presentation to the SFO referred to the collection of data on site in Africa.

1377. There was no advice of any structured kind given as to the advisability or otherwise of bringing documents into the jurisdiction. When Mr Ehrensberger questioned whether it made sense to do so at a meeting with Mr Anderson and Mr Gerrard on 13 March, 2012, Mr Gerrard simply said that Mr Ehrensberger had already agreed that company documents were within ENRC's care and control and the SFO would think that ENRC could call on documents at a moment's notice. If they were not produced there would then be a criminal offence.

1378. I can see that if proper advice was given, it would have to deal with the fact that documents might have to be brought in to enable ENRC to engage properly with the SFO, at least in terms of the engagement it had actually decided to undertake. It might also be said that at least in relation to SSGPO, it would be extremely difficult to resist a s2 Notice calling its documents located in Kazakhstan. As against that, and certainly as at December 2012, the SFO was not optimistic as to the prospect of otherwise obtaining evidence from Kazakhstan and Africa. Part of that might be to do with evidence of different kinds, for example, from witnesses, but nonetheless, the SFO clearly did not regard it as a simple matter.

1379. In truth, the advice which Mr Gerrard should have given was part and parcel of other advice he should have given on areas like privilege and indeed on the utility and advisability of the "running commentary" exercise that ENRC embarked upon.

1380. In my judgment, Mr Gerrard was in breach of duty in failing to at least advise ENRC in a proper way as to the implication of bringing documents into the jurisdiction and whether this was a good idea. Whether, had he done so, it would have made any difference is another matter not to be decided now.

THE SUNDAY TIMES LEAK, DECEMBER 2011

Introduction

1381. On Sunday 11 December, the Sunday Times ("ST") published two articles about ENRC under the by-line of Ben Laurence. They were highly damaging to ENRC and were clearly based on confidential information about it and the SFO investigation which had been leaked. ENRC alleges that the instigator of this leak was Mr Gerrard.

The December Articles

1382. The two articles read as follows:

> [1] **"Fraud Office steps in at embattled mining giant**
>
> THE Serious Fraud Office has launched an inquiry into corruption allegations at one of the FTSE 100's largest mining companies. Eurasian Natural Resources Corporation (ENRC), whose board has been riven by disputes about interference from its billionaire oligarch founders, has been told to hand over details of an investigation into operations in Kazakhstan and the Democratic Republic of Congo. Lawyers working for the threeman audit committee at ENRC have examined claims that money has been siphoned off from SSGPO, an ENRC offshoot that runs an iron ore business in Kazakhstan. The lawyers have complained that attempts to uncover the truth at SSGPO have met with obstruction. Documents have been destroyed, they claim, while others have been falsified, electronic data have been erased and employees have refused to co-operate. In the Congo, ENRC is embroiled in a bitter legal spat over a copper mining operation. A previous owner claims that ENRC bought the business only after the mine was illegally confiscated by the Congolese government. Now, the Serious Fraud Office (SFO) has become involved, The Sunday Times has established. ENRC and its advisers were summoned to a meeting at the agency at which they faced SFO director Richard Alderman and two of his colleagues. It is understood the SFO has warned ENRC that it reserves the right to raid the offices of directors and executives if the company fails to co-operate. A further meeting with the SFO has been held within the past fortnight. It is understood that the SFO is looking for details not only about allegations of corruption within the Kazakh operation, but also about the disputed purchase of the Congo copper business and the way in which ENRC's African offshoots are run. Alderman last week warned foreign companies that conduct business in the UK that they could be pursued for bribes paid in countries overseas. ENRC said this weekend: "We keep in touch with all key regulators. If you check with the SFO, they will refute that there is a formal investigation into ENRC." The SFO said: "We cannot confirm or deny that we are investigating." In June, ENRC hit the headlines when the group's three founding oligarchs - Alexander Mashkevitch, Alijan Ibragimov and Patokh Chodiev joined forces to oust two leading non-executive directors, Sir Richard Sykes, former chairman of Glaxo Smith Kline, and Ken Olisa, who runs the boutique investment bank Restoration Partners. Olisa later described the manoeuvrings and sackings as "more Soviet than City".

> [2] **"Mining giant slips into a new hole;**
>
> **After boardroom bust-ups and legal spats, ENRC faces an inquiry into corruption claims,..**
>
> This was never going to be a run-of-the-mill stock market company. Almost half the shares were controlled by three oligarchs who made their fortunes in the chaos that followed the collapse of Soviet communism. Its roots were in Kazakhstan, where corruption is reckoned to be on a par with that of Ethiopia, Iran and Mozambique. And its business was mining - an industry that operates in some of the most unstable and difficult parts of the world. Yet in December 2007, Eurasian Natural Resources Corporation (ENRC) made its debut on the London Stock Exchange, valued at £6.8 billion. Within months it had joined the FTSE 100 index of the largest companies. Four years on, ENRC has earned an unwelcome reputation. It has become involved in a legal battle after buying a mining operation in the Democratic Republic of Congo (DRC) that was allegedly illegally seized from a previous owner. It has seen one of the most acrimonious boardroom bust-ups at a 100 company in living memory, with an ousted director famously describing the group's actions as "more Soviet than City". The relationship between the oligarchs and ENRC has prompted repeated questions about the trio's loyalties. And now, as The Sunday Times discloses today, the Serious Fraud Office (SFO) is seeking answers about corruption allegations at ENRC operations in Kazakhstan and Africa. The past few months have, to put

it mildly, been eventful. Alexander Mashkevitch, Alijan Ibragimov and Patokh Chodiev, whose businesses formed the core of ENRC at flotation, hold nearly 44% of the company. In June, they ousted two directors - Sir Richard Sykes, former boss of Glaxo Smith Kline, and Ken Olisa, chairman of Restoration Partners, the boutique investment bank.

As a condition of the listing, the oligarchs had promised not to meddle in the running of ENRC. Olisa accused them of failing to stick to that undertaking. In a resignation letter, he said: "The original owners' historical links with directors and senior management meant that their influence would be ever present." In other words, he reckoned some "independent" directors were failing to show true independence. The chairman, Johannes Sittard, had been "frequently playing the part of founders' messenger ... rather than as leader of an independent board", claimed Olisa. It was he who coined one of the City's most resonant phrases of the year, saying his dismissal was "more Soviet than City". Mashkevitch - who had been the subject of money laundering and forgery investigations in Belgium made a move to install himself as chairman after he struck a deal to settle the Belgian charges without admitting guilt. He later dropped the chairmanship idea. Eventually, ENRC rejigged its board, claiming that it now matched good corporate governance standards. Sittard continued as chairman - although he has been criticised by some investors for being too close to the oligarchs. A colourful story? Certainly. But now, with the SFO investigating, matters at ENRC appear far more serious. The SFO has been under pressure for months to look into the company. In April, Eric Joyce, Labour MP for Falkirk, asked the agency to check whether ENRC complied with the Bribery Act, which came into force this year. In parliament, Joyce accused ENRC of "entering into ropey deals with frankly shady middlemen". He was referring to ENRC's purchase of the Kolwezi copper mine in the DRC. The government there had seized the operation from First Quantum Minerals and sold it for $60m (£38m) to Dan Gertler - the mining magnate who is an associate of Joseph Kabila, the DRC president. Gertler sold on Kolwezi to ENRC for $175m. Now, First Quantum is suing ENRC for an eye-watering $2 billion. It was other issues that caught the SFO's eye, however. There are long-running and unanswered - questions about alleged corruption at SSGPO, an iron ore subsidiary in Kazakhstan. A whistle-blower has alleged that kickbacks have been paid on supplies and that some figures in the firm - past and present have been raking in huge sums. In August, the SFO wrote to ENRC demanding a meeting and warning that it would consider raids on offices to seize files from directors and other executives. A meeting was arranged at the SFO. This was no routine affair. Richard Alderman, head of the SFO, was present, flanked by two lieutenants. ENRC was represented by its counsel, Beat Ehrensberger. And there were lawyers from two City law firms. Jones Day was there to represent but also present was Neil Gerrard of Dechert, acting on behalf of ENRC's three-man audit committee of non-executive directors - Gerhard Ammann, Sir Paul Judge and Roderick Thomson. Gerrard spelt out how his firm - with ENRC staff - was looking into corruption allegations at various operations around the world. He said there was no need for the SFO to raid any offices - yet. The meeting broke up with the SFO insisting it must be kept up to date. A second meeting has been held at the SFO's offices within the past fortnight. As autumn closed in, Gerrard visited Kazakhstan to try to discover more about SSGPO. Back in March, he had told the audit committee that previous attempts to investigate the iron ore group had met with obstruction (see adjoining panel). Were things any easier on his latest trip? Not much, according to one source: Gerrard found that the fresh efforts of his team were being frustrated. The outside world knew nothing of this. For a time, it seemed boardroom disputes and concern about the oligarchs' influence might be subsiding. Then a new deal reignited the controversy. One of the issues dogging ENRC is the relationship between its own businesses and those of Mashkevitch, Ibragimov and Chodiev. In October, ENRC tried to take full ownership of Shubarkol, a huge Kazakh mining operation that produced 6m tonnes of coal last year. The oligarchs control the business, and tried to sell it to ENRC three years ago. Originally the trio suggested a price valuing the whole business at $1.5 billion. That was rejected. But in February 2009, ENRC bought a 25% stake for $200m and was given an option to buy the rest. That option was renewed at the end of January this year, and on October 11, ENRC announced it would purchase the outstanding 75% for $600m. ENRC called a shareholders' meeting. All seemed set for an unremarkable acquisition to glide through scarcely noticed by anyone outside the world of international mining. The oligarchs were to be barred from voting, as they were on both sides of the deal: they controlled Shubarkol and had a dominant stake in ENRC. In City parlance, it was a related transaction. Nevertheless, securing the deal seemed assured. Then, on November 4, ENRC issued a statement. It had planned a shareholders' meeting for the following Monday to approve the deal. But, the new statement said, the vote was being shelved. Why? The company said: "At the request of shareholders and given the current volatile market conditions, we deem it appropriate to reconsider the timing of this acquisition." Were market conditions volatile? No, they were rather less volatile than when the proposal was announced a month earlier. The real issue was that Kazakhmys, the mining group that holds 26% of ENRC, had told the company it would vote against the agreement.

> With the oligarchs prevented from voting, that meant the takeover was almost certain to fail. What had been announced to the stock exchange wasn't untrue. But the shelving of the deal had little to do with market volatility - it was Kazakhmys's opposition that had been crucial. Now, according to one well-placed source, the UK Listings Authority which sets rules ensuring companies are transparent in dealing with the market - is looking into the issue: did ENRC give a full account of what had happened? The company said this weekend that several shareholders had asked for more time to review the deal. The situation at ENRC remains unstable. Glencore, the global commodities giant, signalled earlier this year it might buy the company. There is talk of some other restructuring to cauterise the problems caused by the oligarchs' relationship with ENRC. And, of course, the SFO has yet to finish its work. The saga has a long way to run. Catalogue of obstruction Neil Gerrard, who is spearheading the investigation of corruption allegations at ENRC, is a former Metropolitan Police officer who works for Dechert, the law firm. Earlier this year, when he worked for rival DLA Piper, he spelt out the problems he expected to face. In March, Gerrard wrote to ENRC's audit committee. He had been asked to look at claims of corruption within SSGPO, an offshoot that is the largest iron ore mining and processing enterprise in Kazakhstan, employing 18,500 people. His letter gave a taste of the problems that investigators had faced. Gerrard wrote: "Prior investigations revealed that the following obstructive behaviour appears to have been committed by SSGPO employees together with other employees of companies in Kazakhstan: ? Creation of false documentation; ? Destruction and/or failure to provide hard copy documents requested; ? Deletion or wiping of electronic data; ? Encryption of electronic data which could not be opened by decryption software; ? Refusal of co-operation by employees.
>
> As a listed group parent company, ENRC ought to be able to ... exercise control over its wholly-owned subsidiaries and their employees, wherever in the world they may be. Company employees have a duty to assist, rather than obstruct, internal investigations."

1383. It can be seen that the first article made express reference to obstruction of the Kazakhstan investigation, OM1, and OM2. The second made reference to Mr Joyce's allegations, the First Quantum litigation, the Procurement Allegation from WB1, and again, OM1 and OM2. Mr Gerrard's role was described and how he said his attempts to investigate had been obstructed and frustrated. It referred to the 29 March, 2011 DLA letter. There was also extensive reference to the Shubarkol transaction.

1384. One immediate consequence of the Articles was a 5.6% drop in ENRC's share price meaning that £400-500 million had been wiped off the company's value.

Chronology

1385. ENRC first learned of the impending articles on Friday 9 December, after Mr Laurence called Ms Chodieva, telling her what the articles would cover and asking for her comments. Later that day she told Mr Gerrard. In the afternoon he texted Mr Findlay saying: "Call me urgently. More leaks." In the afternoon of 9 December, Mr Gerrard called Mr Thompson to tell him what had happened and said that the information to be published was accurate. Mr Gerrard then told Ms Chodieva that he "will inform the SFO" although in fact, he had already done so. In a later conversation, Mr Gerrard told Mr Thompson that the leak might have been from ENRC's Board since they all knew of the two meetings with the SFO.

1386. Following publication on the Sunday, Mr Ehrensberger emailed Mr Richards and Mr Gerrard saying that the articles were highly unfortunate and asked for an urgent call. Later on, Mr

Gerrard emailed the others at Dechert about the articles, saying: "uncomfortable reading". Mr Ehrensberger then emailed Dr Sittard, Mr Vulis, Mr Dalman and Ms Chodieva, having had the call with Mr Gerrard, to say that he had agreed steps to include Mr Gerrard speaking to the SFO the next day, and that the Kazakhstan investigation would be merged into ENRC's overall project of engagement with the SFO, under the management of Mr Ehrensberger.

1387. On Monday 12 December, the *Telegraph* ran a similar story. Mr Findlay also texted Mr Gerrard asking what he made of the *Sunday Times* article (to which he later replied "not good"). Mr Gerrard later called Mr Thompson saying there was a problem with the Board and there was a leak. This was reported to Mr Alderman. Later the same day, Mr Thompson called Mr Ehrensberger to say that the leak was an "unhelpful" development but the SFO was not the source and he would "relay" the contents of their call to Mr Alderman, to whom he sent a later note. Mr Ehrensberger told Mr Thompson that ENRC was committed to eliminating leaks.

Analysis

1388. ENRC has set out 11 reasons why the instigator of the leak must have been Mr Gerrard. I deal with those points and also the points against made by Dechert, below.

1389. First, it is said that whoever the source was, apart from the provision of the 29 March Letter, they had detailed information about OM1 and OM2. Mr Gerrard accepted, as he had to, that he knew all the relevant information. First-hand knowledge of the meetings was in fact restricted on the ENRC side to Mr Gerrard, Mr Ehrensberger and Mr Richards, and it is not suggested that the latter two instigated the leak.

1390. It is perfectly true, as Dechert point out, that all members of the AC and the Board were aware of OM1 and OM2. Mr Ehrensberger reported to both bodies on OM1 on 7 and 8 November respectively. JD then reported briefly to Mr Ehrensberger on OM2 on 2 December and he forwarded that report to the Board.

1391. However, as to OM1, the SFO had not actually threatened a raid during the meeting and Mr Ehrensberger's report did not suggest that it had. What Mr Ehrensberger said was that the SFO made clear that ENRC had to self-report or "they will knock on the door". Nor did Mr Ehrensberger go into detail as to what Mr Gerrard had said at the meeting. So it seems unlikely that anyone at the Board or AC would have known (if true) that Mr Gerrard had said there was "no need for the SFO to raid any offices-yet". The brief report of OM2 did not refer to any raids.

1392. Second, at least part of the contents of the articles focused on the sorts of points which Mr Gerrard had been making to ENRC: about obstruction and false documents, ENRC's interests in DRC and acquisitions there, the SFO's (supposed) warnings of raids, control over subsidiaries and Mr Alderman's supposed claim to be able to exercise jurisdiction over companies anywhere overseas where one company in the group was in the UK.

1393. ENRC says that this emphasis was likely to have been deliberate on the part of Mr Gerrard. The purpose was to pressure or at least encourage ENRC to take a broader view of the required scope of the investigation, rather than this being a coincidence consistent with someone else having leaked the information. As to that, Dechert says that the forthcoming scoping meeting, being OM3 on 20-21 December, was essentially irrelevant and, after all, the key decision to engage with the SFO had already been taken on 8 November, effected by the service of the 9 November Letter. This is of course true but it somewhat misses the point. It is not so much about the decision to engage with the SFO but the manner and depth of that investigation.

1394. Third, it is said that the reference to Board "bust ups" fitted with Mr Gerrard's agenda of moving control away from Mr Ammann who, as chair of the AC was himself deputed by the Board. I think there is probably less in this point since acrimony on the Board was fairly well-publicised by then.

1395. I do think there is force in the next point which concerns the references to Mr Gerrard's role for example as "spearheading" the investigation and his former role as a police officer. I think that is the sort of publicity which Mr Gerrard would probably wish to engender.

1396. I also agree that his calls to Mr Thompson on 9 December were more than just responsibly forewarning the SFO, though that is how it was put to Ms Chodieva. I think he was keen to give legitimacy to the articles by saying they were accurate. He also said that the story would include a reference to the fact that "the audit committee chair [i.e. Mr Ammann] was a close friend of a bank used by one of the shareholders and the company". That was untrue, although in the event, the articles made no reference to this. Adding that the leak may have come from the Board would be consistent with the theme of Board dysfunction.

1397. The next point concerns what was in the draft press release on behalf of ENRC. Mr Pickworth drafted up such a press release and passed it to Mr Gerrard. Subsequently, when he spoke to Mr Thompson, he told him what would be in the press release but its focus was on anti-corruption rather than corporate governance. I see that difference, even though Mr

Gerrard already had Mr Pickworth's draft. However, I do not think this is especially significant since the draft press release remained the same as Mr Pickworth's, when passed to the client. Mr Gerrard may just have been spinning a line to Mr Thompson.

1398. On 12 December, Mr Gerrard spoke further to Mr Thompson on the phone. Mr Ehrensberger had wanted him to speak to the SFO to do some damage limitation in relation to the leak. Much of their short conversation was about the leaks, how to stop them and that Mr Ehrensberger was very angry about it, but knew it was not the SFO. But in the course of conversation, Mr Gerrard spoke about the need to make his investigation effective, about documents "going west", which was a "damaging" matter of substance, not about managing leaks etc. Mr Gerrard did not mention this aspect of the conversation to Mr Ehrensberger later.

1399. One then has DC9 on 13 December and then later DC10 in particular, which continued the same theme of obstruction and falsification.

1400. It is not really surprising that in her list of matters to discuss at OM3, Ms von Dadelszen included "hurdles encountered by investigators".

1401. ENRC then makes a point about Mr Gerrard deceiving Mr Ehrensberger about his dealings with SPJ. That is perhaps more tangential but in fact, Dechert, in its written Closing, places considerable emphasis on that relationship. This was because of certain matters put to Mr Gerrard while he was being cross-examined about SPJ which included the provision to SPJ of the draft progress report ahead of the 10 August AC meeting. I have dealt with all of that at paragraphs 270-284 above. The reference to the December Article came up in that context because this was when Dr Sittard had asked Mr Ehrensberger to obtain a list of the reports which had been distributed and then collected from various people. This was the list drafted by Mr Anderson which did not make any reference to SPJ. The point however was not so much about the December Article as the omission in the list. So I am not sure how much of this is relevant. It does not seem to relate to Mr Gerrard's alleged motivation to leak to the Sunday Times. Moreover, in respect of much of what Dechert has said about Mr Gerrard's relationship with SPJ, I have taken a different view of the facts; again, see paragraphs 270-284 above.

1402. It is, however, right to say that when the allegation of the December Leak was put to Mr Gerrard (to which he said "absolutely not") this was on the basis that Mr Gerrard either leaked it directly or did so through SPJ. I agree that it was not squarely put to Mr Gerrard that

the motive for this leak was in order to exert pressure or influence on ENRC to engage with the SFO in the expansive way that he wanted. However that sort of motive had been put to him in relation to other matters and we know that he denied it. He would no doubt have denied it here also.

1403. It is also the case that Mr Hollingsworth's sources seem to have told him that Mr Gerrard and/or SPJ were responsible for the leak. In his manuscript notes, he said that it was Mr Gerrard who had made the leak after meeting SPJ and that it was a "self-promoting" story. In his email to Mr Van Niekerk of 14 December, Mr Hollingsworth said that the finger of suspicion was pointed at Mr Gerrard. The latter wanted to put pressure on ENRC and the SFO's interest served that purpose. Also he had an internal fees target at Dechert of £10 million per year and so he needed to keep the investigation going for as long as possible to generate fees. Of course, by itself, supposition by Mr Hollingsworth is not necessarily worth that much - but his observations do not seem far off the mark.

1404. Finally, it is correct that had he wanted to leak, I do not believe that Mr Gerrard would have balked at it. After all he had already done so in relation to the August Article.

Conclusion

1405. In my judgment, all the circumstances do indeed point to Mr Gerrard as having instigated the leak, and I so find. Again, he was therefore in gross and knowing breach of duty.

TERMINATION OF DECHERT'S RETAINER

1406. Precisely how and why Dechert came to be dismissed on 27 March, 2013 is not of central relevance to this case. First, this is not a "wrongful dismissal" claim brought against ENRC by Dechert, nor could it be. ENRC was entitled to terminate Dechert's retainer whenever it wanted. Second, no one at ENRC at the time knew of the serious and serial wrongdoing committed by Mr Gerrard up to that point. Had ENRC needed to justify Dechert's dismissal, that wrongdoing would have more than sufficed. Third, I can see that a real question might be what effect Dechert's dismissal had on the SFO's thinking and in particular whether it contributed to the decision to launch the criminal investigation. That is not an issue for this judgment. But on any view, the important thing would be the fact of the dismissal, not how it happened.

1407. However, the chronology relating to the dismissal does need to be sketched out to some extent. That is because it says something about Mr Dalman's views leading up to the

dismissal. Also it sets (or may reflect) the scene for the final allegations against Mr Gerrard, namely in relation to the March 2013 Leak and the sending of the June 2013 Material.

1408. On any view, the Rappo Letter did represent a setback for ENRC. That much is common ground. Mr Rappo was clearly taking a tougher line. Mr Dalman also felt that this was not the outcome which Mr Gerrard had predicted.

