Neutral Citation Number: [2009] EWHC 901 (Comm)

Case No: 2006 FOLIO 855

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2009

Before :

THE HONOURABLE MR JUSTICE FLAUX

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Between :

(1)PARABOLA INVESTMENTS LIMITED **(2) ARIA INVESTMENTS LIMITED (formerly TANGENT INVESTMENTS LIMITED)**	**Claimants**
- and -	
(1) BROWALLIA CAL LIMITED (formerly UNION CAL LIMITED) **(2) MF GLOBAL UK LIMITED (formerly MAN FINANCIAL LIMITED)** **(3) MATTHEW BOMFORD**	**Defendants**

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Neil Kitchener QC, Steven Elliott and Eleanor Campbell (instructed by **Gordon Dadds**) for the **Second Claimant**
Michael Brindle QC, Jeffrey Chapman and Sebastian Said (instructed by **Legal First**) for the **Second and Third Defendants**

Hearing dates: 9-12 March, 16-20 March, 24 March, 26 March, 30-31 March, 2 April, 6-8 April 2009

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE FLAUX

Mr Justice Flaux:

Introduction

1. The claimant companies are in effect special purpose vehicles set up by their ultimate beneficial owner Mr Rajesh Gill for the purposes of trading. Mr Gill who is still only in his mid 30s is regarded by those who have dealt with him as one of the most successful traders in certain types of stocks and shares and their derivative products on world markets. Over the period of more than ten years since he left university, other than in one period, Mr Gill has consistently made profits from his trading, whether in bull or bear markets, sometimes extraordinarily good profits despite the state of the world markets The exception was the period when he was trading primarily through the second defendant between July 2001 and February 2002, throughout which time he was the victim of the systematic fraud with which this case is concerned. At that time, Mr Gill was still in his late 20s but had already been very successful in his trading.

2. The first and second defendants were financial institutions which carried out, inter alia, stockbroking activities trading on the London Stock Exchange and other world markets. The third defendant ("Mr Bomford") was a senior futures broker employed originally by the first defendant ("Union") until at the end of June 2001, when the team of which he was a member (the Contracts for Differences and Futures Desk), which was led by Mr Piers Whitaker, transferred to the second defendant ("Man"). Mr Gill (whose trading at the time was conducted via the first claimant, "Parabola") transferred the bulk of his trading from his previous brokers, Dealwise, to Union in early 2000.

3. The bulk of the trading with which this case is concerned was in contracts for differences ("CFDs"). A CFD is an agreement to exchange the difference in value of a particular share between the time at which a contract is opened and the time at which it is closed. CFDs allow investors to take long or short positions and are effectively renewed at the close of each trading day and rolled forward if desired. Trades are conducted on a leveraged basis with margins typically ranging from 20-40% of the notional value for CFDs on leading equities. The investor can keep his position open indefinitely, providing there is enough margin in his account to support the position. Before Mr Gill started trading through Union (and subsequently Man) most of his trading was in physical stocks and it was only when he started trading through Union that he traded in CFDs, the advantage being the greater margin available than with physical stocks.

4. Following a debacle concerning shares in a company called Eagle Eye (which, amongst other matters, led to a claim by Parabola against Union and Mr Bomford with which the court is no longer concerned) Mr Gill decided to set up the second claimant ("Tangent") through which he traded from about January 2001, shortly before the relevant broking function transferred from Union to Man. From 1 July 2001, Tangent and Mr Gill traded through Man. This continued until the relationship terminated on 7 March 2002, although to all intents and purposes the active trading ceased soon after 13 February 2002, in circumstances which I will describe in more detail hereafter.

5. The claims which were originally brought by the claimants against Union and Mr Bomford in respect of matters before the transfer of the team to Man on 30 June 2001 (including in relation to the Eagle Eye dealings) were settled between those parties some weeks prior to the commencement of the trial. Accordingly, the court has been concerned only with the claims by the second claimant Tangent against Man and Mr Bomford in