1409. An SIC meeting took place the day after the letter was received, namely 24 January, at 2pm. Mr Dalman was sufficiently concerned that he had asked AG earlier that day to provide a bullet point list of failings on the part of Dechert in time for the meeting. Mr Dalman's own suggestions included:

> "• Dechert's general conduct — accusatorial interviews and threatening behaviour (senior management complaints) and professional conduct towards other law firms.
> • Lack of strategic overview — e.g. repeat of electronic search, no clear direction on search terms or document requests; No clear strategic plan to complete the investigation leads to extension of the remit.
> • Lack of Commerciality — no understanding of commercial needs of the business (eg CCC merger interview issue).
> • Inability to ask straight questions;
> • Too much reliance on forensic professionals without questioning or directing their role."

1410. On any view, Mr Dalman must have been thinking about such matters at the time, even before the Rappo Letter arrived to crystallise his thoughts. He could not have made them up on the spot. Points 1, 2 and 5 strongly resonate with the issues before me. That exchange then led to an email from Mr Simpson listing out 5 matters:

> "1. An opaqueness about the "off the record" discussions with SFO contacts and exactly what the SFO were or were not being told and vice versa.
>
> 2. Consistent criticism of and consequently tension with other professionals particularly where the involvement of others impinged on Dechert's assumed total control of the Investigation e.g. from time to time , PWC, KPMG, Herbert Smith, Jones Day, and Addleshaws.
>
> 3.The impression that NG may now be leading other matters and, without authority for this, Duncan may de facto have assumed the leadership. e.g, very surprised that NG apparently took no part in the ZZ Interview this week given what may be at stake.
>
> 4. A lack of flexibility about their standard interview process which seems to involves every possible avenue being covered in advance by massive document review exercises and engagement of outside professionals (FRA)which is bound to have led to some blind alleys. e.g. based on what we already know VH should have been interviewed and re-interviewed over the last 2 months at least and, if so, might have "hung himself" by now. thus possibly cutting through all the "crap" and saving a mass of time and expense.
>
> 5. For me the biggest strategic failure is to have failed to recognise, which others did, that the biggest risk was that the SFO under new Directorship, and applying a new approach to voluntary reporting, would use delay as an excuse for resiling from the tacit understandings that NG obviously believed he had with the SFO."

1411. Pausing there, in the light of my findings above, this is a list of (largely) familiar complaints. They were in fact echoed in a number of documents to which I have already referred. This

goes against the notion, contended for by Dechert, that apart from a few stresses and strains, by early 2013 Mr Dalman and AG were really giving a ringing endorsement to Dechert's efforts with no qualifications. But the fact was that they were under serious pressure to bring the investigation to a close and deliver a report to the SFO.

1412. One then goes to the SIC meeting itself. Mr Dalman said that he had left the strategy and approach to Mr Gerrard, that he was not now happy and he wanted to know why this had occurred and what Mr Gerrard was going to do about it. Mr Gerrard noted that things had changed with Mr Rappo, that the SFO must have its own evidence against ENRC and this investigation had not been easy and there had been obstruction from Kazakhstan.

1413. As for the Kazakhstan report itself, Mr Dalman said he wanted it in by the end of January as required by the Rappo Letter. There was then the extended debate about KPMG's stripping report already referred to.

1414. It is also worth noting that Mr Dalman's position generally at the SIC meeting was very much that a clear strategy had to be adopted and there was too much focus on matters of detail. He also took the view that delay on the part of ENRC had or might have caused the SFO to react in the way it just had. In evidence, Mr Dalman said that he thought Dechert was slow and the fact remains that AG was appointed to monitor Dechert's performance, which was surely unusual. Mr Dalman made it clear that he did not think at the time that Mr Gerrard was acting in bad faith. I accept that; the list of his failings does not necessarily suggest that, although it certainly suggests negligence. But it is not wholly surprising, since Mr Dalman was not aware of the matters that later came to light.

1415. Dechert make the point that after the meeting, work was progressed very quickly to enable delivery of the Kazakhstan report. Given the time pressure, that is hardly surprising. But the fact that the Kazakhstan report was ultimately delivered does not say anything about the complaints made about Dechert.

1416. On 14 March, there was the Nomination and Corporate Governance Committee meeting. Briefings were given in particular on Improm, Metalkol and the roles of Mr Hanna and Mr Spiteri. Dechert has pointed to the conclusions of the meeting in relation to the investigation. The context was the defaults of three individuals, ENRC's CFO being Ms Zaurbekova, Mr Spiteri, ENRC Africa's CFO and Mr Hanna, ENRC Africa's CEO. As for Ms Zaurbekova it was noted that she had been naïve and acted inappropriately given her role, but not criminally. As for Mr Spiteri there was evidence that he had falsified documents and should

go, and as for Mr Hanna, he had been complicit in the loss of money from Metalkol and had obstructed the investigation.

1417. As for Mr Hanna, it was thought that the SFO might not want his employment to be terminated immediately but rather suspended until it had all the relevant information. It was agreed that Mr Dalman should finalise discussions with the three individuals with a view to an orderly resolution. In doing so he would take advice from the SFO regarding the issues in Africa.

1418. Dechert place emphasis on the words "take advice" from the SFO. It is suggested that this shows the very different character of the self-report process and one which was not adversarial. I do not think there is much in this point. The 2009 Guidance, even as amended, pointed out the importance of taking appropriate remedial action once wrongdoing had been identified. That would obviously include dealing with defaulting members of staff. And as already mentioned, the SFO might have had a particular interest in not seeing Mr Hanna dismissed immediately.

1419. At a conference with Mr Martin Moore QC, on 26 March, the reasons for wishing to suspend Mr Hanna were explained to Mr Vulis.

1420. However, on 27 March, Mr Vulis asked Mr Dalman and Mr Wilkinson to meet him. Mr Mashkevich, one of the Founders, was also there. They were told that Dechert was to be dismissed. Mr Dalman thought that this should be a decision for the Board after being presented with the evidence. But in fact it had to be done that day and it was, at a 3pm meeting between Mr Dalman and Mr Gerrard. Mr Gerrard's take on it was that this was all because the Founders did not want Mr Hanna to be suspended.

1421. Dechert was replaced immediately by Fulcrum Chambers, a multidisciplinary legal advisory and representation company. David Williams QC of Fulcrum Chambers attended the SFO later on 27 March with Mr Dalman and Mr Wilkinson to explain the change in representation.

1422. It transpired that Mr Vulis never did suspend Mr Hanna.

1423. On 1 April, 2013, Mr Ehrensberger sent an email to Dechert which was its dismissal in writing. It is worth reciting it in full.

> "As you have been previously informed, the company has taken the decision to terminate its relationship with you and your firm, Dechert LLP, effective immediately as of March 27, 2013. Such termination includes immediate cancellation of the mandate to investigate, on the company's behalf, certain regulatory matters with respect to which you have been advising the company and/or

communicating with the Serious Fraud Office (SFO). You are instructed to cease and desist any further communications with the SFO or any other person about your prior representation of the company on this or any other matter without the express written consent of myself or another duly authorized executive of the company. Your, or any of your colleague's, failure to comply in strict conformance with this prohibition will cause further irreparable harm to the company and will be met with appropriate response. As you are aware, the company has taken this decision because of your and your firm's negligent and improper handling of many significant aspects of the sensitive engagements entrusted to you and your firm. I provide, immediately below, certain particulars in this regard. This is not an exhaustive recitation and is merely illustrative of the shortcomings of which the company has become aware:

1. Unauthorized Disclosure of Privileged & Confidential Information to the Press The company has reason to believe that Dechert personnel are responsible for the multiple and damaging leaks to the press of privileged and confidential information concerning the engagement. -- These leaks have ranged from unauthorized disclosure of confidential aspects of the investigations to the provision of draft reports intended only for the company's and the SFO' s review.

2. Inappropriate Communications with SFO The company has reason to believe there may have been unauthorized, inappropriate and perhaps illicit communications and dealings between an SFO employee and yourself. -- The company has further reason to believe that the SFO may have become aware of such inappropriate dealings.

3. The Investigation has been conducted improperly and un-professionally The investigation has been improperly conducted in numerous respects and has failed to meet minimum standards of care and due process. -- Credible and repeated accusations have been leveled against yourself and your colleagues that interviewees have been pressured into making inaccurate and false statements against others. -- The company is aware of evidence that you may altered minutes of certain meetings in material and misleading ways. -- You have repeatedly misled the company about the status of the investigation and about the nature of your communications with the SFO. -- The SFO repeatedly has complained about Dechert's dilatory response to questions from the SFO and your firm's failure to provide status reports on the investigation's progress in a timely manner. These delays are particularly inexplicable considering that the investigation has lasted more than two years and cost the company tens of millions of dollars.

4. Retaliatory Actions The company is aware of evidence of retaliatory actions you have taken against a number of individuals at the company who questioned the scope and integrity of the investigation. You have repeatedly impugned the reputations of other major law firms and practitioners who advise the company and questioned the investigative process you implemented.

5. Improper Billing The company has reason to believe that you and your firm have made decisions regarding the methods and scope of the investigation for the principal purpose of extending the investigation to generate greater fees, rather than to serve the interests of the investigation itself. -- The company further believes that you and your firm have engaged in excessive, unjustified and potentially fraudulent billing practices. The company's new outside counsel, David Williams QC of Fulcrum chambers, will contact you shortly to provide further instructions on disposition of any and all files that your firm has in its possession, custody or control concerning the investigation and any other prior engagement between the company and your firm. The company reserves all rights with respect to your and your firm's mishandling of its engagements on behalf of the company. Yours sincerely, Beat Ehrensberger"

1424. In cross-examination, Mr Ehrensberger said that he wrote the email himself. However it represented the views of a number of people including from AG. He was not prepared to indicate the source of information on leaks or SFO contacts. He was saying that certainly much of the information had come from Mr Vulis although he was not aware of the latter's sources. Mr Vulis himself said that he had received a copy of WB2 a few days earlier on 24 March and this gave rise to some of the matters relied upon. As to allegations of failure to maintain minimum standards of care, Mr Ehrensberger said that members of the SIC like Mr Zinger, Mr Wilkinson, AG, and Mr Vulis held the same view. He said that on interviews,

Dechert had acted in a way which was designed to get the interviewee to say that a particular person had been involved in wrongdoing. He said he also had personal experience of inaccurate minutes because once they had said he was a fixer for Mr Hanna and on another occasion that he was going to replace Mr Hanna in Africa, neither of which was true. He also said that the huge delays in the investigation and reporting to the SFO were largely Dechert's fault. He also said that the SFO had complained of delays. On Mr Hanna and Mr Spiteri, less convincingly I thought, he suggested that the steps suggested to be taken against them were a "witch-hunt".

1425. As to contact with the SFO, Mr Ehrensberger said that Mr Gerrard should have been in "listening mode". That was implicit, but in any event, he did not think it necessary to tell a lawyer only to speak to the SFO as instructed and not to speak badly of the company. He agreed that if asked, Mr Gerrard would inform him about any meeting with the SFO, but not everything. Clearly, as Mr Ehrensberger effectively admitted, the decision to write to Dechert was not his. Dechert had already had its retainer terminated and he was there to put this in writing on instructions, albeit he had some of his own personal insights. It is, however, worth noting although at a very preliminary and high level stage, a number of the allegations in that letter have now on evidence been proved to be true.

1426. It is not satisfactory that Mr Vulis did not himself give evidence. He could have clarified a number of matters. But in the end, the absence of his evidence does not matter.

THE FINANCIAL TIMES LEAK, MARCH 2013

Introduction

1427. On 14 March, 2013 the FT published the March 2013 Article. It read thus:

> "ENRC internal inquiry raises suspicions
>
> MARCH 14, 2013 by Christopher Thompson An internal investigation into whistleblower accusations at the FTSE 100 miner Eurasian Natural Resources Corp has raised suspicions over whether it made $l00m in "fraudulent payments". A draft presentation to the Serious Fraud Office prepared by Dechert, the US law firm that carried out the inquiry, raised concerns over payments totalling at least $100m over four years. It cites contracts given to a company with apparent links to Zaure Zaurbekova, ENRC's chief financial officer. In one example, a company incorporated by Ms Zaurbekova's son, Bulat, was said to have won three contracts for stripping work - the separation of metal ore from the waste materials dug up at mines - worth $10.3m between September 2010 and May 2011. It adds that Ms Zaurbekova's son sold the company in September 2009, although its registered address continued to be a flat owned by Ms Zaurbekova in Almaty, Kazakhstan's largest city. In February Mehmet Dalman - the former investment banker who was appointed chairman a year ago with the primary task of improving governance at ENRC - gave a report of the investigation to the Serious Fraud Office. The company declined to give the Financial Times a copy, but it said: "[ENRC] takes all whistleblowing allegations seriously, and it is of paramount importance that they are thoroughly investigated. The company is currently in a reporting process with the SFO and therefore is unable to comment on ongoing investigations." ENRC is awaiting news on whether the agency will conduct its own investigation or let the matter drop. The miner has been plagued by boardroom rifts and concerns over

> governance since joining the London market in December 2007. The founders of the business, Alexander Mashkevich, Patokh Chodiev and Alijan Ibragimov, together own 44 per cent of the company's shares. Aside from the whistleblower claims at ENRC's Kazakhstan business Sokolovsko-Sarbai, known as SSGPO, the company became embroiled in a fierce legal dispute in the Democratic Republic of Congo over copper assets with rival miner First Quantum Minerals. The dispute was settled for $1.2bn. Mr Dalman's arrival was predated by the high-profile dismissal of former GlaxoSmithKline boss Sir Richard Sykes and investment banker Ken Olisa - the latter who described the miner as "more Soviet than City". The Dechert draft listed the difficulties the investigation team allegedly encountered, including the construction of a false office, an unnamed employee using a specialist computer wiping tool and a refusal to co-operate on the part of outsourcing companies and contractors. It also referred to allegations of "endemic fraud" in relation to procurement. Ms Zaurbekova and her son could not be reached for comment."

1428. ENRC alleges that this was based on materials leaked to the FT by Mr Gerrard. The principal material is what has been referred to by ENRC as "the Doctored Slides". I shall simply call them the "Amended Slides". A second document said to have been leaked is the first page of an early version of the Improm Timeline, which was attached to Dechert's letter of 30 July, 2012.

1429. Copies of the Amended Slides were subsequently obtained by ENRC from Mr Hollingsworth, Mr Yearsley and from "sam@thetruthprovider.com". The latter sent to the SFO and many other email addresses, a PDF file with over 2,200 pages of emails apparently sent to or from Mr Hollingsworth.

1430. I deal with the Improm Timeline below.

The Amended Slides

1431. The slides in issue purport to be a draft of what ultimately became two separate PowerPoint presentations to the SFO at OM7, one in relation to Kazakhstan and the other in relation to Africa. The Amended Slides consist of 27 pages. The content is similar but not identical to a draft presentation in a single PowerPoint sent to Mr Zinger on 22 June and Mr Dalman on 24 June ("the June Slides").

1432. However, the differences between the two are important:

(1) the PowerPoint template used in the Amended Slides is a slightly different and older style to that used in the June slides – see the line at the bottom of each page, the 2 colours used and the slightly different framing of the name Dechert ("the Older Template"); the Older Template was not in use by June 2012 although it was the basis for other PowerPoint presentations, some of which had been sent to ENRC;

(2) the first three bullet points at page 2 of the Amended Slides, headed "Kazakhstan Investigation-History of Issues", are blank; so are all the bullet points at page 5,

headed "Evidence Gathering"; there are further bullet points missing at page 6, headed "FRA Books and Records Review";

(3) page 8 is called "Investigation Difficulties", referring, among other things, to the false office, a specialist wiping tool used by an employee and outsourced companies and contractors refusing to cooperate. This content was in the June Slides also but it was not in the final version;

(4) at page 9, headed "Farm" the content was expanded so as to refer to acquisition costs of the farm paid from SSGPO funds and the reference to nominee shareholding having the additional words "on behalf of SSGPO President and major shareholder, Alijan Ibragimov";

(5) at page 25, headed "Other concerns" the following was added:

> "Contract stripping companies affiliated with the Chief Financial Officer, Zaure Zaurbekova-
> Contract stripping companies previously owned by son and brother of CFO hastily transferred to friendly nominee
> Lack of related party disclosure to board and regulators, including collusion of SSGPO president with family in law member and major shareholder Alijan Ibragimov….
> Quantum
> At least USD100 million in fraudulent payments over 4 years."

(6) the June Slides had pages which were not in the Amended Slides, being in total 33 pages long;

(7) the additional allegations contained in the Amended Slides do not appear in the ultimate July presentations or in any previous draft.

1433. It is clear from the content of the March 2013 Article that the author had the Amended Slides. That is because of the references to US$100m in potentially fraudulent payments etc. and to Ms Zaurbekova. In fact, in the Kazakhstan Report she was exonerated from any wrongdoing.

1434. The allegations concerning Ms Zaurbekova had not been raised with ENRC at the time of the July presentation. As for Mr Ibragimov, it had not been suggested that he was the true owner of the Farm via a nominee shareholding. The allegation of payments of US$100 million was entirely new.

1435. There is also evidence from FT representatives that it had the Amended Slides. First, when Mr Murphy of the FT spoke to ENRC's PR advisers ahead of publication, on 7 March, he referred to a July presentation given to the SFO but with allegations not otherwise appearing in any draft or the final version. Second, when the FT representatives who met Mr Dalman on

8 March were provided with a copy of the actual July presentation they realised that what the FT had was a different version.

1436. As for the Improm Timeline, the March Article made reference to Ms Zaurbekova's son said to have won three stripping contracts worth US$10.3 million and using her flat as the company's registered address. This all appears at page 1 of the Improm Timeline. It is not in the Amended Slides. It is also clear that the page 1 of the Improm Timeline supplied was page 1 of an early draft rather than the one ultimately produced. Further, questions asked of ENRC by Mr Murphy in an email dated 13 March prior to publication, reflected knowledge of page 1 of the Improm Timeline draft.

1437. Dechert has not admitted the above as such, but it did accept that the FT had claimed to have the July presentation and Dechert's 30 July letter to which the Improm Timeline was attached. In my judgment, ENRC is correct as to the basis for the March 2013 Article. Indeed, the Amended Slides had been forwarded by Mr Hollingsworth to Mr Glenn Simpson on 20 March by which time they seemed to be well in circulation among journalists.

The effect of the allegations in the Amended Slides and Improm Timeline

1438. Insofar as the Amended Slides contained false information, this was damaging to ENRC and now in the public domain. Moreover, if true, they had been removed from the final report. As for obstruction, while that section was in the June Slides, it did not appear in the final presentation; it was damaging, and again now in the public domain.

1439. The allegations from the Improm Timeline were also damaging. In addition, the final timeline document (not sent to the FT) had said that Ms Zaurbekova had confirmed that she did not own the relevant flat.

The Creation of the Amended Slides

1440. As to how these were formed, what appears to have happened is that all or part of the content of the June Slides was put onto a PowerPoint presentation using the Old Template. That would not be difficult to do. It also suggests strongly that it must have been done at Dechert's offices. Access to the Old Template and a version of the June Slides in native PowerPoint format (not PDF) would be required. While Mr Zinger and Mr Dalman did receive the June Slides in native format, they would not have had access to the Old Template to create the Amended Slides had they wished to do so.

The Source of the Leak

ENRC

1441. It is true that Mr Ehrensberger and Mr Vulis had received earlier and different presentations in native PowerPoint format using the Old Template, albeit with different colours. However, while they could have cleaned up the earlier presentations to leave a "bare" Old Template, they did not have the June Slides either at all or in native format.

1442. Of course, in theory, Mr Dalman, Mr Zinger, Mr Ehrensberger and Mr Vulis could all have conspired together to make, from the material they had, the Amended Slides. But it is quite impossible to see what reason they would have had for doing that, especially at that particular time.

Mr Gerrard

1443. One therefore turns to Mr Gerrard. He certainly would have had the means to create the Amended Slides. Of course, the point is made that he of all people would hardly be likely to accomplish this on his own. I think that is probably true but not much flows from it since he could have asked an Associate or someone else from the (very large) team at Dechert dealing with the investigation, to assist him. Doing so would not excite any suspicion.

1444. Mr Gerrard accepted at first that he would have had access to the draft slides. He also accepted that unless the client had a draft of the presentation in that format, it could only have been created at Dechert. (That is subject to the unrealistic scenario I described in paragraph 1442 above). It is true that later on in cross-examination, Mr Gerrard claimed that he would not even have been able to access the Dechert document management system and would not have been able to find where the slides were kept. I do not accept that he was quite that inept.

1445. Mr Gerrard did not suggest that it would not be possible for him to ask someone like Ms Adams to assist him on this. However, he said that if so, there would have been a record of that request somewhere and no record would in fact be found. That might be true in terms of a documentary record of such a request. But he accepted that there would be no record if he simply asked someone orally.

1446. Nor would it necessarily be the case that there would be a record of accessing of the June Slides (and/or earlier presentations) from emails or local drives or storage devices, amending them and then printing them out as hardcopies, to be passed on.

1447. Moreover, if in truth this exercise could only have been done at Dechert, then there really is only one candidate, namely Mr Gerrard.

1448. As for the Improm Timeline, the FT's Alphaville blog, written by Mr Murphy, explained that the FT had obtained "the doc" from a "trusted" source, and then the FT had to go to ENRC for its comments, hence the calls and meeting on 7 and 8 March. The lawyers at FT then raised all sorts of red flags but Mr Murphy went back to the source "who laughs" and then 24 hours later produced a "more granular" document which must have been the Improm Timeline. As for the "source" referred to that might have been Mr Gerrard but equally could have been someone else acting on his behalf or further down the line who had received the Improm Timeline.

1449. Had Mr Gerrard wanted to leak these documents it would not have been difficult for him to do so. It looks as if the FT obtained the Amended Slides first although they were certainly in circulation by 14 March. One obviously direct route to the FT was one of its journalists, Caroline Binham, with whom Mr Gerrard had lunch at Coq D'Argent on 6 March. Although he does not refer to Ms Binham or the lunch in his WSs, it emerged in cross-examination that he had known her for about 15 years. Prior to March 2013 they would meet up for lunch once or twice a year. In addition, they would occasionally communicate by text. So, for example, after a lunch on 12 October 2012 with Mr Gerrard, Ms Binham wrote:

> "thanks for a lovely lunch on Friday. Great to catch up, as always. I had an unexpected invitation from Miriam to the Deputy PM's office this week so if you had a hand in that, I thank you."

1450. In cross-examination Mr Gerrard denied that he had the contact with the Deputy PM (Nick Clegg, being Ms Gonzalez's husband) and said that Ms Gonzalez would have done that because she knew Ms Binham and it would be in her diary. In fact, it was later confirmed that there were no entries about Ms Binham at all in Ms Gonzalez's diary.

1451. Another example was a text from Ms Binham dated 9 November, 2012 thanking Mr Gerrard for a tip about a "Saudi story" which the FT had then confirmed and ran. He ultimately accepted that he had obviously given her some information though he denied it was a tipoff.

1452. On any view, ENRC must have been discussed between them because on 17 April, 2013, after the termination of Dechert's retainer, Ms Binham contacted the SFO to say that she understood that the SFO had issued a s2A notice to Dechert recently. She did not reveal her source, but said she was confident of the information and that the FT would be running a story the following day. On 23 April, she texted Mr Gerrard to say "Mehmet has resigned".

1453. So, it is clear that Mr Gerrard and Ms Binham knew each other reasonably well and would sometimes share information.

1454. That brings one back to the fact that they had lunch together on 6 March. There is no document relating to that meeting. It could just have been a catch-up but the timing is very revealing. It was on the following day that Mr Murphy first got in touch with ENRC saying that he had seen a presentation (which turned out to be the Amended Slides). When Mr Gerrard spoke with Ms Chodieva and Mr Dalman on 8 March, he did not disclose his lunch with Ms Binham.

1455. I agree that it is a powerful inference from this that, at the lunch, Mr Gerrard spoke to Ms Binham about the documents he wanted to leak and she agreed to assist him by getting them one way or another to Mr Murphy.

1456. It is right to say that Mr Hollingsworth had said, on 28 March, to Mr Carr of K2, that the conduit for the leak was a PR consultant called Damien McCrystal, and suggested that the end client was ENRC or Mr Gerrard. He added that this intermediary had told a journalist two weeks earlier (i.e. on 14 March) that they had "one day to publish". However, on 14 March, Mr Hollingsworth had emailed Mr Christopher Thompson at the FT to say that he had discovered that by then several if not all of the national newspapers had the "Dechert report to the SFO" and so the FT needed to publish as soon as possible. That casts doubt on his claim as to the conduit being Mr McCrystal. In any event, it was entirely possible that intermediaries became involved one way or another in the circulation of the leaked documents.

1457. So the above points do not, to my mind, cast doubt on the proposition that Mr Gerrard was the source.

1458. I should add that Mr Gerrard did not himself take any steps, as ENRC's solicitor, to investigate the leak although as it turned out, of course, there were only another two weeks to go of his retainer.

1459. However, there then remains the question as to why Mr Gerrard would wish to cause a leak at this point in time.

1460. ENRC says that Mr Gerrard's aim by this stage was positively to bring about a criminal investigation. It relies on the highly damaging disclosures and points made to the SFO on 27 and 28 February and 13 March, which it says were accompanied by the same objective. As I said in relation to those DCs, I am not sure that Mr Gerrard was positively seeking a criminal investigation for its own sake or so as to enable Dechert to earn more fees. I think he knew by then that the retainer might not survive, especially in the light of the Rappo Letter. He may

now not have cared whether a criminal investigation would follow, but I do think he now positively wanted to try and secure his own position with the SFO going forwards. To that extent, he would now distance himself as much as possible from his client. He would be prepared to put further damaging information or suggestions into circulation.

1461. In that context, the March 2013 Leak is all of a piece with DC23-25. Moreover, the particular additions put into the Amended Slides with their focus on Ms Zaurbekova, chimed with his continued hints at wrongdoing by her in DC23 and DC24. This was a matter that, at the time, Mr Thompson certainly thought was potentially interesting. In his email to Mr Rappo dated 1 March, he said, having read the executive summary of the Kazakhstan report, "Even the CFO's involvement may not be as interesting as first thought, but we await Neil's final conclusion on that."

1462. Furthermore, the form of the Amended Slides, as a purported pre-July 2012 draft, would fit with the notion that ENRC was in fact suppressing important information and if so, the conclusion in the Kazakhstan Report of Ms Zaurbekova's innocence might not be true.

Conclusion

1463. For all those reasons, regrettable though it is, but as with the August and December Leaks, the facts point irresistibly to Mr Gerrard being the source of the March 2013 Leak. Accordingly, he was in gross breach of his duties to ENRC.

THE JUNE 2013 MATERIAL: CLAIM AGAINST DECHERT

1464. It is common ground that on 4 June, 2013 a brown envelope addressed to the ENRC Investigation was delivered to the SFO. It contained 25 pages from the annotated copy of the HS Report. As already noted in paragraphs 414-422 above, the only redactions were in relation to Mr Gerrard's annotations. It also included 30 pages from the PP Report, a copy of Mr Gerrard's letter to ENRC of 12 April, 2013 in relation to the criticisms made of Dechert's handling of the ENRC investigation, and finally, hard copies of the Amended Slides, dealt with above in the context of the allegation about the March 2013 Leak. All of this is referred to collectively as "the June 2013 Material".

1465. ENRC alleges that the sender of the June 2013 Material was Mr Gerrard. If he was, it is not seriously suggested that he would not have been in gross breach of duty in so doing even though, by then, the retainer had been terminated. This is because, on any view, most of the material was privileged, namely at least some of the HS Report, the PP Report, and what

purported at best to be a draft presentation to the SFO. Even if the material had been merely confidential to ENRC and not privileged, there would be the same breach of duty.

1466. Rather, the issue is whether the June 2013 Material was sent by or at the instigation of Mr Gerrard.

1467. In that regard, it will be recalled that I have already found that he was prepared to and did instigate the March 2013 Leak, which included the Amended Slides.

1468. By June, of course, there really was no love lost between Mr Gerrard and ENRC. Indeed, in one of the emails collected by "sam@thetruthprovider.com" from Mr Hollingsworth dated 17 April 2013, Mr Hollingsworth stated that Mr Gerrard was "spitting blood and has asked Dick Gould… to serve him with a Section 2 letter so that he can reveal all to the SFO!!!".

1469. In addition, Mr Gerrard had also, by this time, assisted Mr Depel in writing his letter to the SFO dated 15 April, 2013, described in paragraph 243 above. Further, Mr Gerrard's own letter of 12 April to ENRC, defending his firm's conduct, was included in the package. It is difficult to see why anyone other than he would want to include it. Given his previous conduct and motives as set out above, Mr Gerrard had a clear motive for sending this material to the SFO.

1470. Assuming he wanted to send it, he obviously could because he would have had all the relevant materials. Here, it is important to note that it was only his own annotations on the HS Report which were now blanked out.

1471. A further point concerns the brown hair found stuck between two of the unfranked stamps on a brown envelope containing the June 2013 Material. On 10 March, 2020 ENRC's solicitors, Hogan Lovells, wrote to Dechert's solicitors, Clyde & Co. LLP, to ask whether they would permit a comparison of that hair with Mr Gerrard's admitted hair or that of his PA. They said this:

> "In principle, the hair may have become affixed to the Brown Envelope at any point in time before we received it, including while it was in the SFO's custody. Nevertheless, forensic testing of the hair may provide evidence as to the identity of the person responsible for sending the Brown Envelope to the SFO. We therefore propose that the Brown Envelope should be made available to a suitably qualified expert to carry out a comparison of the hair to Mr Gerrard's hair and the hair of his personal assistant(s). In circumstances where our client has no samples of these individuals' hair, ENRC is willing to make the Brown Envelope available to an expert of your clients' choosing (subject to ENRC's prior approval of the expert's credentials)."

1472. Clyde & Co. declined, saying that:

> "As you acknowledge, "the hair may have become affixed to the Brown Envelope at any point in time". Accordingly, our clients do not accept that "forensic testing of the hair may provide evidence as to the identity of the person responsible for sending the Brown Envelope to the SFO." Given that the

> results of any tests on the hair would carry no evidential weight, our clients decline your client's proposal."

1473. A similar point was made at paragraph 218 of Dechert's written Closing.

1474. However, first, I do not think that Hogan Lovells were making any concession as to the non-utility of the exercise. I simply think they were recognising that if the hair could have got stuck at any particular stage, then it could have belonged to anybody. However, if it was shown to have come from Mr Gerrard, that would be important. The reason is because, on the face of it, it would be hard to see why a hair from Mr Gerrard should have got stuck to the stamps at any time after the brown envelope was sent. There could be no sensible basis for saying that it could somehow have arrived while the envelope was in the custody of the SFO. The same would be true once the original became part of the documents for this litigation. Accordingly, it did not seem to me that the point being made by Dechert as to why it refused a comparison, carried much weight. I raised this in oral argument on Day 47 and invited Dechert to clarify the objection to the comparison if it wished to do so. The result was a note produced after the end of closing submissions, on 7 October, 2021.

1475. I have read that document carefully, but I am afraid that I am really none the wiser as to why a comparison with a hair admittedly from Mr Gerrard would be of no value. At paragraph 3, the suggestion seems to be that the sending of the June 2013 Material was part of a further attempt (like WB2) to smear Mr Gerrard. Moreover, for a hair to end up between two stamps could hardly be careless. It would require a deliberate act. Although not stated expressly, the suggestion seems to be that even if this was Mr Gerrard's hair, it could somehow have been obtained by someone else (perhaps Dechert had Mr Findlay in mind) and then deliberately placed in between so as to implicate Mr Gerrard. I have to confess that I find this a quite implausible speculation. And certainly, if Dechert really meant to say that this was done by Mr Findlay, it did not put that to him.

1476. In any event, I see no reason why, in principle, a hair from Mr Gerrard's head could not have fallen down on the envelope prior to him fixing both stamps.

1477. Paragraph 4 of the document then makes the point about the chain of custody, especially when the envelope was with the SFO. But as already stated, it is hard to see why a hair from Mr Gerrard would have arrived there in the first place.

1478. Finally, the document says that there was no evidence put before the court that it was even forensically possible to test the hair some 7 years after it was affixed (i.e. 2020, when ENRC first proposed the exercise). However, that is not what Clyde & Co. LLP said in their letter of

1 April. Moreover, given the sophistication of DNA testing, it is very hard to see why any comparative exercise would not be efficacious. In any event, Hogan Lovells invited the comparison to be done with experts when no doubt all of this could be gone into.

1479. Accordingly, had I needed it, I think there is a strong inference from all of the above that the reason why the comparison was declined was because it might have shown that the hair did indeed come from Mr Gerrard.

1480. As it so happens, in my judgment the case against Mr Gerrard is quite powerful enough without recourse to the argument about the hair; but if it had not been, this would have made it so.

1481. Accordingly, I find that the June 2013 Material was sent to the SFO by or at the instigation of Mr Gerrard. He was therefore in serious and deliberate breach of duty.

FAILURE BY DECHERT TO REPORT ITS OWN BREACHES OF DUTY TO ENRC

1482. It follows that there was also a major failure by Dechert to report its own breaches of duty to ENRC in such instances (being most of them) where I have found that it was reckless.

FURTHER BREACHES OF DUTY ALLEGED AGAINST THE SFO: INTRODUCTION

1483. I deal below with the following other allegations against the SFO (in misfeasance only), namely,

(1) WB2;

(2) The leak of the criminal investigation decision;

(3) The June 2013 Material;

(4) The Beige Notebook;

(5) The Website Statement.

1484. I will consider the issue of knowledge of loss after considering the individual breaches of duty.

WB2

1485. In July 2012, not long after Sir David took over as Director of the SFO, an anonymous letter ("WB2") was received in his office. It read as follows:

> "London July 2012
> Dear Mr Green,

I am writing to you anonymously because I fear my career will be ended if I am identified. This note concerns allegations made by a lawyer called Mr Neil Gerrard. Even if partially true they make a mockery of the operational independence of the Serious Fraud Office and its ability to effectively investigate.

My only regret is that I did not write sooner, I hesitated because "whistleblowing" against a colleague is not something that comes easily. I now realise that to delay was wrong.

A few months ago I was in the company of Neil Gerrard as part of a fairly large group; mainly lawyers. During the evening he was holding forth about on number of different issues. Whilst admittedly the worse for wear, he made the following assertions/allegations about the Serious Fraud Office and about you. I managed to record about 60% on my BB and although there is a lot of background noise his voice is perfectly recognisable and what he said is perfectly clear.

Summary:

1. He claims to be given "insider information" on companies and individuals that are the subject of Serious Fraud Office investigations. His main contact is an individual identified as "Dick". He made the joke that this man is "the only Dick a lawyer ever needed". This information includes central allegations, copies of case notes and the Serious Fraud Office investigation strategy. Gerrard then uses this information to obtain instructions from the party being investigated.

Specific cases he mentioned were a company called Alstom: and Bernie Ecclestone. At the time he claimed he knew that the Serious Fraud Office going to investigate the Barclays LIBOR scandal and he was using that information to "get instructed shortly". Regarding Ecclestone he also claimed to have high-level contact in the relevant department of the Revenue whom he "did deals with" to get clients "off the hook".

He alleged that he was warned by the Serious Fraud Office that there was a "multi agency" investigation into a number of leading law firms in London including Eversheds. He claimed to have "fucked" any relationship the law firm Jones Day may have with the SFO by "judicious leaking".

2. He claimed that this insider information was provided with the tacit agreement of yourself and Dominic Grieve, as there was "nothing more satisfying" than a guilty party paying for an investigation into their own wrongdoing.

3. He claimed the Serious Fraud Office was inept and toothless and could only investigate seven or eight cases a year. As part of “the agreement” with your office he could guarantee that his clients would never be investigated and that he could change a criminal investigation into a civil settlement. He cited the case of Haliburton whom he apparently represented recently.

He claimed that he had "negotiated" the Serious Fraud Office into agreeing a £9 million civil settlement as opposed to the $US 750 million criminal judgment in the US.

4. He claimed that via Miriam Gonzales his legal partner he had direct access to Nick Clegg and the heads many European governments. He had the ability to influence and in some cases change government policy. He described to us "in confidence" how he had been asked by Dominic Grieve to oversee and guide changes to UK regulatory strategy with the aim of giving the Serious Fraud Office the "kick up the arse" it needed.

5. Turning to you personally he said of your recent appointment that you were "very much second choice" and that he didn't accept the post "this time round" as he couldn't afford "a pay cut". He claimed that you were "keeping the seat warm for him" and when he takes over from you in 2016 Dominic Grieve had guaranteed him £250,000 a year salary as opposed to £150,000 and an elevation to the House of Lords as opposed to a Knighthood.

These are the key allegations. Whatever the truth or otherwise a number of us were appalled that despite being obviously drunk he should speak so openly, especially as it appears that he is receiving confidential and commercially sensitive information from contacts in the Serious Fraud Office.

I cannot come forward publicly as my career would be ended. I have instructed a French law firm (I cannot do this in London) to try and identify how I might release a copy of the audio recording to you without my identity being compromised.”

1486. In fact, and as noted above, the author was Mr Findlay although of course Sir David did not know that.

1487. On receiving WB2, Sir David said that he regarded it as a complete nonsense and absurd. As a result he did not take any formal steps into investigating the allegations. The only SFO individual named as being a contact for Mr Gerrard was "Dick" whom he assumed to be Dick Gould. He asked Mr Bailes, the then COO, to investigate. This was on the basis that Mr Bailes was one of the few members of senior management remaining from Mr Alderman's time as Director, who knew the office and staff. Mr Bailes reported back that Mr Gould knew nothing about it. Sir David said that he would also have notified the Attorney General's Office ("AGO") about it. He would also have asked the SFO's Communications Section to notify the AGO's Communication Section in case WB2 had been raised with them or the Attorney General himself. The Attorney General, Dominic Grieve QC, was of course mentioned in WB2.

1488. There was no note on the SFO's files of the receipt of WB2, nor of how Sir David dealt with it, at the time. However, WB2 resurfaced subsequently via third parties on a further three occasions. The first appears to have been on 5 July 2013 when a freelance journalist called Jason Lewis emailed Sir David. He said that he had been passed a letter making a number of serious allegations about the SFO and its relationship with a senior lawyer. He wanted to know if it was genuine and whether it had been passed to the SFO and whether there had been an investigation into its contents. On receipt, Sir David asked Ms Givens for a discussion about it. His own note from that day said that he was well aware of the letter and that he had been given a copy of it by Lord Goldsmith QC in the same week. He noted that it was obviously doing the rounds; certain aspects had been explored at the time when first received in July 2012 and no basis for them had been found. No credence was given to it, as there was no way of verifying the claims. Ms Givens would be dealing with a response.

1489. On 11 July 2013 Ms Givens emailed Mr Peck as follows:

> "I'm afraid with everything else going on I have not yet drafted the response to this - will do it tonight/tomorrow. However DGQC and I discussed it last Friday and agreed the general content of the response - to the effect that a great deal of the letter is defamatory; furthermore some of it is demonstrably false, other parts are not capable of verification by ourselves, and in respect of the remainder, some effort had indeed been made to look into the allegations but without resulting in standing them up.
>
> Neil Gerrard is a lawyer known to this office and to an employee called Dick, however none of the speculation/comment about their alleged conversations can be corroborated and there is little reason to give them credence in the context of the other outlandish claims.
>
> The fact that the letter is anonymous means that we cannot probe further or assess the motives of the correspondent so there the matter rests unless and until the person comes forward.
>
> The AG may very well have been apprised of this letter before - it was first received here last July and has subsequently found its way to us at least twice more via third parties. I think I may have seen it myself whilst at AGO.

> But, given the fact that preposterous statements are attributed to him, I want to make sure he's aware that it now appears to be doing the rounds amongst journalists. If, of course, it turns out that the AG has in fact promised Mr Gerrard a knighthood and/or the DSFO job at £250K pa, doubtless you'll enlighten me!"

1490. That email was then forwarded to the AGO.

1491. ENRC contends that the SFO (through Sir David) was in breach of the Independence Duty when dealing with WB2, and that Sir David knew of or was recklessly indifferent as to such unlawfulness. This is because the allegations contained within it were so serious (potentially amounting to the offence of perverting the course of justice and offences under the Official Secrets Act 1989) and *prima facie* credible that they cried out for independent investigation (as was required by the SFO's own complaints procedure); also that the allegations were corroborated by multiple pieces of information available to the SFO; and finally that no written record was kept, recording how the SFO responded to WB2.

1492. ENRC alleges that in particular Sir David knew or suspected that he was duty-bound to investigate WB2 fully, but did not do so and he knew or suspected that his failure to do so would probably cause loss to ENRC. His motive for not investigating was because he wanted to sweep WB2 and its implications under the carpet because he did not want to "rock the precarious SFO boat" so soon after his arrival, in late April 2012.

1493. Sir David denied these allegations firmly. He came across to me as a reliable and plainly honest witness. ENRC says that it is not necessary for me to find that Sir David was lying in his evidence in order to find him guilty of misfeasance. I do not agree. He could not have simply forgotten that he actually knew or was reckless as to the alleged breach of duty or that he had the alleged motive for acting as he did. He said his state of mind was otherwise; so either he is telling the truth or he is indeed lying. Whether, in all the circumstances, he <u>should</u> have done more to investigate does not help, for that establishes no more than negligence.

1494. As it happens, there is in my view some significant corroboration for his state of mind at the time, in the form of the documents from 2013 referred to in paragraphs 1488-1489 above. That is, unless his note gave a deliberately false account of his then thoughts and Ms Givens' email did so, too.

1495. It is important to note that WB2 directly implicated Sir David himself, along with the Attorney General; see paragraphs 2 and 5 thereof. It is not suggested that those allegations were true, and of course, Sir David knew they were untrue. The fact that Mr Gerrard said things along these lines to Mr Findlay, though without foundation, is nothing to the point. In cross-examination, Sir David accepted that the allegation of an improper relationship

between the SFO and a senior lawyer was an extremely serious one. However, that did not mean that he could not have described it here as being risible.

1496. Sir David made a number of concessions in his oral evidence. He accepted that he knew of Mr Alderman's reputation for conducting "fireside chats", which practice he thought was dangerous. He could have discovered that JD had worked on the ENRC case together with Mr Gerrard, but had later been removed. He could have interrogated Mr Gould's mobile phone. He accepted that morale at the SFO was at rock bottom after he joined and that he spent about 20% of his time building a supporting coalition against a possible decision to abolish the SFO altogether.

1497. But when it was suggested that he was reluctant to investigate anything (like WB2) which could cause a "kerfuffle", he denied it and said that he was not hesitant in, for example, taking action in connection with Mr Alderman. ENRC argued that this was a different sort of investigation than WB2, which would involve a scandal and concern a senior long-standing officer and so Sir David might have been less willing to undertake it, as distinct from the former investigation. I did not find this sort of argument realistic at all. Sir David's evidence remained that he acted at the time in good faith in relation to WB2 and thought it was not credible, whatever is now said about certain parts of it.

1498. In fact, some of the lines of enquiry which ENRC suggested would obviously have alerted Sir David to the truth of some of the allegations seemed to me to be very unrealistic. For example, in relation to Alstom. The only evidence about Alstom is that recounted in paragraphs 459-464 above. ENRC says that basic enquiries by Sir David would have turned up that email exchange. That seems to me to be highly unlikely.

1499. Another allegation in WB2 that Sir David was entitled in good faith to reject as "preposterous" (using his words) was that in paragraph 3 where Mr Gerrard allegedly said there was an agreement with "your office" to guarantee the absence of a criminal investigation or the conversion of a current criminal investigation into a civil settlement. Such an agreement could only have been made with the knowledge and consent of the Director (i.e. Sir David) himself. So far as this was untrue to his knowledge, he was entitled to reject it.

1500. It is not necessary to go through each and every one of the points made as to which parts of WB2 were or might have been true (as opposed to having been asserted by Mr Gerrard in an apparent drunken boast). The issue was whether there were facts in relation to WB2 which

can properly raise the inference that Sir David knew or at least suspected the truth to the extent that a full investigation was warranted, and that he did not do so for his own reasons, being at least wilfully blind to the necessity of such an investigation. In my judgment, the evidence goes nowhere near establishing that.

1501. I should add that ENRC suggests that I should take into account the separate issue as to the alleged leak by the SFO of its decision to commence the criminal investigation, dealt with in paragraphs 1505 to 1519 below. That is because this issue also involves an allegation that the SFO deliberately or recklessly failed to conduct a proper investigation. It is said that findings there may be of assistance here. However, in the event, I have found that there is nothing in the issue of that leak anyway. So the point does not arise.

1502. My findings above dispose of the misfeasance claim here. However, I should add that in addition, I do not find that Sir David knew of the probability of the suffering of loss by ENRC as a result of his breach of duty or recklessness to that effect. There is no reference to ENRC in WB2 and Sir David's own evidence was that he was unaware of ENRC until mid-August. He accepted that this was at least according to his own manuscript note of that date. ENRC sought to establish that his knowledge of ENRC, its engagement in the SR process and the role of Dechert, was some time earlier. A briefing paper dated 30 April 2012, Dechert's attendance notes of OM6 (18 June 2012) and a memo from Mr Collins to Sir David dated 14 July 2012 were all said to show such knowledge. I do not think that they did. In any event, it is very hard to see how he knew or was reckless as to the fact of the probability of loss to ENRC (as opposed to the SFO) since ENRC was said by WB2 to have benefited from the information illicitly passed to Mr Gerrard.

1503. I add that in my judgment, there was no knowing or reckless breach of duty in not recording the SFO's response to WB2 at the time.

1504. Accordingly, this element of the claim against the SFO fails.

THE LEAK OF THE CRIMINAL INVESTIGATION DECISION

The Facts

1505. ENRC has alleged that someone at the SFO leaked to the press the decision to open the criminal investigation. The first point to make is that this is not a pleaded cause of action against the SFO and (as must follow) no loss therefrom is alleged. That would be enough to dispose of this allegation insofar as it is relied upon as a separate claim. However, (a) it has been covered in the parties' closing submissions and (at least to some extent) in cross-

examination and (b) ENRC seeks to rely upon it as some support for its case on WB2, discussed above. Accordingly, I deal with it in any event.

1506. The essential chronology is this: a Case Evaluation Board report was made by Mr Gould on 12 April, 2013. It recommended that a criminal investigation be started. A meeting with Sir David to discuss this was arranged for 9am on Wednesday 17 April. Present were Sir David, Mr Gould, Mr Thompson, Mr Wagstaff, Mr Milford and His Honour Geoffrey Rivlin QC. The meeting concluded with a decision to launch that investigation as recorded in Sir David's manuscript note and a short note from Mr Gould sent at 11:36am the same morning.

1507. At 2.08pm, Ms Rowe, the SFO's Press Officer emailed Mr Thompson to say that a journalist from the *Independent on Sunday* had called her at 1:20pm. He had asked if there was an SFO investigation and referred to a supposed four-year investigation which was to be inferred from media coverage and asked some other questions about SFO investigations. Mr Thompson observed by email to Mr Coussey and Mr Gould that this was "remarkable timing". Although ENRC referred to this email in its Opening and Closing Submissions, it was not put to any relevant witness and ENRC's general case is that the SFO caused the leaks which resulted in a press comment on 25 not 17 April. In any event, I think that this enquiry was probably a coincidence and indeed the journalist concerned seems to be referring to some existing enquiries ongoing between the SFO and ENRC, which of course there had been since 2011. Accordingly, this takes the matter no further.

1508. The s2A Notice against Dechert had been served on the 28 March. In response to a query from Ms Black about it on 19 April, Mr Gould said he could not discuss it because internal processes were ongoing which might affect it. This was a reference to the fact that it was likely now to be converted into a s2 Notice as a result of the criminal investigation. On 22 April, Ms Black emailed Mr Gould to arrange a meeting; she said that she understood that he would not be available until Thursday. That was 25 April, the day when the SFO met ENRC to inform it of its decision. In evidence, she agreed that it was likely that she had received that information about Mr Gould's availability from Mr Gerrard. Mr Gerrard had in fact been speaking to Mr Gould earlier that day and again on the following day. It was put to her that Mr Gould had in fact informed Mr Gerrard that there was to be an investigation. Ms Black did not agree and said that she was not aware at that point that a criminal investigation would be launched and I accept that evidence. This particular point was not put to either Mr Gerrard or Mr Gould. Even if Mr Gould told Mr Gerrard that he could not be available until the Thursday, it does not follow that he said why.

1509. The meeting with ENRC on 25 April started at 9am at the SFO's offices and it had ended by about 9:45am. Present were Mr Williams QC and Mr Pearce of Fulcrum Chambers, Mr Coussey and Mr Gould. It was agreed that the SFO would publicly announce the criminal investigation at 1pm that day. After the meeting, Mr Williams and Mr Pearce went to ENRC's offices where a meeting had been hastily arranged for 10:30am with Mr Vulis, Mr Ehrensberger, Mr Ammann and Ms Chodieva. Mr Ammann agreed that it was likely that they had been informed of the SFO's decision prior to the start of that meeting and Mr Ehrensberger thought this was possible. That must be right since ENRC's lawyers had known since around 9am that day and would have wanted to communicate this important news to their client as soon as possible.

1510. At 10:16am on 25 April, Mr Hollingsworth emailed a contact at Global Witness to say that he understood that the SFO would be releasing a statement that day that they would be launching an investigation.

1511. In the course of the meeting at ENRC, Ms Chodieva took a message that Bloomberg had been in touch seeking comments on the fact that there was to be an SFO investigation and that ENRC was already aware of this. Mr Gould had been made aware of this development by 12:10pm. Later that day, Fulcrum sent a letter expressing concern about the leak and saying that it could not have come from ENRC, and that the SFO should conduct an investigation. At a further meeting with the SFO at 5:30pm that day, back at their offices, Mr Gould had told Mr Williams that he shared his concerns, and was making his own internal enquiries. In fact, no substantive enquiries were carried out.

1512. Later, on 16 May, 2013, Fulcrum complained to the SFO about the leak and invited the SFO to investigate, which it declined to do.

Analysis

1513. First, there is the question of who might have leaked the information to Mr Hollingsworth and to Bloomberg. Since the information included the fact that ENRC had been told and that the announcement would be later that day, such information could only have been leaked on 25 April itself and not earlier. So, although there may have been up to 20 people at the SFO who had become aware of the decision to launch the criminal investigation since 17 April, it is hard to see how such a number could potentially have been involved in a leak which could only have been made in the morning of 25 April and with the particular information given.

1514. In theory, either someone at the SFO or ENRC could have leaked the information that day in order for it to get to Mr Hollingsworth and Bloomberg in advance. As for the SFO, Sir David and Mr Gould both denied leaking the information and I see no reason to disbelieve their evidence here. As for Mr Hollingsworth, he had said in the claim made against him by ENRC that the source was not the SFO and in a note that he made on 26 April, he referred to "sources close to ENRC".

1515. Sir David and Mr Gould were both asked why the SFO did not conduct a formal investigation into the leak. They both said that they thought there was no reason to think the leak could come from the SFO and it was not practicable to do an investigation every time there was a story in the press. That seems plausible to me.

1516. On the material before me, I am not satisfied that there was a leak made or orchestrated by the SFO. Nor do I consider there was a knowing or reckless breach of duty on the part of the SFO in not conducting an investigation into it.

1517. In reaching that conclusion, I have taken into account two further matters. First, the issue over WB2 as potentially being relevant evidence as to an unwillingness on the part of the SFO to investigate matters. But because of my findings on that issue, it takes the matter no further. Second, there are the matters pleaded at paragraphs 12-16 of the 2019 Reply. These set out various communications from Mr Hollingsworth in 2013 and 2017, together with some press articles from September 2016. Such matters are relied upon as "similar fact evidence" to suggest a propensity to leak on the part of the SFO back in April 2013. These matters do not assist. Most significantly post-date the alleged leak here, and some do not actually implicate the SFO anyway as the source of any leak.

1518. Finally, it was not distinctly put to any SFO witness in relation to this matter that they knew that instigating a leak of a decision that was going to be made to the market hours later would probably cause significant loss to ENRC or they were reckless as to that matter. Indeed, it is not clear to me what loss would be alleged to flow here.

1519. Accordingly, for all those reasons, this element of the claim against the SFO fails.

THE JUNE 2013 MATERIAL: CLAIM AGAINST THE SFO

Introduction

1520. I have set out in paragraph 1464 above the documents which made up the June 2013 Material. I have dealt above with the allegation that Mr Gerrard sent this material and found

that he did. The allegation in this context is that the SFO acted in breach of duty once it received it.

1521. The June 2013 Material was received by Mr Coussey, a senior prosecutor and by then a senior member of the QUT01 team, who was probably by then in his early 70s. He had been called to the Bar in 1971 and worked in various prosecutorial agencies since 1972. He was awarded an OBE in 2010. He retired from the SFO on 4 May, 2018.

1522. Mr Coussey produced a file note in relation to the June 2013 Material on 6 June ("the Coussey Note") which stated as follows:

> "On 4th June I was handed a posted envelope by an SFO Messenger containing a copy of an 8 page letter dated 12 April 2013 from Neil Gerrard of Dechert LLP to Beat Ehrensberger (General Counsel for ENRC) and other papers.
> There was no accompanying letter from Dechert with the papers but one has to assume that the papers were submitted in compliance with the Section 2 Notice served on Dechert on 14th May 2013.
>
> The letter was written after Dechert had been de instructed by ENRC
>
> The terms of the letter concerned refutations by Dechert of allegations, by ENRC against Dechert, inter alia of:
> - That there had been unauthorised disclosure of privileged and confidential information to the press.
> - Inappropriate communications with the SFO
> - That the Dechert investigation had been conducted improperly and unprofessionally
> - Retaliatory Action by Dechert against individuals in ENRC
> - Improper Billing
>
> Dechert maintain that the allegations are unfounded.
>
> Enclosed with the letter are a number of documents which are marked Legally Privileged - "prepared for the purpose of obtaining legal advice" They include copies of slides presented to the SFO in July 2012 by Dechert.
>
> The enclosed documents relate to allegations of wrong doing in Kazakhstan (which at this stage are unlikely to be investigated by the SFO).
>
> The accompanying letter makes brief reference to the 3 Congo entities (foot of pp 5 and top of pp 6) which could form part of the SFO's investigation.
> It would of course be helpful to see Dechert's work on Camrose Resources, Camec and Chambishi, all three being Congolese entities and all three we will have an investigatory interest in.
>
> Dechert was going to refer to their work re the Congo at a meeting on April 3rd with the SFO, but by then their services had ben dispensed with by ENRC and switched to Fulcrum chambers. Clearly this material ought to be put on to our data base."

1523. According to Mr Mack, the Coussey Note was transferred from Mr Coussey's laptop to the QUT01 case drive in April 2018. Mr Mack also received two files of papers which Mr Coussey had prepared prior to his retirement. Mr Mack placed those materials in his filing cabinet.

1524. As at August 2018 there was a heavy filing cabinet with a lock, referred to by some as a safe (as I shall refer to it) which was meant to be a repository for particularly sensitive material.

On 21 August, Mr Robinson needed to look for something in the safe. He noticed that there was something there which he did not recall seeing before. This included the brown envelope containing the June 2013 Material and the Coussey Note. He could see that the materials not seen before related to Mr Coussey because there was, with the brown envelope, a black file making reference to him. Mr Robinson knew that Mr Mack had been sorting through Mr Coussey's materials after his retirement, and so he handed the file and the brown envelope to him.

1525. Mr Mack skim-read the Coussey Note until he started to question whether the accompanying material was privileged. He brought the matter to the attention of Mr Gibson, then the Case Controller, noting at the time that he thought Mr Coussey could have gained access to the safe to place material there by asking either Mr Robinson or Mr Hawkins who had the relevant code. Mr Mack then put the material into a blue bag, which is where hardcopy documents suspected to be privileged would be put and thereby quarantined. In his file note at the time, Mr Mack said that he thought it had been reasonable for Mr Coussey to have assumed that the material had been provided in compliance with a s2 Notice. For the purpose of his WS, Mr Mack was shown part only of the HS Report. In reading it he thought there was nothing which would have been any use to the SFO on QUT01 since it dealt with Kazakhstan.

1526. The existence of the June 2013 Material was first notified by the SFO to ENRC in the former's letter dated 26 September, 2018.

1527. Meanwhile, on 3 September 2018, Mr Coussey made a further note. This was in response to a letter from Kate Davies, a member of the SFO's Criminal Advisor/Security Advisor Team, asking Mr Coussey to assist in relation to the June 2013 Material which had been found in the safe. It appears that he asked for a copy of [his] Coussey Note to give some context, but he was not provided with it. He said in this further note that if he believed and wrote that the material had been handed over in compliance with a s2 Notice, then that was his honest belief at the time. He recalled that at the time, there was a requirement to get the (newly commenced) criminal investigation moving. He said that he did not discuss the material with Mr Wagstaff or Mr Dawes but might have discussed it with Mr Rappo or Mr Mallela.

1528. He went on to say that he could not recall what he did with the material or where it had been stored. He said the SFO was not interested in accessing privileged material and he usually questioned himself as to the status of any material. Here, it had been handed over and so presumably it had all been authorised by experienced solicitors who would know whether

they were waiving privilege or not. He could not recall sharing knowledge of the material with the investigation team in 2013 and had not done so with the current (2018) team. He did not know when the material had been placed in the safe but he did not recall putting it there. He very much regretted what had occurred. On the face of that note, if it is to be believed, it is not as if Mr Coussey was unacquainted with the concept of privilege. Rather, at the time, he assumed privilege had been waived.

Analysis

1529. ENRC alleges that Mr Coussey acted at least recklessly in relation to what was privileged material in the brown envelope. In other words, he did not honestly believe that any privilege had been waived because it had been voluntarily sent to the SFO. Instead, either he knew that it had not been, or he turned a blind eye to that possibility.

1530. Unfortunately, and as already noted, because of ill-health Mr Coussey was not called to give evidence and the SFO was permitted to rely upon his WS dated 10 December 2020, made in anticipation of the trial, as a hearsay statement. So he was not cross-examined. In his WS he deposed to the truth of what he had said in his September 2018 note and repeated that he took the view that the material had been authorised by Dechert to be sent to the SFO.

1531. He added that although he had said in the Coussey Note that the material should be put on the database, he was simply doing a review of it; he did not himself put it on any database nor did he instruct anybody else to do so. He wrote his WS without seeing the June 2013 Material but thought that from the Coussey Note, although not a detailed analysis of the material, the documents mainly related to wrongdoing in Kazakhstan which was not likely to be investigated.

1532. He could not recall what happened to the Coussey Note or the material after he wrote it. Indeed, as at September 2018, he could not recall that he had read it. While acknowledging the possibility of discussing the matter with Mr Rappo or Mr Mallela, he had no actual recollection of doing so. He did not recall a safe on the 4th floor at Canada House, which is where he worked back in 2013, but he thought there was one on the 6th floor which was given over to the investigation some two years later. He had absolutely no recollection of placing the materials there himself. He ended by saying that he carried out his duties in good faith, was not dishonest and did not intend to jeopardise ENRC or the investigation.

1533. If what Mr Coussey said in his September 2018 Note and in his WS is correct, there can be no misfeasance through him.

1534. ENRC placed much emphasis on the fact that Mr Coussey was very experienced and had many dealings with questions of privilege, including in the weeks preceding the arrival of the June 2013 Material. It also relied on Mr Mack's concession in oral evidence that it was perhaps not reasonable for Mr Coussey to have assumed that the material came to the SFO in compliance with a s2 Notice. Unsurprisingly, ENRC also relies on the fact that this particular package did not come with any covering letter or anything of that kind, which was obviously unusual. Equally, that Mr Coussey did not take the simple step of checking with Dechert whether it had sent it.

1535. Mr Wagstaff thought Mr Coussey's actions in dealing with the June 2013 Material were out of character. ENRC also noted the later expression of regret by Mr Coussey in 2018.

1536. I see all of that, and it makes a strong case of negligence against Mr Coussey. Of course I take into account that the ENRC has not had the opportunity to cross-examine Mr Coussey. Nonetheless, I do not accept that he was in knowing or reckless breach of duty. I cannot see what motive there would have been and I bear in mind the high regard in which he was generally held, according to a number of witnesses. ENRC says that Mr Coussey's reference to a need to get the investigation going means that he could plausibly have recklessly sacrificed ENRC's right to LPP for the end of a good result for the SFO investigation. I do not accept that. It is also said that Mr Coussey's comment that the SFO had no interest in gaining access to privileged documents was "belied" by the reference in the Coussey Note to seeing Dechert's work on the DRC transactions. I do not agree. I think his earlier comments just meant that if the material was viewed as privileged the SFO had no interest in seeking to use it when they would have been unable to.

1537. Moreover, if Mr Coussey was indeed knowingly or recklessly in breach, it would mean that, quite apart from his WS, his September 2018 note was also deliberately false as to what he thought. I do not think it was.

1538. For all the above reasons, I do not find any knowing or reckless breach of duty on the part of Mr Coussey in dealing with the June 2013 Material. Nor do I find that he was at least reckless as to any loss to be suffered by ENRC if he had been and indeed this was not something expressly submitted although, of course, it could not be put to him.

1539. However, in addition, ENRC alleges that on the basis that some or all of the June 2013 Material was in fact privileged without any waiver, the SFO made use of it during the investigation at least in the period before it was notified to ENRC in September 2018.

Further, that because of this, I should grant declaratory relief to prevent any use of it by the SFO in the investigation going forward.

1540. It is certainly something of a mystery as to how the June 2013 Material ended up in the safe by August 2018. However, ENRC emphasised that if Mr Coussey thought the material should go on the case drive I should assume that somehow this did happen. After all, in readiness for his retirement, he left the files and an index for Mr Mack and took him through them.

1541. Given that, on any view, the June 2013 Material was in the SFO's possession for around 5 years, ENRC asks me to infer that it must have been used by the SFO at some point. Indeed, it clearly was used by Mr Coussey in writing the Coussey Note; however, if that is all there was, that point does not really go anywhere.

1542. In order to rebut the suggestion of later use, the SFO makes two points. First, there is no electronic trace of the June 2013 Material anywhere from the investigation. It was never uploaded onto Autonomy DRS, which is the SFO's database. Nor was it recorded as having been booked in by the QUT01 Electronic Source Form. Both of these datasets have been searched but did not reveal anything in relation to the June 2013 Material. Mr Dawes was clear that if the material had been booked in or uploaded, he would have been made aware of it. And as the person responsible for developing the strategy for the case against ENRC he said, that to the best of his recollection, he was not aware of the material at all. Likewise for Mr Gibson.

1543. Second, the SFO relies on the multitude of witnesses who produced WSs to the general effect that they were not aware of the June 2013 Material. Eleven of the relevant individuals at the SFO who produced WSs on this subject were not cross-examined. That is no criticism of ENRC which had to decide how best to use its time in relation to all the witness evidence filed on this subject. But the fact remains that this represents a body of evidence from relevant individuals broadly stating that while they might have been aware of Mr Gerrard or the role of Dechert acting for ENRC, they had no recollection of seeing any of the June 2013 Material. Their evidence is summarised at Appendix N of the SFO's Closing and it is not necessary for me to repeat it here.

1544. One then has the witnesses who were cross-examined by ENRC. They were Mr Mallela, Mr Day, Mr Dawes, Mr Mack, Mr Hawkins, Mr Robinson and Mr Gibson. In relation to those witnesses, ENRC did not really get anywhere in cross-examination although it suggested that

their evidence might have been "too categorical" in saying that they had not seen the June 2013 Material. Only Mr Day accepted that he might have seen it.

1545. Finally, on witnesses, ENRC makes the point that there were 14 other individuals who were engaged in investigatory roles in relation to ENRC who had since left the SFO and not been called as witnesses. Four of them had been involved in the investigation by April 2014 and so they could have been briefed by Mr Coussey not long after he made the Coussey Note. I think that is something of a counsel of perfection so far as ENRC's comment is concerned.

1546. The fact is that a wealth of evidence including the fact of negative electronic searches has been produced to rebut the suggestion that the SFO has in fact used the June 2013 Material in the investigation. Given that much of it concerned Kazakhstan, it is not as if there would have been much interest in it in the years following the Coussey Note. Pausing there, on that basis, I cannot possibly find that the SFO did use the June 2013 Material in the investigation.

1547. However, I have to deal with a further point made by ENRC, made for the first time in a letter dated 8 April, 2021, i.e. not long before the trial started. Here, ENRC said that it must follow that Mr Coussey and other members of QUT01 had looked at the June 2013 Material. This was on the basis that Mr Gerrard's letter of 12 April 2013 had, at page 6, made specific reference to evidence presented to members of the SIC and Martin Moore QC on 20 and 26 March 2013, who confirmed that the ENRC Board would be criticised and could face individual personal liability if it failed to take action against certain individuals. The earliest SFO document making any reference to Mr Moore was one produced by Mr Coussey originally on 15 August 2013, being an update on events since 14 June 2013 and which, according to the SFO and meta-data, was subject to further updating. There is an entry dated 9 May 2014 about an email from Mr Gibson of the same date referring to Mr Moore. A s2 Notice, drawn up by Mr Hawkins, was sent to Mr Gerrard at Dechert on 21 May 2014. The documents required included documents sent to Mr Moore on or about 15 March 2013 to include those that were in what was described as a blue file. ENRC argued that the only way that the SFO could have got information about Mr Moore advising was from Mr Gerrard's letter of 12 April 2013, which formed part of the June 2013 Material.

1548. In response to this, the SFO served a further WS of Mr Emson dated 21 May 2021. He said that some of the information about Mr Moore had in fact come from a different source, namely individuals who were interviewed on 10 and 28 April, 2014. The first gave a voluntary interview and the second was interviewed pursuant to s2. In his WS, Mr Emson did not produce either of the notes of the interviews themselves on the basis that they were

considered to be subject to the SFO's LPP relating to material generated by the QUT01 team for the purpose of the criminal investigation. He said that the SFO could not voluntarily identify any interviewees without their consent. The s2 interviewee refused consent and this meant that the issue of consent by the person who gave the voluntary interview became academic; this was because it was necessary to have the notes of both interviews to establish the point about Mr Moore being identified as the relevant counsel.

1549. That then led to an oral application made before me on the last day of openings on 27 May 2021. ENRC said that as far as the s2 interview was concerned, there had been a waiver of privilege by the production of Mr Emson's statement, and any confidentiality issue in relation to the voluntary interview could be overridden by an order of the court. I acceded to that application to the extent that I ordered that the SFO should by 3 June produce to the other parties copies of such parts of the interview records including any record of questions asked which elicited relevant answers that concerned how the SFO claimed to have become aware in its criminal investigation of the involvement of Mr Moore with ENRC. See paragraph 8 of my order of 27 May. Extracts from the typed interview notes were produced with substantial redactions. I should add that on 7 July 2021, the SFO served a second WS of Mr Gibson, dealing with these matters also.

1550. These documents showed that Mr Day had made a typed note of the 10 April 2014 interview, which he conducted together with Mr Gibson. Page 7 of that note did not refer to Mr Moore by name but said that Mr Dalman had wanted an independent QC to look at the evidence and this was arranged through AG.

1551. The second (s2) interview was attended by Mr Gibson, Mr Day and Mr Dawes. Mr Gibson said he understood that separate counsel was being instructed to assist the SIC and he asked the interviewee who it was; the answer given was Mr Moore.

1552. As to the first interview, Mr Gibson and Mr Day accepted that the information given might have been in response to leading questions. As for the second, while Mr Gibson referred to assisting the SIC, the unredacted parts of the 10 April interview note had made no reference to such assistance. However, the 12 April 2013 Letter did say that evidence had been produced to the SIC and Mr Moore; i.e., the particular reference to the SIC must have come from somewhere other than the interviews themselves. Also, it was put to Mr Gibson that the interview notes did not refer to Mr Moore being given documents in a blue file so he must have got that information from somewhere else. Mr Gibson said that he knew of the blue file from a number of sources but Mr Coussey was not one of them. The point could not be taken

further because the SFO at that stage claimed LPP in relation to matters concerning QUT01. ENRC submits that this piece of evidence is itself inconsistent with Mr Gibson's claim in his second WS not to recall how he had learned of Mr Moore's instruction. I am not sure that this follows since this reference in paragraph 4 was that without looking at other contemporaneous records he was unsure of how he came to know that Mr Moore had been instructed for the purpose of the s2 Notice against Dechert although, on reading the Notice again, now, a certain person did come to mind. Either way, I did not think that Mr Gibson was being untruthful when he referred to other sources for the information about the blue file. Furthermore, it is certainly the case that the 12 April, 2013 letter made no reference to a blue file.

1553. Mr Day thought that he might have spoken to Mr Coussey in advance of the interviews but no further specific questions were asked of him. Mr Dawes was almost certain that Mr Coussey had not provided him with any of the June 2013 Material although he accepted that he spoke to Mr Coussey regularly and did not know of any reason why Mr Coussey might want to keep that information from him.

1554. ENRC added that it had asked the SFO for copies of Mr Day's manuscript notes taken during the voluntary interview to see what questions were asked that elicited the answers quoted. Such documents should have been produced because of a collateral waiver, according to ENRC. It also asked for documents showing Mr Coussey's awareness or otherwise of the interviews, which it said were necessary in order for the SFO successfully to rebut the inference sought to be drawn by ENRC. In response, the SFO denied that there had been any collateral waiver and said that what evidence it wished to adduce to rebut the alleged inference was a matter for it. There the matter rested. This was correspondence which was occurring during the trial. I was not asked to make any ruling that there was (or was not) non-compliance with my order of 27 May or otherwise. I therefore simply have to proceed on the basis of the information before me.

1555. One matter which is significant, in my view, is timing. The s2 Notice was sent to Dechert on 21 May, not long after the two interviews, and the reference to Mr Moore in the update document started by Mr Coussey on 9 May. This suggests that the interviews were indeed the source of the reference to Mr Moore. Mr Gibson also made the fair point that if he already knew of Mr Moore's involvement prior to the interviews, it is difficult to see why he asked who the relevant counsel was in the s2 interview.

1556. In my judgment, there is no satisfactory evidence that the SFO did make use of the June 2013 Material. Nor do I accept that there was a breach of duty in not "blue-bagging" or alerting ENRC to the June 2013 Material earlier than occurred. In any event, even if there had been a free-standing duty to take those steps (and I do not think that there was) there was no basis for thinking that it was deliberate or reckless.

1557. For all of the reasons given above, no part of the claim against the SFO in relation to the June 2013 Material succeeds.

THE BEIGE NOTEBOOK

Introduction

1558. It is common ground that Mr McCarthy made notes in a number of notebooks while he was at the SFO, although he also recorded matters elsewhere. It is also common ground that he had a notebook covering the period 22 July, 2011 until his departure on 9 December, 2011. Although Mr McCarthy has not given evidence, he has said (and it is accepted for present purposes) that his last notebook was the colour beige, as he had run out of blue notebooks, his usual colour. Finally, it is common ground that what has been referred to as the Beige Notebook has gone missing. It potentially covered matters relating to ENRC since he was dealing with ENRC over that period along with other matters.

1559. ENRC claims that the SFO has deliberately suppressed or destroyed the Beige Notebook in breach of its Independence and/or Evidence Duties. ENRC suggests that this was done so as to hide its (on ENRC's case, incriminating) contents, namely Mr McCarthy's work on ENRC and his contacts with Mr Gerrard. The SFO denies any breach of duty (and denies the existence of an Evidence Duty in any event) but obviously accepts that if it had been deliberately suppressed or destroyed there would have been a breach of the Independence Duty.

The Documentary Trail

1560. I have seen a number of documents and heard from Mr Mills and Mr Magenis in particular as to the SFO's general system for archiving material. The process was this: if documents are to go into physical archive or storage, the person depositing the material fills out a "Record Transfer List" ("RTL"). This will say how many boxes of material are being deposited and give a description of each of the items, or categories of item, within them. The material is delivered to the SFO's Materials Management Team ("the MM Team"). Once received, the MM Team would send most material to offsite storage sites but if necessary it could be stored

on site, in the team's safes. At some point in 2012, secure off-site facilities became available which could take materials which would otherwise have to stay within the SFO's premises.

1561. If someone wanted to have temporary access to any archived material, they would first need to sign it out in the Archived Material Book and then sign it back in when returned. The general practice was that individual items could not be signed out but only the boxes containing them, which would then have to be returned.

1562. On arrival at the MM Team, a member would check the contents of the box with the description given in the RTL. The box and its contents would then be entered onto a Registry Database. The system would automatically allocate a Job Number and the date when the entry was created, known as a "Mark Off Date". The box would also be allocated a Mark Off number which consisted of a letter prefix, depending on the source of the document or the letter "U" if the source is not a defined category, followed by the last two digits of the relevant year e.g. 12 for 2012, and then the Job Number and then the number of the box as there might be more than one.

1563. In addition, if the box was to be secured off-site there would have to be a barcode entered which would be provided by the relevant storage facility as opposed to one generated by the SFO's system. Best practice would be to enter all boxes delivered on the Registry Database even if they were to stay on site but as Mr Mills accepted, this did not always happen; it depended on the individual dealing with the box. If the box was not entered on the Registry Database, some other record of its arrival would be made but it might not always be easy to find that separate record. As it happens here, there are Registry Database entries for all of the boxes with which I am concerned.

Mr McCarthy's Documents

1564. The above process is relevant because Mr McCarthy's PA, Ms Carlyle, sought to archive all of his material following his departure from the SFO. In January and February 2012 she archived a total of 7 boxes of his material. In relation to Box 1, she sent to the MM Team a draft RTL on 10 January and then on 12 January sent actual RTLs for Boxes 1 and 2. She said that more would follow. The RTL for Box 1 described the third item thus:

> "Confidential-Keith McCarthy's Note Books:
> Volume 1 - 0 4 December 2009 - 02 February 2010
> Volume 2 – 22 February,2010 – 20 September 2010
> Volume 3 – 02 August 2010 – 16 December 2010
> Volume 4 - 10 January 2011 – 21 July 2011"

1565. The RTLs relating to Boxes 1-4 were entered onto the Registry Database although it looks for some reason as if this was not done until 16 May. For all 7 boxes deposited in January and February, there are corresponding Registry Database entries.

1566. In relation to Box 4, Ms Carlyle attached by email a revised RTL on 10 May because she wanted to add a further item to it which she said she would bring down. Mr Magenis emailed her later to say that it had been placed in "Box A in a safe" and the records would be updated. He also sent a separate email at the same time to other members of the MM Team (including Mr Mills) to say that he had made a folder within the Safes Folder on the G Drive containing Ms Carlyle's RTLs. Her boxes were marked with numbers while those in the safes appear to have letters as identifiers. There seems also to have been a Box B because on 23 April, Mr Ells signed it out and returned it the following day. This was said to refer to or contain "Confidential KM Files".

1567. It is further common ground that at least when initially delivered, the Boxes were to be stored securely on site. However, and as can be seen from the relevant barcodes, this changed when secure off-site facilities were contracted for.

1568. In their evidence, neither Mr Mills nor Mr Magenis could be sure what Box A was, although Mr Magenis said that it was a temporary holding reference. I agree that the likelihood is that Box 4 and Box A were the same. I also agree that there is no reason to think that Box A was some separate collection of documents not appearing in Boxes 1-7 which had not been logged in an RTL or on the Registry Database. There is, further, no reason to think that the extra item which Ms Carlyle wished to add was itself the Beige Notebook. This is first, because the notebooks were all put into Box 1, not Box 4, and secondly because of what she said on 9 July.

1569. On 9 July, when Ms Carlyle was obviously investigating something to do with Mr McCarthy, she sent an email to Mr Tumani, copied to Sir David. The unredacted parts read thus:

> "Firstly, I have managed to locate some further papers that Keith held on… so please let me know when you are at your desk so that I may pass these to you personally. Secondly, I have recalled the archive box in which Keith's 'note books' are held. Having now gone through them, the only reference I can find in relation to…is as follows, and there is no reference made to where this note book entry came from or who (if that is the case) he was discussing it with…
> This is in the notebook 'Vol4' dated 10 Jan 2011 to 21 July 2011. I do not have or have I had access to the note book that follows on from this which would take you up to Keith's departure on 09 December 2011."

1570. That last sentence seems a clear reference to her understanding at the time. It is consistent with only the four identified notebooks as having been logged on the RTL.

1571. On 25 July, Ms Carlyle deposited an 8th Box although she did not give it a number as such. This was no doubt the further material she had alluded to in her email of 9 July.

1572. Two further boxes were delivered by Ms Carlyle to the MM Team in November 2012.

The Search for the Beige Notebook

1573. By August 2013, Mr McCarthy was assisting the SFO in providing information in relation to discussions he had had with Sir Alex Allan, or at least he was in contact with the SFO on such matters. On 6 August, he emailed Sir David requesting a copy of his notes of such discussions and he wanted the pages from his notebook which dealt with a meeting with Sir Alex. No doubt as a result of that, Mr Peck emailed Ms Carlyle to have a word about Mr McCarthy's old notebooks.

1574. On 19 August, Mr Peck emailed to Mr Drake that "we know where we are in respect of Keith's own notebook". In an email to Mr Drake dated 21 August Mr Peck wrote in very large letters: "Find me a solution to this!" As Mr Peck said in his WS, these suggest that by then he was aware of a problem in locating the notebook, which included the relevant notes (which, because of the dates, would have been in the Beige Notebook); he could not say if by that stage he knew that it had been lost.

1575. On 30 August, Mr McCarthy chased Sir David and Mr Drake about being provided with the relevant notebook pages. On 10 September Mr Drake wrote as follows to Mr Peck:

> "… The relevant pages that Keith McCarthy is requesting from his SFO notebook (Volume 5) which SFO is not in possession of.
> Sam Carlyle… Recalls archiving 5 volumes but when she had occasion to recall them for a previous SFO SMT enquiry there was 1 missing. It does not appear that this was officially reported but Sam can give the full details…."

1576. Mr McCarthy, Mr Peck and Mr Drake then had a meeting on 30 September. Mr Drake's note included the fact that the meeting was called to discuss the contents and whereabouts of Volume 5 of Mr McCarthy's notebooks. Mr McCarthy referred to various entries in the notebook which would have been in late July and up to mid November 2011. He referred to its beige cover.

1577. In addition, however, Mr Peck's manuscript note for this meeting said that according to Ms Carlyle, she had been asked to recall the archived boxes by Ms Williamson's Private Office in February or March 2012. She asked for what purpose and nothing further happened. However it appears as if they were recalled by Ms Williamson's office. When Ms Carlyle did recall the files for another purpose, in early April, Volume 5 was no longer there. An action point noted by Mr Peck was to email Ms Williamson to see what she knew about this. He did

so on 1 October. However she replied saying she had no knowledge of the 5th notebook. Indeed it was news to her that he had kept notebooks, let alone archived them.

1578. Pausing there, the information apparently provided by Ms Carlyle at this time is inconsistent with what she had written in her email of 9 July, which was that she had never had access to the Beige Notebook.

1579. Mr McCarthy had obviously been told the gist of what Ms Carlyle had said because he stated it in an email to the Metropolitan Police on 7 November, 2013. In addition, Mr McCarthy was interviewed by Slaughter and May in connection with the *Tchenguiz* proceedings. He said that a notebook of his had gone missing and it had been checked out by Ms Williamson. Following an application for pre-action disclosure by ENRC and following an enquiry from Mr Gibson, Mr Drake sent to Mr Gibson the file note of the meeting of 30 September, 2013 and an extract of the message from Mr McCarthy to the Metropolitan Police. That led Mr Gibson to write to ENRC's solicitors saying that it had been established that it appeared that the notebook was booked out of the SFO archive in March 2012 by the then CEO of the SFO, Ms Williamson.

1580. Later, in May 2019, Ms Ling, an investigator at the SFO, emailed Mr Drake about the missing notebook. At that stage, Mr Drake said that Materials Management had told them at the time that Ms Williamson had booked out the box with the last notebook. This was confirmed by the recollection of Mr McCarthy's last SFO PA, Ms Carlyle. He was then asked by Ms Ling to explain the fact that while Mr McCarthy said that he had been told in the meeting about the access by Ms Williamson, Mr Drake's own note of the meeting did not refer to this. Mr Drake responded by saying his memory was quite vague about who said what given the passage of time but at the time of the meeting they did know about the box supposedly being booked out to Ms Williamson. Either he or Mr Peck told this to Mr McCarthy.

1581. All of these statements clearly derived from the information which had been supplied back in September 2013, being what Ms Carlyle had apparently said. The only possible addition to this comes in the reference by Mr Drake in his May 2019 email to "Materials Management" saying something to the same effect as Ms Carlyle. That said, those who produced evidence (Mr Emson, Mr Mills, Mr Magenis, Ms Anderson, Mr Chapman, Mr Coleman, Ms Connery, Ms Dias, Ms Hamilton, Ms Morley and Mr Lee Man Yan), said that they did not hear this at the time.

Analysis

1582. Ms Carlyle did not give evidence before me, nor did Mr Drake. There is no basis, in my judgment, for me to conclude that Ms Williamson did indeed remove the Beige Notebook. First, this was not Ms Carlyle's recollection the year before when she was still in the process of archiving material. Second, although Mr Drake's email of 3 May suggests that possibly someone other than Ms Carlyle had said the same thing, there is no evidence before me that this actually happened. Third, there is no documentary evidence of Ms Williamson booking anything out from the boxes relating to Mr McCarthy.

1583. ENRC submits that the Beige Notebook must have been archived nonetheless. I do not see how. I do not think that the Boxes A and B contained material other than Boxes 1-7. It was also suggested that perhaps the Beige Notebook had come in as item 6851 on Box 6, according to the Registry Database, on 7 February 2012. There was no barcode against this item and its description was blank and so it was suggested that this could have been the Beige Notebook, originally there, and then removed. That does not make much sense to me. In fact, the relevant RTL recited a list of 9 items, which were reflected in items numbered 5549-5558. 6851 seems an additional and much later number. Mr Mills thought it was an accidental entry. Moreover, because all the Registry Database logs were done using consecutive numbers, that suggests that this entry came after 6087 which appears in relation to the 8th Box logged on 13 July. But this was just after Ms Carlyle had said in the email that she did not have and never had the 5th notebook.

1584. As against all that, ENRC makes the further point that first, Mr Mills was unable to find Box 5 in any of the MM Team's safes. It did not appear to have gone off site (as the others ultimately did) because there were no barcodes which would be necessary for that to occur. I agree that this means that it is impossible to check the physical contents of the Box because it cannot be found. But the RTL and the Registry Database entries are all there and they do not record the Beige Notebook. Box 5 was delivered on 25 January 2012. So, if Ms Carlyle had the Beige Notebook (which she said she did not) it would surely have gone in Box 1 a short time earlier. So this point takes the matter no further.

1585. Next, in relation to item 6851, it is correct that Mr Mills accepted that there was no text and if it was not an error (he thought it was) one would not be able to say what item had been originally added. Further, any addition might not necessarily show because although Ms Carlyle made an addition to Box 4, this seems not to have been reflected in the new RTL although she obviously thought that she was amending it. But all of this is speculation,

especially if the thesis is that in July, the Beige Notebook was added, and then removed at some later point. Anyway, if one goes by the oft-repeated account that Ms Williamson had called for the box and removed this notebook, that suggests that it had been there with the other notebooks and then taken from Box 1.

1586. I take the point that I have not heard from Ms Williamson, who declined to give evidence, nor from Mr Drake, even though he still works for the SFO, while others who were called commented on Mr Drake's emails. It is also correct that other MM Team members who had left the SFO were not called nor was Mr Ells. However, I can see that there is a limit to the number of witnesses to be called to prove a negative, especially if they all are saying more or less the same thing and as for Mr Ells, it is not suggested that he took the Beige Notebook.

1587. It is true that in the Privilege Proceedings, Mr Gibson's 4th WS said that he had reviewed Mr McCarthy's notebooks (Mr McCarthy being one of the "Key Custodians"). That was not correct because the Beige Notebook was missing. But he said that he was not aware of the Beige Notebook when he made this statement in September 2016. That evidence was not challenged and in any event I accept it. Equally, it is true that Slaughter and May did not refer to the missing Beige Notebook on 30 June, 2014 when they stated that Mr McCarthy's notebooks had been disclosed, even though they were aware of this from Mr McCarthy. But it was not suggested to the witnesses who were asked to comment on it that this was deliberately misleading.

1588. In my judgment, despite all the suspicion and speculation, there is in truth nothing of any substance in the allegation that someone on behalf of the SFO deliberately suppressed or destroyed the Beige Notebook. This aspect of the claim against the SFO must therefore fail.

THE WEBSITE STATEMENT

Introduction

1589. ENRC's core allegation is that the SFO failed to remove from its website any reference to an investigation into ENRC's activities in Kazakhstan until 27 January 2016, even though from an early stage Kazakhstan was not the focus of the investigation, Africa was. The two SFO witnesses who dealt with this matter were Mr Gibson, who was cross-examined, and Ms Givens, who was not.

1590. ENRC contends that the SFO delayed very considerably in correcting what it knew to be an inaccurate presentation of the scope of the investigation on the website and this was in breach of its Independence Duty. The motive for doing this is alleged to have been that the SFO did

not want negative publicity when it would be realised that it had "dropped" any investigation into Kazakhstan. In cross-examination, ENRC added another motive on the part of Mr Gibson; that he had an "animus" against ENRC. All of this is denied by the SFO.

Key documents and events

1591. I set out first the history by reference to some key documents.

1592. The website announced the investigation in this way, using wording supplied by Mr Gould:

> "ENRC PLc
>
> 25 April 2013
>
> The Director of the SFO has accepted ENRC Plc for criminal investigation. The focus of the investigation will be allegations of fraud, bribery and corruption relating to the activities of the company or its subsidiaries in Kazakhstan and Africa."

1593. Although readers were invited to check the website for updates, there was none as such until January 2016 when the references to both Kazakhstan and Africa were removed.

1594. A file note made by Mr Coussey on 6 June, 2013 said that at that stage Kazakhstan was unlikely to be investigated.

1595. On 8 October, the SFO issued a s2 notice against Fulcrum Chambers but this notice excluded material relating to ENRC's Kazakhstan operations. On 18 October, Fulcrum Chambers wrote seeking a confirmation that this meant that the SFO's investigation into Kazakhstan had been concluded and ENRC would not therefore expect a s2 notice in that respect. The SFO's letter of reply of 25 October did not give that confirmation because it would be premature to rule out an investigation in the future about Kazakhstan.

1596. On 8 November, the SFO informed a *Mail on Sunday* reporter that there was no update to the website statement.

1597. On 14 November, Fulcrum Chambers wrote saying that there was no proper evidential basis for ENRC continuing to be considered a corporate suspect in relation to Kazakhstan. The refusal of the SFO to acknowledge this formally was causing harm to ENRC in conducting its business affairs including dealing with banks. The only proper course was for this aspect of the investigation to be concluded and for the SFO to confirm that ENRC was no longer a corporate suspect in that regard.

1598. The SFO did not respond directly although at a meeting with FRA on 19 June, Mr Gibson said (according to his file note) that the SFO was confining its investigations at that stage to Africa. According to ENRC's file note, Mr Gibson said that the SFO was not investigating

Kazakhstan at the moment and so FRA could take the Kazakhstan data offline, and just hold it as a backup.

1599. By this stage, work was progressing on a new SFO website. A beta version of the website eventually went public on 10 December, 2015 and then it replaced the former website on 27 January, 2016. On 27 June, 2014, Ms Givens wanted to know whether the new website should contain the existing website entry for ENRC. Mr Gibson sent the following revised statement to be used, which was then put on the beta website:

> "The focus of the investigation is allegations of fraud, bribery and corruption around the acquisition of substantial mineral assets in Africa."

1600. However, the existing website was not updated in parallel. Ms Givens explained in her WS that as a matter of routine, the existing website was not being updated in parallel with the beta website because that would mean it would take even longer to finish the new website project. But if a member of a case team had specifically asked for the wording of an entry on the existing website to be changed, they would have done so.

1601. On 24 March 2015, the firm of Debevoise & Plimpton wrote to Mr Gibson. This was further to a meeting which had taken place on 19 March. The letter also referred to a meeting between Lord Goldsmith QC and Mr Wagstaff on 16 March. On that occasion, Mr Wagstaff informed Lord Goldsmith QC that the SFO was no longer investigating Kazakhstan and had not done so for some time. According to the letter, Mr Wagstaff had expressed surprise that ENRC did not already know this. This was in the context where the letter was suggesting that until then, ENRC had been led to believe that the SFO was still looking at Kazakhstan. It was stated that there had been repeated requests for the SFO to state its position on Kazakhstan and this element of the investigation was having a profound effect on ENRC's business, as the SFO had already been told. Among other things, the SFO was asked immediately and publicly to announce the conclusion of its investigation of the Kazakhstan business.

1602. On 27 March, 2015, Mr Gibson replied thus:

> "We refer to your letter dated 24 March 2015. Your letter is predicated on an assumption that the SFO has made a decision formally to end its investigation into your client's affairs as they relate to Kazakhstan. That is not the case. Rather, as we indicated during the course of our meeting on 19 March 2015, our present focus has been, and remains, on your client's African operations. You will appreciate, however, that our investigation is not yet concluded and we will continue to pursue all reasonable lines of enquiry. For this reason, whilst we are content to confirm that we are not at present actively investigating your client's Kazakh operations, we cannot confirm that we will not do so at some future point. In the light of this, your other requests are inapplicable."

1603. The correspondence eventually came to an end with a letter from the SFO dated 14 May as follows:

> "We refer to recent correspondence between the SFO and your solicitors — Debevoise & Plimpton LLP. We confirm that we are not at present actively investigating any of your operations in Kazakhstan."

1604. As it so happens, on 11 May, Ms Roe of the SFO's Press and Communications Office wrote to Mr Gibson to see if he wanted to amend the current entry on the beta website which was expected to go live to the public soon. It had been made available to SFO staff since 23 April. Mr Gibson's reply was this:

> "We have just spoken. I will try to ensure that we confirm the correct wording of the SFO investigation into ENRC 'case information' on the new website. Please make sure that the new wording you propose is not published on the new website without the express agreement by me and Matthew Wagstaff. As I explained we should have agreed wording for you by Friday 15th May in any event."

1605. Accordingly, the web content changed to that extent. The existing website was unaltered and in fact it would be over 6 months until the beta website went live.

1606. The final episode is this: on Wednesday 21 October, the FT's Moscow correspondent called Ms Roe. He had just interviewed Benedict Sobotka, the then CEO of ENRC. He had said that the SFO had confirmed that its investigation into Kazakhstan had been dropped with the focus now on Africa. Ms Roe proposed to Mr Gibson that a "no comment" answer be given. Mr Gibson agreed but added that what Mr Sobotka alleged was itself incorrect. The correct position was as stated in his letter of 27 March, after which ENRC had not come back to request an amendment to the website. Ms Roe then sent an email to others at the SFO including Ms Givens to say that she had explained the position to the SFO's team on the ENRC investigation. She told them that the SFO did not have a policy of making a running commentary on investigations. Just because it was not focusing on Kazakhstan now did not mean that the focus might not shift back later on. It was thus not necessary to amend the original website entry of 25 April 2013.

1607. As already noted above, the existing website entry was only removed when replaced by the new one on 27 January 2016.

Analysis

1608. The first question is whether Mr Gibson was exercising a relevant power for the purpose of the misfeasance claim. In my view, he was. He was dealing with how the criminal investigation should be described to the public which seems to me to be ancillary to his underlying power (along with others) to investigate ENRC. I reject the argument that dealing with website content is too remote from the underlying power. Indeed it is significant that the

website content relating to an investigation needs to be overseen, or at least checked, by a caseworker on the relevant team.

1609. As for the relevant duty, ENRC's case effectively is that to mislead the public about the scope of an ongoing investigation is, or could be, a breach of the SFO's Independence Duty. It is not suggested, nor could it be, that there is some free-standing duty to maintain an accurate website or anything along these lines. The reason why there could be a breach of the Independence Duty is because not to remove a misleading website entry would or could amount to a lack of objectivity, or independence or constitute bad faith since the making of a misleading statement has the capacity to damage the interests of the company concerned and/or indeed damage the standing of the SFO itself. In this case, of course, ENRC was indeed saying that its own commercial interests were being affected by the continued reference to Kazakhstan.

1610. It follows that a mere failure to correct a misleading statement in the website, even if negligent, is not sufficient for the claim of misfeasance here. In essence, Mr Gibson must have been acting in bad faith as against ENRC. That is not the same as targeted malice. ENRC's principal case on motive was rather that he (and the SFO) did not want the embarrassment of any suggestion they had "dropped" Kazakhstan. Knowingly leaving a misleading statement on the website for that reason would be bad faith. Equally (and this would come close to targeted malice) if Mr Gibson had a real "animus" towards ENRC at the material time and wanted to harm it by leaving the uncorrected statement, that, too, would be bad faith and be sufficient in my view for misfeasance.

1611. Before turning to Mr Gibson and his evidence, certain preliminary points may be made:

(1) In the end, the SFO submitted that the website statement was actually correct because it was always true, as a matter of historic fact, as at 25 April 2013; I see this, but this was not posted as an archive and the objective reader would not see it in that way, otherwise it would mean that it could never be inaccurate and for the same reason, not of much use. Further, other SFO witnesses agreed that the entry was misleading and indeed so did Mr Gibson himself;

(2) Mr Gibson was happy to amend the entry in June 2014 for the purpose of the new website; on that footing (and without knowing how long it would in fact be before the new website would go live) that is hardly the sign of concern over "dropping" Kazakhstan or an animus towards ENRC;

(3) Equally Mr Gibson later confirmed the position over Kazakhstan in the letter of 27 March, 2015 with a reasoned explanation as to why it could not be said that there was any formal end to a Kazakhstan investigation; this was then followed by the letter of 14 May (which could presumably be shown to third parties) confirming no active investigation, and without further complaint from ENRC;

(4) The revised wording of the beta website to remove the reference to any jurisdiction was explained as being required in order to keep open all lines of enquiry without having to keep returning to the website.

1612. Mr Gibson himself was not a straightforward witness in that he was at times argumentative and opinionated and certainly bore an animus towards ENRC now. That is perhaps unsurprising since ENRC commenced legal proceedings against him and the SFO in January 2021. This new claim alleged that Mr Gibson had passed confidential information from the criminal investigation to the press in 2020, long after he had left the SFO. The claim is denied in its entirety. However, the question is not about his animus now but whether he had such an animus back in 2014-2015.

1613. On the other hand, in many respects, Mr Gibson made concessions, for example that the original entry was misleading and that, as case controller, he had decided that Africa would be the focus within a few weeks of his arrival in March 2014. He was also realistic about how ENRC's commercial interests might be affected by a misleading entry. Overall, I thought that, fundamentally, he was an honest witness.

1614. It is perfectly true that there was no amendment to the original entry when he agreed the text for the beta website. But as already indicated that is perhaps understandable if the beta website was thought then to be coming on stream reasonably quickly. Ms Givens explains the significant delay and her account is unchallenged. Mr Gibson accepted that the correction should have been done but that the new website had taken a long time to appear.

1615. In cross-examination, he accepted that by October 2014 the investigation into ENRC had become a very challenging environment. He was beginning to lose patience with ENRC, having originally been optimistic. But he firmly denied that this had a bearing on his willingness to allow misleading information on the website to continue. As he said, if that was so, he would not have gone on to do what he did for ENRC in March and May 2015.

1616. It seems to me that Mr Gibson was also entitled to change the information on the beta website to make no reference to any particular jurisdiction. Had that been done at the outset,

ENRC could not have complained. It has to be remembered that the SFO tended not to comment on current investigations for obvious reasons and a "no comment" response was not unusual.

1617. Given the delays with the new website it would obviously have been better if Mr Gibson (or, for that matter Ms Givens) had kept a tighter grip on the content of the existing website - they may have been careless in not doing so. But that is no basis to say that Mr Gibson (or anyone else at the SFO) was acting in bad faith either to avoid embarrassment on Kazakhstan or deliberately to act against ENRC.

1618. Accordingly, the claim against the SFO is not made out here.

CONCLUSIONS ON THE FURTHER MISFEASANCE ALLEGED AGAINST THE SFO

1619. As a result of my findings on the further misfeasance allegations, set out at paragraphs 1485-1618, the question of knowledge of loss does not arise. All of these further claims fail as against the SFO.

ADVERSE INFERENCES

1620. As will have been seen, there is, in truth ample evidence to support proof of the allegations which I have found to be established. I did not consider it necessary or appropriate here to resort to the drawing of adverse inferences against the SFO from its failure either to call Mr Alderman (in the end for personal reasons) or at least to have obtained a WS from him at a much earlier stage.

1621. Nor would I draw an inference against ENRC from its failure to call Mr McCarthy, which in any event is double-edged, since the SFO could, in the end, have called him.

1622. Finally, I drew no adverse inference from ENRC's failure to call Mr Vulis. I agree that he may have assisted on some matters, not least where negative points about him were made by Dechert, and as the present sole director of ENRC, this failure may seem odd. However, in my view, any evidence that he could have given would not be particularly important on the key issues.

1623. However, as noted on occasion above, it remains the case that there is in fact no evidence from these three individuals. To that extent, the materials before me were not complete, and I have had to go on what is before me.

LIMITATION OF LIABILITY

Introduction

1624. It is common ground that any claim against Dechert and Mr Gerrard is subject to the various limitation of liability provisions to be found in and annexed to the Retainer Letter. I first set out those provisions and then determine the issues between the parties as to the scope and applicability of those provisions.

The provisions

1625. The Retainer Letter itself contains the following:

> "**Limiting Dechert LLP's liability to you**
>
> Our maximum liability to you in relation to this matter will not exceed £3 million. By signing and returning a copy of this letter to us you confirm that you understand and accept this. Please let us know if you would like to discuss it further.
>
> We draw your attention to the limitations of liability in our Terms of Engagement, attached as an appendix to this letter, particularly where you have agreed a limitation of liability with another professional adviser acting for you on the matter.
>
> This letter does not amount to a contentious business agreement within the meaning of the Solicitors Act 1974. You understand that the consequence of that is that first, your statutory rights to challenge our costs is not limited by section 60 (1) of that Act and second, our ability to agree with you a limit on how liability is not affected by section 60 (5) of that Act.
>
> **Complaints**
>
> If you are unhappy about any aspect of the service you have received, or about the bill, please contact me or Senior Partner in London.… You may also have a right to object to the bill by applying to the court for an assessment of the bill under Part III of the Solicitors Act 1974."

1626. The appendix to the Retainer Letter is headed "DECHERT LLP TERMS OF ENGAGEMENT". The relevant provisions are as follows:

1627. "**Exclusions and Limitations on our Liability**

> *Proportional liability*
>
> There is a risk that we will be prejudiced by any limitation or exclusion of liability which you agree with any other person (for example, another adviser) in connection with a matter in which we are advising you. This is because such a limitation or exclusion of liability might also operate to limit the amount which we could recover from that other person by way of contribution if we were required to pay you more than our proper share of the liability. Accordingly, in order that our position is not adversely affected by any limitation or exclusion of another person's liability, you agree that we will not be liable to you for any amount which we would have been able to recover from the other person by way of indemnity, contribution or otherwise but are unable to recover because you agreed, or are treated as having agreed, with them any limitation or exclusion on their liability…
>
> *Liability cap* We may, from time to time, agree with you that our aggregate liability to you in relation to a matter is limited to an amount specified in the relevant Engagement Letter (a **"Liability Cap"**). Where a Liability Cap is agreed it will apply to our aggregate liability to you (together with any associated party for whom you are acting as agent in relation to the relevant matter on any basis (including for example contract or negligence) for all Losses arising from or in connection with our services in relation to the relevant matter. By **"Losses"** in this and the following paragraph we mean all demands, claims, actions, proceedings, damages, payments, losses, costs, expenses or other liabilities.

[the Cap]

No claim against individual employees/partners

You accept that we have an interest in limiting the personal liability and exposure to litigation of employees, consultants and partners and that we are a limited liability entity. Accordingly in instructing us you agree that you will not bring any claim personally against any individual employee, consultant or partner in respect of Losses which yon suffer or incur, directly or indirectly, in connection with our services. The provisions of this paragraph will not limit or exclude the firm's liability for the acts or omissions of our employees, consultants or partners.

The provisions of the above paragraph are intended for the benefit of our employees, consultants and partners but the terms of our engagement may be varied without the consent of all or any of those persons.

[the Allocation of Liability]

Limitation on exclusions The above exclusions and limitations will not operate to exclude or limit any liability for fraud or reckless disregard of professional obligations or liabilities which cannot lawfully be limited or excluded."

The Issues

1628. In relation to the £3 million limitation on liability ("the Cap") ENRC contends as follows:

(1) it does not apply at all to ENRC's first head of loss claimed, being wasted or unnecessary fees paid to Dechert ("the Fees Point"); Dechert denies this as a matter of construction;

(2) however, if it did, the Cap was subject to the reasonableness requirement imposed by s2 (2) of the Unfair Contract Terms Act 1977 ("UCTA") insofar as the claims made are for negligence, as defined by s1 (1) thereof and/or because it formed part of Dechert's written standard terms, for the purposes of s3 (2) ("the Reasonableness Point"); again, Dechert denies this;

(3) in any event, the Cap does not apply to any liability on the part of Dechert which arises from fraud or reckless breach of duty because of the operation of the clause headed "Limitation on Exclusions" set out above ("the Exception"); Dechert denies this and in particular says that upon the true construction of the Exception, it will not operate unless the relevant liability is also one that cannot be excluded as a matter of law ("the Exception Point");

(4) further or alternatively, the Cap would not cover liability for any deliberate breach of duty because, as a matter of general law, that cannot be excluded; further, the Exception itself recognises this expressly ("the Deliberate Breach Point").

1629. As for the Allocation of Liability which, taken on its own, purports to exclude any claim being brought against Mr Gerrard personally, ENRC again raises the Exception and the Deliberate Breach Point, as above. It also contends that the Allocation of Liability amounts to a purported contractual estoppel which cannot operate ("the Estoppel Point").

The Cap

The Fees Point

1630. ENRC alleges that the vast majority of the fees it paid to Dechert were unnecessary and but for the Dechert Defendants' breach of duty would not have been incurred. It claims back £11m of unnecessary fees as damages for breach of contract or negligence or as equitable compensation for breach of fiduciary duty (see paragraphs 181-182 of the Particulars of Claim).

1631. Dechert argues that those claims fall within the definition of "Losses" set out within the "Liability Cap" referred to above. I agree that on its face, the expression "Losses" is couched in wide terms. However, it is only those Losses "arising from or in connection with our services in relation to the relevant matter" which are governed by the Cap. Further, the list of items finishes with "and other liabilities". I think there is force in ENRC's point that such language, while broad, is not apt to cover claims for the return on fees paid to Dechert itself in respect of the instant transaction now complained about. Those fees are "internal" costs and not ones which arise in relation to third parties or otherwise incurred by ENRC (e.g. management costs). That distinction applies whether (as here) the return of fees is claimed by way of damages or otherwise.

1632. If a claim for the return of wasted fees was included in the expression "Losses" it could follow that if fees of say £5 million paid to a solicitor were wasted, or almost so, for example because of the failure of the transaction due to the solicitor's negligence, the client could never recover more than £3 million back. That, to my mind does seem commercially absurd.

1633. I also think that this is one of those situations where it could properly be said (*per* Lord Leggatt in *Triplepoint v PTT* [2021] UKSC 29 at paragraphs 108-110) that the court is here dealing with a clause which seeks to interfere with a "valuable right", namely a client's ability to recover wasted fees from the solicitor to whom they were paid, and it should therefore be slow to conclude that such interference is established.

1634. ENRC does, of course, or at least did, have the right to have the fees assessed under Part III of the Solicitors Act 1974, as the Retainer Letter expressly states. But it is far from clear that such a right would encompass a claim of the kind made here.

1635. If Dechert is right, this might in theory exclude the ability of ENRC to invoke the statutory detailed assessment procedure which would be a very surprising conclusion. It has not been invoked thus far by Dechert in that context. Further, Dechert's interpretation would mean that if there was a claim in restitution for fees paid under a mistake either made by the client or because of a mistake in billing made by the solicitor and the amount of fees to be recovered was more than £3 million, they would not be recoverable.

1636. Accordingly, I resolve the Fees Point in ENRC's favour.

The Reasonableness Point

1637. That conclusion means that it is unnecessary for me to deal with the Reasonableness Point. However, lest I am wrong on the Fees Point I do so, briefly.

1638. "Negligence" is defined in s1 (1) of UCTA to cover breach of any obligation arising from the express or implied terms of the contract to take reasonable care or exercise reasonable skill in the performance of the contract. It also includes breach of any common law duty to take reasonable care or exercise reasonable skill. In other words, negligence here is not limited to claims in tort. The essence of the claims here, albeit put high, in the sense of alleging recklessness, is negligence in relation to a solicitor's professional duties of care. Accordingly, in my judgment, these are claims made in negligence.

1639. That being so, one moves straight to the reasonableness requirement. The burden of showing reasonableness here lies on Dechert. It is, of course, said that ENRC was a very substantial and sophisticated commercial entity. It had its own General Counsel, who in fact signed the Retainer Letter. All that is true. Whether ENRC could have negotiated a different definition of Losses so as to exclude fees is another matter. It may not have seemed important back in April 2011 when a fees estimate given shortly before was around £400,000. It might have been thought, objectively, that if there was to be any claim for return of fees, it could sit comfortably within the £3 million limit. However, the problem was that if the fees did expand very significantly, as they did, they would go way beyond the £3 million limit.

1640. Furthermore, at the time, while a client could in theory have threatened to terminate Dechert's retainer if it did not agree to alter the Cap, that was somewhat unrealistic at the time since Mr Gerrard had been on board since the end of the previous year and there would

have been a reluctance at this stage to lose the specialist services and skills which he purported to have in this particular area of law. This was far from, for example, a standard piece of conveyancing or other transactional work which could be done by any competent firm. Of course, ENRC did eventually terminate Dechert's retainer but that was in the very different circumstances obtaining in 2013.

1641. Dechert has not produced any evidence as to the level of its professional indemnity insurance cover for claims in relation to its work for ENRC. It has said that it was obliged to maintain cover in the amount of £3 million in respect of any one claim. But it is not clear whether the cover it obtained was for a greater amount. Even if not, there is no evidence about its ability or otherwise to have obtained greater cover. Nor is there any evidence about what the precise scope of the cover was. Equally, it could have provided evidence that it was usual for a solicitor's limitation of liability clause to encompass claims for unnecessary fees. This is relevant because it is said that ENRC should have known that a limitation on liability was a common feature of solicitors' engagement terms. But the point at issue here is not the £3 million limit *per se,* rather it is the application of that limit to claims in respect of fees already paid to the solicitor concerned. I agree that the Cap only limits and does not exclude liability and that there is the Exception. I do not think that either of these matters carry much weight here. The typical claim contemplated would be one for "mere" negligence not fraud or reckless disregard. I also agree that the Cap cannot be said to have been buried in small print somewhere. On the other hand, its true scope may not have been obvious. Finally, the point on commercial absurdity made in relation to the interpretation of the Cap at paragraph 1632 above would equally be relevant here.

1642. For all those reasons, I consider that the Cap, insofar as it applied to claims in relation to wasted or unnecessary fees, is unreasonable. There is no freestanding claim that the Cap is unreasonable in any event.

1643. Given that most if not all of ENRC's claims against Dechert would be ones in negligence, it is probably academic to consider the alternative route to the reasonableness requirement under s3 (2) of UCTA. Had it been necessary to do so, I would, on balance, have said that the Cap was a written standard term. That is because the critical provision, i.e. the definition of Losses, is within the Terms of Engagement of Dechert which it accepts are its written standard terms. I recognise that the amount of the Cap is itself within the Retainer Letter. I also recognise that the question of reasonableness is to be assessed by reference to the particular limit set here and not merely by reference to the definition of Losses. Nonetheless,

the fact remains that the essential machinery is all within the Terms of Engagement and that seems sufficient to me to bring the Cap within s3(2). If so, then the reasonable requirement applies and it would be decided as I have already decided it, above.

The Exception Point

1644. Here, Dechert contends that the Exception will apply where there has been fraud or reckless disregard of professional obligations ("reckless disregard") provided that they are liabilities which cannot be limited or excluded. As against that, ENRC contends that the Exception covers 2 situations: (a) reckless disregard, and (b) disjunctively, liabilities which cannot be limited or excluded.

1645. In my judgment, ENRC is plainly correct here. Indeed, the words "liabilities which cannot lawfully be limited or excluded" are to some extent surplusage because if the relevant liability cannot be excluded as a matter of law, it makes no difference whether that inability is expressly recited somewhere in the agreement or not. As a matter of language, the Exception is clearly disjunctive in this regard. The first part is liability for reckless disregard and then, as denoted by the word "or", there are other liabilities which are incapable of exclusion or limitation. Dechert contends that this result could only be achieved if there had been a comma after the word "obligations". I disagree. The word "or" does that job. Dechert's reading would mean that the first element would be "… Reckless disregard of professional obligations or liabilities"; but that does not make any sense. It does reinforces the disjunctive character of the Exception, as contended for by ENRC. There is no surprise in this. Fraud and reckless disregard are commonly seen as very different matters to "mere" negligence and altogether more serious.

1646. The important upshot of this is that if ENRC can show reckless disregard in respect of any part of its claims, the Cap will not apply to such part.

1647. I should add that it seems obvious that reckless disregard must include deliberate disregard. Further, the phrase "professional obligations" here must encompass all of the relevant duties which Mr Gerrard and Dechert owed their client in the context of this case. No party appears to have argued otherwise, nor could they.

1648. Finally, where the Exception applies, it of course follows that the Fees Point disappears. There is no separate and general bar to claiming fees as damages and indeed the Cap assumes (as I have found) that claims for wasted fees are to be seen as damages in the sense that they form part of the Losses.

The Deliberate Breach Point

1649. In the light of my findings above, it is not necessary to deal with this point, because where there is any case of Deliberate Breach it would fall within the Exception as reckless disregard.

The Allocation of Liability

1650. Dechert says that the effect of the Allocation of Liability is that there can be no personal claim against Mr Gerrard at all. I agree with ENRC that on a proper analysis of the clause, it amounts to a promise not to sue. If that is correct, then one would have thought (as with the Abuse of Process point) that if there was anything in it, it should have formed the basis of an early interlocutory application even though, in this case, Mr Gerrard would no doubt still be appearing as a witness for Dechert.

1651. In fact, it seems to me that there would have to be a positive claim (or here, counterclaim) made to enforce the promise not to sue which has not been done. That may seem somewhat technical but it does flow from the nature of the provision. I do not accept that the provision, properly construed, means that Mr Gerrard never owed any duty at all or that his personal liability was simply excluded.

1652. Second, in my view, and as with many clauses which purport to exclude liability (which is not this clause but it would have this effect if sued upon) it should not be interpreted to exclude a claim for fraud or conduct which is akin to it, which in my judgment would include a deliberate or reckless breach of professional duty. If that argument is correct, then the clause would not cover the vast majority of wrongdoing which has been found against Mr Gerrard.

1653. On this point, Dechert relies on the decision of Gross J (as he then was) in *Frans Maas v Samsung* [2004] EWHC 1502. In that case, he accepted that a bailee's clause which excluded liability for the wilful default of an employee would prevent a claim in respect of the bailee's employee's theft. However, that was on the express basis that the risk of employee wilful default in general was a "real, foreseeable and commonplace risk" (see paragraphs 136 and 139 of the judgment). One could hardly say that of the type of solicitor's default which occurred here.

1654. Accordingly, in my judgment the clause does not operate here at all because it has not actually been invoked as a claim by Dechert or Mr Gerrard. However, even if that is wrong, it

would not operate in respect of the vast majority of Mr Gerrard's liability, which was found to be on the basis of reckless rather than merely negligent breach of duty.

LIMITATION: TIME-BAR

The claim against Dechert

1655. Dechert contends that ENRC's claims in relation to Mr Gerrard's role concerning the August Leak and the DCs which preceded 25 September, 2011 are time-barred. That is because it is said that they arose more than 6 years before the issue of the 2017 claim on 25 September 2017. ENRC accepts that they are *prima facie* barred but relies on section 32 of the Limitation Act 1980. Insofar as is material, this provides as follows:

> "32.— Postponement of limitation period in case of fraud, concealment or mistake.
>
> (1) Subject …below, 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; or
>
> (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."

1656. It is common ground that, as claimant, ENRC bears the burden of proof in relation to these matters.

1657. ENRC puts its argument here on two bases:

(1) All the relevant breaches of duty by Mr Gerrard fell within s32(2), in other words his breach of duty was committed deliberately in circumstances where it was unlikely to be discovered for some time; and/or

(2) There was deliberate concealment without the need to resort to s32(2) anyway.

1658. As for s32 (2), a breach of duty is "deliberate" if the defendant appreciates that there is a real risk that his conduct will amount to a legal wrong in circumstances where it is unreasonable for him to take that risk. See paragraphs 60-62 of the judgment of Rose LJ in *Canada Square v Potter* [2021] EWCA Civ 339. The question of the unlikelihood of discovery for some time is an objective question of fact.

1659. For the purposes of s32 (1), what has to be discovered is that which would give, or with reasonable diligence could have given, sufficient knowledge to the claimant to plead a claim. Reasonable diligence is a question of fact in each case.

1660. On that basis, and given the facts which I have found in relation to Dechert on the August Leak and DC1, those breaches of duty were plainly deliberate. And at the time, it was obviously unlikely that they could be discovered for some time. ENRC asked Mr Gerrard to investigate the August Leak and through him Mr Findlay, but since they were the perpetrators, they were hardly likely to admit their own wrongdoing and did not do so. Indeed, in evidence, Mr Gerrard said that the view at the time was that it was SPJ who had been responsible for the August Leak. In fact, ENRC only learnt of Mr Gerrard's involvement in the August Leak much later, following the production of evidence by Mr Findlay pursuant to his settlement with ENRC on 21 February, 2018.

1661. Equally, there was in any event deliberate concealment by Mr Gerrard of his own wrongdoing for obvious reasons.

1662. Finally, ENRC could not with reasonable diligence have discovered Mr Gerrard's wrongdoing prior to 25 September, 2011. It would not have been able to discover the perpetrator of the leak from *The Times* and, as already mentioned, enquiries through Mr Findlay would not have revealed him.

1663. ENRC has also referred to the breach of duty in relation to DC4. I do not quite follow this, since it only occurred on 26 September 2011, so it could hardly have been found prior to 25 September 2011; in any event, and insofar as there was any part of that breach of duty committed earlier, there was again, in my judgment, a deliberate breach of duty in the required sense by Mr Gerrard because he was not likely to and did not report that he had imparted the relevant information to Mr Alderman without authority. He said, for example, that he probably did not report back his reference to the "big problem".

1664. For all those reasons, the limitation defence advanced by Dechert fails and presents no bar to the claim insofar as it would otherwise succeed against Dechert.

The claim against the SFO

1665. As the 2019 claim was issued on 25 March, 2019, the SFO contends that any cause of action arising against it prior to 25 March 2013 is time-barred.

1666. In the light of my findings above concerning the SFO, the relevant claims against it all relate to the DCs where I have found a relevant inducement to breach of contract, being those

numbered 1, 4-7, 8-11, 13, 15, 19A, 20, 23 and 24, that last being 28 February 2013, well before 25 March, 2013.

Deliberate Concealment

1667. As with the claims made against Dechert, ENRC first relies upon s32(2) to provide the relevant concealment. In this context it needs to be emphasised that the expression "breach of duty" here covers not merely a breach of some particular or distinct legal duty. It captures legal wrongdoing of any kind. Second, as one would expect, the expression "deliberate" here includes recklessness.

1668. As for the reference to deliberate concealment in s32(1)(b), it is common ground that concealment does not require a deliberate breach of some free-standing legal duty to disclose. The obligation to disclose can arise simply from a combination of utility and morality. But it must of course be deliberate in the sense adverted to.

1669. For the purposes of s32(2), the relevant substantive breach of duty is made out because of my findings of inducement (subject to causation and loss) in respect of the relevant DCs. Further, those findings establish that each of the SFO officers acted recklessly at least in relation to the relevant DCs. That recklessness would encompass an appreciation that there was at least a real risk that they were acting wrongfully and yet they (unreasonably) took that risk and kept on doing so. On that basis, there was therefore the deemed deliberate concealment by virtue of s32(2) and the next question would be discovery and reasonable diligence.

1670. Before turning to those matters, I should add that I consider that deliberate concealment within s32(1)(b) is also established. Utility and morality plainly required the SFO to inform ENRC about Mr Gerrard's unauthorised disclosures to the relevant officers, even if there was no free-standing legal duty to do so. This then leaves the question as to whether the concealment was deliberate. Again, recklessness will do. So here, if the officers knew that they should have told ENRC about the unauthorised communications and deliberately or recklessly chose not to, this element is made out. That is not hard to find here since I have already found that they were acting in bad faith towards ENRC in the way that they dealt with Mr Gerrard. It is not to the point that some of the DCs were reported back and some meetings were authorised. This says nothing about the actual content, the objectionable parts of which were never revealed.

Reasonable Diligence

1671. The relevant knowledge which a claimant must have for these purposes is sufficient knowledge to plead a claim. So, in the case of deceit, there must be enough to plead the relevant representation, falsity, and the dishonest or reckless state of mind of the representor.

1672. It is not suggested that ENRC did in fact discover sufficient information to enable it to plead a case against the SFO which here would mean specifying the relevant individuals as well as alleging effective bad faith. Rather, it is said by the SFO that with reasonable diligence, it could have done so in time.

1673. As to that, the SFO relies principally on the following matters:

(1) Insofar as ENRC had an inferential case, it cannot point to any evidence actually being hidden. That is a non-sequitur in my view. At some point, evidence did emerge sufficient to enable it to plead an inferential case which in fact was drawn from documents. There always needs to be material from which the putative inference can be drawn; the fact that the SFO Letter came shortly after the August Article does not mean by itself that an inference could be drawn about the particular misconduct on the part of the SFO by then;

(2) There is the 1 April 2013 email from Mr Ehrensberger to Mr Gerrard explaining the reasons for the termination of the retainer; that email itself, of course, post-dates 25 March 2013. In any event, the suspicions set out in that letter were of a general kind and were dismissed by Mr Gerrard on 12 April;

(3) The next point was that Mr Ehrensberger had said that Mr Vulis had informed him of these matters and they amounted to a sufficiently firm allegation to put it as number 2 in the list of reasons for terminating Dechert's retainer; I follow that, but this hardly means that it was sufficient to plead out a case of serious wrongdoing against the SFO and by reference to particular individuals and their states of mind;

(4) The SFO then says that some of the allegations made must have derived from WB2, which ENRC said it learnt of in March 2013. As it happens, Mr Ehrensberger did not accept that proposition in cross-examination. Moreover, the SFO itself said the letter was not credible and there was no reason to take it further, and on that point, I have agreed with them;

(5) It is true that Mr Ehrensberger knew of the fact of some meetings, obviously where they had been authorised. Mr Gerrard also said expressly that he had spoken to Mr

Ammann and his billing narratives do refer to a number of DCs. That is all very well, but at the time of those DCs, ENRC did not know of their objectionable content which of course neither Mr Gerrard nor any of the SFO officers told them about. Moreover, only 8 entries related to the DCs complained about here and the narratives disclose no wrongdoing. There were 25,000 entries on Dechert's bills and to say that they should have reasonably prompted ENRC to make further enquiries is unrealistic;

(6) The SFO pointed to other evidence which it said had put ENRC on notice. Thus, AG had said on 24 January, 2013 that there was "an opaqueness about the "off the record" discussions with the SFO contacts and exactly what the SFO were or were not being told and vice versa", that board minutes had stated that Mr Vulis "had reason to question the bona fides of Dechert" before 15 March, 2013 and that Mr Prosper said in evidence that even as at Autumn 2011 he had "some concerns with how things were portrayed by Dechert regarding SFO communications". However, first, these remarks seem principally directed to wrongdoing by Mr Gerrard, as opposed to the SFO. Second and in any event, in respect of the first two items, it hardly meant that ENRC would have been in a position from such material to discover sufficient facts to make a claim by 25 March, 2013;

(7) It is true that Mr Ehrensberger accepted in evidence that by 24 March, ENRC had grounds to make an allegation that Mr Gerrard was conspiring with an SFO officer against ENRC's interests, but that was based only on what he had been told and shown following Mr Vulis' receipt of WB2 on 24 March. Mr Ehrensberger was not even sure he had seen WB2 by then. Again, it cannot seriously be suggested that within a day or a few weeks ENRC could have investigated the allegations sufficiently to plead a case against particular SFO officers.

1674. In addition, ENRC itself made the following further points:

(1) As already noted, the SFO did not disclose to ENRC what was going on. The upshot is that since ENRC had no visibility of what actually went on in the DCs, it would be difficult for it to find out; the sort of suspicion held by January 2013 would not get very far in terms of identifying the particular officers through whom the claims would be made and their states of mind;

(2) In early March 2013, ENRC was seeking to comply with the ultimatum in the Rappo Letter and was to some extent locked into Mr Gerrard in terms, at least, of getting the

Kazakhstan report out. This was swiftly followed by the termination of the retainer and the start of the criminal investigation;

(3) Indeed, it is a fair point to say that it took ENRC a number of years to establish a case to plead against the SFO. While Dechert's files were passed over to Fulcrum on 17 May, 2013 onwards, the SFO papers did not start to come through until 27 January, 2015 and then later, in 2016. I consider that the detailed chronology of when information came through to ENRC about the SFO, set out in Appendix 12 to ENRC's written closing, amply supports this point.

1675. Given the nature, scale and seriousness of the claim against the SFO and all the matters referred to above, it is in my judgment plain that ENRC could not, with reasonable diligence have got sufficient information to plead a case against the SFO by 25 March, 2013, or anywhere near it.

Conclusion

1676. Accordingly, the time-bar argument raised by SFO must fail.

CAUSATION AND LOSS IN RELATION TO THE SFO

1677. I refer here to the two issues of causation in relation to the claim against SFO set out in paragraph 94 above.

Causation in relation to the SFO Letter

1678. On my findings about the form of DC1, it was much attenuated from ENRC's original allegation. The tip-off of the leak hastened, but did not cause the writing of the SFO Letter and specifically not in a "but for" sense. As to the particular reasons for finding the contrary, as advanced by ENRC:

(1) The fact that the SFO did not consider a criminal investigation was warranted does not rule out the SFO Letter which, in terms, said that there was no such investigation; but the letter was still written along the lines of Mr Collins' suggestion in his email of 24 May;

(2) I do not set much store by the reference to "recent intelligence" in the SFO Letter. It could cover a number of sources of information - or no particular source. It might have been no more than Mr Gerrard's tip-off to Mr Alderman about the leak to the press. I do not agree that the tip-off constituted some material *"imprimatur"* of Mr Gerrard, such that without it, the SFO would have paid less attention to the August Article. The latter said what it said and clearly made reference to highly confidential

information. It might have been a different thing if I had found that Mr Gerrard had passed the underlying documents to Mr Alderman, but I did not;

(3) There was sufficient material about ENRC by this stage, once the August Article was put into the mix, for the SFO to become interested to the extent that it wrote the SFO Letter; I agree that the letter was itself unusual in terms of the communications to possible corporate targets at the time, but given that its form was presaged by Mr Collins on 24 May 2011, and that the Bribery Act was now in force, its nature and content (as opposed to its particular timing) could not be regarded as extraordinary, or at least so unusual that it could only have arisen because of the contact between Mr Gerrard and Mr Alderman and not otherwise.

1679. It follows that it is not the case that, but for the SFO's wrongful conduct in relation to DC1, it would not have sent the SFO Letter.

Causation in relation to ENRC's entry into the Review Process

1680. The second causation question relates to ENRC's entry into the Review Process. Part of ENRC's argument here is that the SFO Letter itself was a product of the SFO's wrongful conduct and it led or contributed to ENRC's later decision to enter into the process. However, I have just rejected that proposition above.

1681. ENRC also relies on the proposition that Mr Alderman was duty-bound to "report" Mr Gerrard to his clients, as it were. Had he done so, Mr Gerrard would have been sacked and a different approach to SR would have been advocated by JD, such that ENRC would never have entered the process at all. The difficulty with this is that I have found that Mr Alderman owed no such duty to ENRC. While he should not have dealt with Mr Gerrard in the DCs which I have found to be wrongful, that is not the same thing as a reporting duty.

1682. Once these two propositions are rejected, all ENRC can say is that the SFO's conduct in respect of DC4-DC7 was such that it drove ENRC to SR and that without it ENRC would not have done so. Given what I have found above in particular in relation to Mr Gerrard's advice on raids and SR over this period, I could not possibly make that finding.

Conclusion

1683. The upshot is that had it been relevant, I would have found against ENRC on the two causation issues which arise for consideration now.

CONTRIBUTORY FAULT ON THE PART OF ENRC

Introduction

1684. This is pleaded as against ENRC at paragraph 444 of the Dechert Defence, but was refined at trial to be under the following headings:

(1) Failure to prevent Messrs Vulis and Hanna from obstructing the investigation;

(2) ENRC's decision to terminate the retainer;

(3) Failure to provide the Dechert Defendants with access to information and data including failure to pay third party fees;

(4) ENRC's decision to retain Bridge2 when it had become clear that they were incapable of performing the necessary work.

1685. At this stage, I am not asked to quantify any finding of contributory fault. I am just asked to determine whether, overall, there was some real contributory fault as opposed to it being *de minimis*.

1686. Dechert has set out its detailed points in a new Appendix 5 to its written Closing and this is responded to by ENRC in its new Appendix 13. As already noted, Dechert no longer pursues a case of obstruction as such against ENRC.

Failure to prevent Messrs Vulis and Hanna from obstructing the investigation

1687. I do not think it can be doubted that at least sometimes, Mr Hanna was hostile to the investigation. That is perhaps not surprising. After all, he had a role in the Camrose acquisition which was said to be questioned and in respect of the Metalkol payments. In the end, of course, the Board resolved that he should at least be suspended for obstruction, although in the event, he never was because Mr Vulis did not carry through the instruction.

1688. However, it is far from clear that he obstructed the investigation to any significant extent which could bear upon the fees of Dechert or third parties.

1689. As for the reliance on Mr Gerrard and Mr Findlay's January 2012 telephone call, while Mr Gerrard did refer to Mr Hanna "pushing hard" on Kazakhstan and Africa, the fact is that the investigation team went to both. The alleged statement by Mr Findlay that Mr Hanna was "flat out not allowing access to Africa" was in fact a question addressed to Mr Gerrard, not a statement. Mr Hanna is then recorded as saying that the team could go out once the deal with Mr Gertler had been done.

1690. As for interference with interviews, it is right that AG certainly took the view that Mr Hanna had tried to interfere and indeed Mr Simpson said that he should be suspended. But the interviews were in fact done. Further, Mr Wilkinson had "read the riot act to Mr Hanna" for "having a go at" Mr Waller as he informed the SIC on 13 September 2012. At a Dechert-AG-ENRC meeting on 20 January 2013, Mr Simpson again said that he should be suspended but Mr Wilkinson said that at this stage operational reasons would prevent that. AG thought that Mr Hanna had been "bullying" and "interfering" but it was difficult to catalogue.

1691. As for the interview of Mr Webbstock, the pleaded allegation is that Mr Hanna caused the delay in it being taken. It was in fact done on 8 March instead of the original planned date of 4 January, 2013. That delay is not significant. It is also said that Mr Hanna ultimately persuaded Mr Webbstock to withdraw his statement. As to that, if correct, it is very hard to see how that could contribute to unnecessary fees. Furthermore, this was very shortly before the termination of Dechert's retainer.

1692. Finally, Dechert rely on paragraph 57 of Ms Coppens' evidence that Mr Hanna imposed himself on a call about IT on 17 July, 2012 which he then tried to end. The latter was said to be in response to questions being raised about why the African data had not in fact yet been imaged although Mr Hanna had previously said it was. Mr Hanna had said that questions about data should be raised by email. In evidence, Ms Coppens said that Mr Hanna said he was joining the call because he was the CEO of Africa. In fact, Ms Coppens' own notes show that Mr Hanna had said that "highly technical questions" should be put in writing. While she said that she had an impression that Mr Hanna was trying to end the call, this was not in her notes. Then she made a different point which was that they thought he had not answered their questions because he was a suspect. I do not think this evidence really goes anywhere.

1693. Finally, Dechert refers to the contents of the SIC meeting of 2 August when Mr Zinger said that there appeared to be a "blockage" due to a combination of Mr Ehrensberger and Mr Vulis. In fact, the note refers to Mr Ehrensberger and Mr Hanna so this is a non-point insofar as Mr Vulis is concerned. In fact, the blocking issue was, according to Mr Zinger's WS, limited to a matter where Mr Ehrensberger had not signed a necessary consent form but when contacted by Mr Vulis he was apologetic and dealt with it immediately. It all related to the review of Mr Ehrensberger's own data in Zürich for which local law required his consent. In the end, it took some 9 days from when he was requested to do it.

ENRC's decision to terminate the retainer

1694. It is correct that Mr Dalman's view was that any decision to terminate the retainer should be taken by the Board. In the event, it was not. See paragraph 1420 above.

1695. However, as ENRC has pointed out, the relevant damages claim is confined to the costs incurred during the retainer (and those of the Privilege Proceedings but they are not relevant here). So the dismissal cannot have contributed to those already incurred costs. Second, in normal circumstances, the fact that a company changes its solicitor should not be a reason for the SFO to change its approach. Here, the only possible reason why the termination of the retainer could have caused the SFO to start the criminal investigation (if it did) is because Mr Gerrard had primed the SFO with references to the need for him to resign etc. and what he had said in other unauthorised disclosures, creating the impression that without him as the solicitor, ENRC was not likely to make proper disclosure in the SR process.

1696. In any event, as matters have shown, the termination was in fact entirely justified, if not necessary, because of Mr Gerrard's conduct. That being so, it is very hard to see how Dechert can now pray it in aid as contributory fault.

Failure to provide Dechert with access to information and data including failure to pay third party fees

1697. Dechert first contends that it had wrongly been led to believe that a forensic image had been taken of the London and Zurich servers in relation to (a) WB1 in January 2011 and (b) the June Leak investigation, when in fact it was only an off-line copy. However, Ms Coppens was unable to point to any precise instruction to obtain the former rather than the latter. She said that she expected that whatever would be produced would be adequate for the investigation, although at that stage, the SFO had not become engaged.

1698. Mr Trevelyan cannot recall telling Dechert that it had been a forensic image at the outset, and it was not suggested to Mr Trevelyan or Mr Findlay that they had misled Dechert. In fact, it appears as if no forensic image was ever taken.

1699. As to Africa, it is not clear that anyone misled Dechert about this and in any event, again, no forensic image was taken.

1700. So it cannot be said that any data work was wasted or that any confusion caused unnecessary fees.

1701. It is now accepted that at OM4, it was Mr Gerrard and not Mr Ehrensberger who told the SFO that the African data was already backed up and in Zürich when it was not. The

documents show that Mr Gerrard had not definitely been told prior to OM4 that the data had been backed up; it was just a possibility. Otherwise, what had been conveyed was that the data of members of staff who were located in London or in Zürich but who worked on Africa, was located in London or in Zürich, and for those staff actually working in Africa, it was in Africa. Anyway, Mr Jobson clarified the position about the non-backup of the Africa-based data in Zürich, shortly after.

1702. The next point is that the trip to Africa was allegedly derailed by Mr Adonis. Ms Coppens said at paragraph 63 of her WS that Mr Adonis had sought to cancel a proposed trip by FRA to South Africa on 48-hours' notice. However, the contemporaneous emails show that as far as Mr Adonis was concerned he only learnt of the trip at 6:42 PM on Friday 16 August with FRA arriving the following Monday. Mr Adonis said that with his limited resources he was not prepared for such a visit especially as emails of (now) the full complement of 800 staff would have to be imaged. He suggested a two-week delay. This was not acceptable to Mr Wiggetts on the basis that Mr Dalman probably believed (as a result of Mr Wiggetts' conversation with him on the Thursday) that FRA was already there. Also, Ms Coppens said that the plan to go to Africa had been discussed for some time. However, there is nothing to suggest that the trip was actually scheduled before Thursday 16 August. Mr Adonis was obliged later to explain his position to Mr Vulis, which he did on 22 August. That makes plain the pressure which he and his team had been put under at very short notice. In the event, a forensic image of the Africa server was never taken, only another off-line copy, as already noted. Although Dechert relies on what Ms Coppens said in cross-examination about this on Day 21/152-162, in fact, those passages show that her evidence was unsatisfactory and incorrect.

1703. Epithets like "staunch resistance", to describe the attitude from the third party contractor Ecotech were not justified. As Mr Adonis's email of 22 August explains, Ecotech was just having to respond to a very large request at very short notice with many formalities to be dealt with.

1704. In this regard, I deal finally with the other allegations referred to by Dechert which are in paragraph 159 (4) of its Opening. At sub-paragraph (c) thereof, Dechert says that between March and May 2012, it repeatedly asked for information but it was not provided. However this relates to some very extensive requests for information in relation to data from very many custodians going back 3 years. On any view, it would take time to obtain clarity and fulfil the requests. There were some delays on the part of Mr Ehrensberger as I have set out

in paragraphs 1269 and 1274 above, but overall, I can see no significant and negligent delay on the part of ENRC.

1705. It is right to point out that FRA's report to ENRC dated 13 September 2012 did include a number of criticisms of Mr Adonis, including his responsiveness while they were there. Some of these may be justified but they have to be seen in the context of the very short notice given to him. However, even if there were some failings on his part, I cannot see how, overall, that could have contributed much to the costs.

1706. The last point was that ENRC's failure to pay HS fees immediately had led to a delay. There had been a billing dispute between ENRC and HS from about April to July 2012 and it did hold up HS's responses to the many factual questions raised by Dechert. But ENRC was not deliberately seeking to avoid paying HS's fees and such a dispute could not constitute relevant negligence here.

ENRC's decision to retain Bridge2 when it had become clear that they were incapable of performing the necessary work

1707. The allegation here is not that there was obstruction from Mr Findlay and Mr Trevelyan. B2 was a separate contractor and ENRC was not vicariously liable for its failings. Accordingly, as against ENRC, the allegation has to be that it was negligent of it to retain B2 for the period that it did. It is not suggested that there was any other kind of negligence, for example, giving instructions to B2 which B2 could not reasonably comply with etc.

1708. It is true that at the beginning, B2 was not available in April 2011 and so the Kazakhstan trip had to be delayed. But that does not show negligence on the part of ENRC and possibly not even on the part of B2.

1709. Although Dechert refers to ENRC's awareness of B2's shortcomings in July 2011, the first pleaded date comes in September 2011. Mr Ehrensberger had queried why B2 did not already have some "kit" and questioned whether the job might be too big for it. Mr Findlay said that in any event, the person closest to B2, and who would have had the most acute awareness of any shortcomings on its part, was Mr Gerrard. But he was not complaining then and indeed he was involved with Mr Findlay in organising the August Leak at around that time.

1710. It is correct that there was a problem in December 2011. The imaged data would need to be reviewed on an E-discovery platform. Neither B2 nor Cyntel had one and they decided to invest in a platform known as Nuix which cost $110,000. On 6 December, Mr Findlay said that B2 could carry out the relevant review work, but he withdrew that 2 weeks later. He said

that there would not be enough time. There was therefore a modest delay, while all the data was going to be transferred over to FRA. All that Cyntel would do was process the data. Later on, it was asked to OCR the data but then this work was transferred to FRA as well.

1711. Dechert then refer, again, to the January 2012 telephone call between Mr Gerrard and Mr Findlay. I agree that pages 9-15 of the transcript are essentially occupied by an argument between them over B2's performance. That said, Mr Gerrard did not give much, if any, direct evidence about this. Here, it has to be borne in mind that I have rejected the "row" allegation emerging from this call insofar as it concerned the evidence about the August Leak. Moreover, on 17 February 2012 Mr Gerrard said that he was happy to continue with B2.

1712. The sole issue involved in the documents cited at paragraph 14 (iv) of Dechert's Appendix 5 concerned the fact that the keyword searches being done on email data for the Education Allegation could not be applied to PDF documents. Mr Gerrard then wanted to redo the exercise on the basis that the SFO would expect the email review to be comprehensive. Mr Ehrensberger's response was that he did not wish to hear the expression "the SFO would expect" anymore. In the event, the review was redone but without any different results.

1713. Dechert then relies on what is said at paragraphs 144-146 of its Closing. While it is true that Mr Gerrard did ask Ms Black to get quotes from other providers, the narrative as to why Mr Findlay was "furious" etc is one which I have rejected including what did (or did not) happen at the AC meeting on 10 August. I think that Mr Findlay's anger was indeed because of the incident which had just occurred involving the photographing of and challenges to B2's staff who were doing a security sweep of ENRC's offices.

1714. There was an attempt at that stage to look for new IT providers. On 16 August, Ms Black needed Mr Trevelyan to give certain information that she would need for quotes but not in a way which would lead Mr Trevelyan to think they were looking at other options. Had this involved the removal of B2 and had Mr Findlay found out about it by 15 August, I can understand that he may well have been angry especially (on my analysis) because he was <u>not</u> taken to task at the AC meeting. But these dates do not work because there is no evidence that Mr Findlay knew at that stage of the plans to go somewhere else. In the event, B2 and Cyntel were not replaced at that point.

1715. It is clear from the documents that while B2 and Cyntel transferred their work on the SSGPO data to FRA, as agreed, in January 2012, by February and March Mr Findlay and Mr Gerrard

were again speaking about further work. In the interim, B2 and Cyntel continued to do work for ENRC, albeit on other projects.

1716. By 22 February, in particular, Mr Findlay was in contact with Mr Gerrard about applying search terms to the London and Zürich servers in relation to Africa. He had also been asked to do imaging of computers in Rudny. However, he said that B2 did not want to do this because it was not commercially viable and as FRA were hosting the Project Maria material they should deal with the imaging. Mr Gerrard replied, among other things, to say that he was disappointed that Mr Findlay felt unable to image in Rudny because he thought "Rob [i.e. Mr Trevelyan] and the team were excellent." He then asked whether Mr Findlay could assist with interviews in Rudny.

1717. Without going into further detail, the above does not suggest any negligence on the part of ENRC in continuing to use B2 and Cyntel for some work after January 2012.

1718. They were then given further work to do by Mr Zinger in June and July. At the SIC meeting on 9 July, Mr Gerrard did raise concerns over B2 and as to why ENRC had used them. Mr Zinger explained that it was done for efficiency because B2 had most of the data in its possession. But he agreed that if it was necessary, they would use a different specialist. That is what ultimately happened.

1719. For the sake of completeness, since it appears tangentially to form part of Dechert's arguments on contributory fault, it is worth saying something more about what occurred in June and July.

1720. B2 and Cyntel were tasked with facilitating the review of the Africa data using the Nuix E-discovery platform they had purchased in December 2011. This was going to be operated by Dechert. On 27 June 2012 Mr Wiggetts emailed to say that Dechert "were very happy with [the Nuix] platform and functionality" and thanked Cyntel for demonstrating it. Ms Coppens, in paragraph 119 of her WS set out various supposed inadequacies on the part of the platform. She then made reference to an internal email to her from Ms Fung dated 4 July 2012. Contrary to what she stated, this did not actually report that Nuix was unsuitable. It said that the paralegals "were happy with the review platform". There were certain functionality matters but even here the email described how they could or should be dealt with and there was no real criticism of B2.

1721. It is right, however, that on 8 July, Ms Coppens emailed Mr Gerrard and Mr Duthie saying that there were two limitations which the reviewers had currently on Nuix. The first was that

they could not go back to documents they had already reviewed and tagged. The second was that the reviewers could not do searches within populations of responsive documents allocated to them. She said that these limitations arose from the technical capability of Nuix but she had never experienced such limitations on other document review platforms.

1722. Another document which was mis-quoted was the email from one of Mr Duthie's colleagues in response to Ms Coppens' query. It is worth citing almost in full:

> "We don't have much experiencing reviewing within NUIX. We use the review as an early case assessment .... to verify properly processed data ..... do some preliminary searches to get an idea of volume - to check for encrypted data etc We use NUIX as a processing tool - we import - process – and then export everything so that we can have the flexibility to review in anything we want.
> It doesn't sound right to me that they have this type of restriction. I can already think of problems here for example what if someone accidentally codes a document as non-responsive and needs to go back and correct the error? There would potentially be missed data .... this would not fly with the SFO. And let's remember that in cases like this the SFO are using the tool to search and find and review documents related to an investigation. They don't need to go through and flag documents as being responsive or not - they have the pleasure of assuming all documents are responsive - because that's why the received them.
>
> NUIX is a pretty impressive piece of software, The software can be tailored to do pretty much anything you want, So I would be surprised if there is a limitation on the software that prevents this sort of thing. I will note that it can be difficult tailoring the software to do different things other than the default setup. We've certainly had our issues with tailoring the software - but at least we are allowed to do it!
> I can't say with absolute authority that what the vendor is saying is incorrect. But I've sent an email to NUIX support to see if they can shed light on this."

1723. I consider that much of Ms Coppens' evidence on the shortcomings of B2 and/or Cyntel and/or Nuix was unsatisfactory here. In any event, none of this begins to show that ENRC had itself been negligent to ask B2 to do the review work in June.

1724. To finish off this topic, it is worth noting the basis on which the SIC then decided to remove B2 and Cyntel on 9 July. One justification was that Nuix was not really an E-discovery platform at all. That was not so and Mr Trevelyan confirmed this. Second, it was said that B2 could not manage the review process. However, it had only started it on 3 July. Third was the supposed concern now over the independence of B2 because of its apparent direct contact with ENRC (as opposed to Dechert) as expressed by Mr Gerrard. In his email to Mr Dalman on 7 July, he said that the restrictions on Dechert and the processes being used were suspicious. He was concerned that Mr Ehrensberger, Mr Hanna and maybe even Mr Jobson were communicating with B2 without copying Dechert in. If so, it endangered the independence of the review. Then, at the meeting itself, he repeated those points and said that there was a concern about the potential loss of LPP and that B2 could no longer be viewed as an independent party by Dechert, or more importantly, by the SFO. This, regrettably, was a

familiar refrain on the part of Mr Gerrard. It was a very odd comment for him to make here and there seems to have been no specific basis for it.

1725. In relation to all of these points, even if B2 was in some respects negligent or otherwise at fault, it is still hard to see how ENRC itself was negligent in respect of it.

Conclusion

1726. Of course, in relation to all the allegations of contributory fault, I must not only examine them individually but collectively, to see if when added together they could then form the basis for there being a real amount of contributory negligence as opposed to being *de minimis*. In my judgment, even looked at cumulatively, it is still impossible to see there being any real contributory negligence. Accordingly, this issue will not be taken further.

DECLARATORY RELIEF

1727. By paragraph 62 of the 2019 Particulars of Claim ENRC seeks:

> "declarations that (i) the SFO is not entitled to publish, disclose, divulge or otherwise make use of any confidential and privileged material which was disclosed to the SFO by Dechert and/or Mr Gerrard in breach of duty, including but not limited to the June 2013 Material and (ii) that members of the SFO's staff who reviewed the said material should be removed from the team investigating ENRC."

1728. Since the material is not limited to the June 2013 Material it would presumably encompass any confidential and privileged information communicated by Mr Gerrard to the SFO in the relevant DCs and also the relevant privileged material conveyed by Mr Depel to Mr Thompson in the Depel Interview.

1729. In debating this issue both sides have sensibly concentrated on the material which is not merely confidential (which can be overridden by the Court) but also privileged.

1730. At the outset, I should deal with one point made by ENRC which is that the declarations sought are not limited to use of the material for any criminal proceedings against ENRC, and there could be other uses to which the material is put. I consider this to be an unrealistic point. The only conceivable arena in which any privileged material might be sought to be deployed by the SFO is any criminal prosecution and any use made of it since the criminal investigation began would be with that in mind. It is, of course possible (though in my judgment somewhat unlikely now) that ENRC and the SFO could come to some settlement to be obtained by a CRO or DPA. But in that event there would be a consensual process which would no doubt deal with the involvement if any of privileged material. Accordingly, I deal

with this issue on the basis that the declarations sought are in fact aimed at criminal proceedings.

1731. In my judgement, the first and fundamental point is that by reason of the decision of Goff J (as he then was) in *Butler v Board of Trade* [1971] 1 Ch 680, it is not open to me to grant such a declaration. In that case, Goff J declined to grant a declaration which effectively restrained the defendant from tendering in its prosecution of the claimant a letter which was protected by the claimant's LPP. In a well-known passage of his judgment at pages 690-691, he said this:

> "There remains, however, the final question whether the law or equity as to breach of confidence operates, in the terms of paragraph 14 of the special case, to give the plaintiff " any equity to prevent the defendants from tendering a copy of the letter in evidence in any of the said criminal proceedings," where if tendered it would, as I see it, clearly be admissible: see *Calcraft* v. *Guest…*, subject of course to the overriding discretion of the trial court to reject it if it thought its use unfair…
> …I can dispose briefly of the argument advanced by counsel for the defendants that the plaintiff cannot be entitled to any relief in equity because he does not come with clean hands. That seems to me to beg the question. If the letter was part of a criminal project then the copy is not protected anyhow. If, however, it was not such a part then the mere fact, if it be so, that it may help the defendants prove their case on the criminal charge does not soil the hands of the plaintiff with respect to his proprietary interests in the copy.
> …As far as I am aware, there is no case directly in point on the question whether that is merely an immaterial difference of fact or a valid distinction, but in my judgment it is the latter because in such a case there are two conflicting principles, the private right of the individual and the interest of the state to apprehend and prosecute criminals: see *per* Lord Denning M.R. in *Chic Fashions …*and in *Ghani* v. *Jones*…
> In my judgment it would not be a right or permissible exercise of the equitable jurisdiction in confidence to make a declaration at the suit of the accused in a public prosecution in effect restraining the Crown from adducing admissible evidence relevant to the crime with which he is charged. It is not necessary for me to decide whether the same result would obtain in the case of a private prosecution, and I expressly leave that point open."

1732. *Butler* was expressly approved by the Court of Appeal in *R v Tompkins* (1977) CrAppR 181, in *R v Cottrill* [1997] CrimLR 56 and then again in *R v K (A)* [2010] QB 343. I refer to the following passages in the judgment of Moore-Bick LJ in the latter case:

> "69 Even so, it has been recognised that legal professional privilege is concerned with disclosure and not with admissibility and that if evidence of a privileged communication has fallen into the prosecution's hands, use may be made of it. In *Butler v Board of Trade…* a copy of a letter written to the claimant by his solicitor warning him of the consequences of certain actions was inadvertently passed to the official receiver in his capacity as liquidator of a company with which the claimant had been involved. The Board of Trade intended to adduce it in evidence in criminal proceedings against the claimant and accordingly he sought an injunction to prevent it from doing so. The basis of his application was that the original communication, of which it was a copy, was covered by legal professional privilege and that the copy was confidential. Goff J held that it would not be right to grant an injunction to prevent the document being adduced in
> evidence…
>
> 70 In *R v Tompkins*…a note given by the defendant to his counsel was found on the door of the court and passed to counsel for the prosecution. Although the note was privileged and the defendant could have refused to disclose it, it was held to be admissible in evidence once it had fallen into the hands of

> the prosecution. Giving the judgment of the court Ormrod LJ said, at p 184: Privilege, in this context, relates only to production of a document; it does not determine its admissibility in evidence. The note, though clearly privileged from production, was admissible in evidence once it was in the possession of the prosecution: Butler…Admissibility depends essentially on the relevance of the document; the method by which it has been obtained is irrelevant:…
>
> 71 *Butler*…and *Tompkins*…were followed and applied in R v Cottrill…In that case the defendant had given his solicitor a written account of events leading up to his arrest which the solicitor had disclosed to the prosecution in an attempt to persuade it to drop the case. The account differed significantly from the case the defendant was advancing at trial. It was held that the prosecution was entitled to adduce the note in evidence, although the defendant could have refused to disclose it on the grounds of legal professional privilege.
>
> 72 As Goff J recognised in *Butler v Board of Trade*, there is a strong public interest in the investigation and prosecution of crime and it is one that must be taken into account when deciding whether the public interest in promoting settlements is sufficient to render without prejudice communications inadmissible in subsequent criminal proceedings. Given that the law has not afforded such far-reaching protection to confidential communications between lawyer and client, we find it difficult to accept that, if evidence of an incriminating admission falls into the hands of the prosecuting authorities, it is rendered inadmissible against the maker at a subsequent criminal trial on public policy grounds simply by reason of the fact that it was made in the course of "without prejudice" discussions. The immediate purpose of the "without prejudice" rule is to enable parties to negotiate freely without compromising their positions in relation to their current dispute and although it may be justifiable to extend the scope of protection to subsequent proceedings involving either of the parties to the original negotiations, the public interest in preserving confidentiality becomes weaker the more remote the subject matter of those proceedings becomes from the subject of the original negotiations. Criminal proceedings involve different parties and are of a different nature. To that extent they are necessarily at one remove from the dispute that gave rise to the negotiations. In those circumstances we consider that the public interest in prosecuting crime is sufficient to outweigh the public interest in the settlement of disputes and therefore that admissions made in the course of "without prejudice" negotiations are not inadmissible simply by virtue of the circumstances in which they were made."

1733. On that basis, in my view, *Butler* is and remains good law, and I am bound by that decision, and indeed that of the Court of Appeal in *R v K*. Even if there was only the first instance decision in *Butler*, I could only depart from it if I thought that it was clearly wrong. In fact, respectfully, I think it clearly right.

1734. ENRC contends that in the light of subsequent legal developments in the law of LPP, *Butler* must nonetheless be disregarded. It refers to the cases of *Three Rivers*, and *Morgan Grenfell v Special Commissioners of Income Tax* [2003] AC 563. I do not agree. The recognition of LPP as a fundamental right does not affect the question of admissibility in criminal proceedings if the material has been obtained. Second, it is correct of course that in the context of disclosure, if the material is privileged and it does not fall into the recognised exceptions to disclosure thereof, the court cannot (as it could with merely confidential information) order disclosure on the basis that there was a greater public interest in the particular case in disclosure as opposed to non-disclosure ("the Balancing Test"). However, none of that is relevant in the context of admissibility in criminal proceedings as Goff J and Moore-Bick LJ made clear. Third, if the cases just cited now undermined the principle of the

decision in *Butler*, then the Court of Appeal in the later case of R v *K (A)* could not possibly have decided (or said) as it did.

1735. It is correct that in the New Zealand case of *R v Uljee* [1982] 1 NZLR 561, the Court of Appeal held that a privileged communication between the accused and his solicitor made after the police had arrived at his home, and which was overheard by a police officer there to guard the premises, was inadmissible at the criminal trial. Since *Tompkins* would, in English law, have entailed a different result, it can be said that the New Zealand Court of Appeal declined to follow it. Indeed it made reference to various other jurisdictions to support its decision. However, that is of no significance in this context, since I am concerned with English authority to the opposite effect.

1736. It was then suggested that in the Privy Council decision of *B v Auckland District Law Society* [2003] 2 AC 736, Lord Millett approved *Uljee*. That he did, but not in the respect referred to in paragraph 1735 above. Rather, he approved a separate passage which made the point that where it was a question of disclosure (as opposed to admissibility in criminal proceedings) there was no Balancing Test. So reference to *Auckland* does not assist ENRC.

1737. Accordingly, it is not open to me to grant the declarations sought.

1738. However, even if it were, I would not, as a matter of discretion make them, for the following reasons:

(1) If the declarations were only sought with prospective effect it would mean that any use already made of the relevant material would be unaffected unless it was discrete enough to be identified now; there does not seem to be much point in this given that the investigation is 9 years old; on the other hand, if the declarations would require some review of the historic use of this information I suspect that it would be very difficult and time-consuming, and might not even be possible at all;

(2) Either way, the wording of the declarations (itself taken from the declarations sought in *Butler*) is very wide and probably unworkable;

(3) In relation to the June 2013, I have found that it has not been used in the criminal investigation – see paragraphs 1539-1556 above;

(4) I need also to bear in mind that in relation to the June 2013 Material and the Depel Interview, while I found that Mr Gerrard was in relevant breach of duty, I did not find

the SFO to be in breach of duty. It is true that I did find the SFO to be in breach of duty so far as the relevant DCs were concerned. However, when one considers the nature of the privileged material disclosed then, while highly damaging to ENRC at the time, it is very hard to suppose that much use would have been made of it in the criminal investigation itself.

1739. Accordingly, I cannot, and in any event I decline to, grant the declarations sought.

OVERALL CONCLUSION

Dechert

1740. I have found that Mr Gerrard was in breach of his contractual, tortious and fiduciary duties to ENRC in that he:

(1) knowingly failed to inform ENRC of the Depel Interview;

(2) instigated the August, December and March 2013 Leaks;

(3) was in at least reckless breach of duty in respect of DCs 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 15A, 17, 18, 19A, 20, 21, 23, 24, 25 and 25A;

(4) was negligent (and for the most part reckless) in relation to his:

(a) failure to record in writing his own advice;

(b) wrong advice about ENRC's potential criminal liability, the risk of raids by the SFO, potential penalties, the risks involved in engaging with the SFO in the way that ENRC did, and not at least considering a different course;

(c) unnecessary expansion of the investigation;

(d) failure to determine the scope of the SFO's concerns in relation to ENRC in the context of the investigation;

(e) wrong advice about bringing documents into this jurisdiction;

(f) failure to protect ENRC in relation to privilege; and

(g) being the sender to the SFO of the June 2013 Material.

1741. I have further found that:

(1) the limitation of liability clause does not assist Dechert to the extent set out above;

(2) the claims against Dechert are not time-barred;

(3) there is no real contributory fault on the part of ENRC.

The SFO

1742. I have found the inducement claim against the SFO made out (subject to causation and loss) in respect of DCs1, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 19A, 20, 23 and 24, but the misfeasance claim is not made out in respect of those DCs. Otherwise,

(1) the inducement claim referred to is not time-barred;

(2) no other claim succeeds as against the SFO, and

(3) declaratory relief will not be ordered.

Generally

1743. The next stages in the proceedings will be the determination of questions of causation and loss in respect of the claims which have succeeded thus far.

1744. On any view, this has been a very lengthy, complex and challenging trial for the parties in terms of the serious issues raised within it. It is a tribute to the industry, maturity and efficiency of, and the high degree of co-operation between, the parties' respective Counsel and legal teams, that I was able to ensure that the trial proceeded smoothly and ended on time. For all of that, and for their most helpful oral and written submissions, I am extremely grateful.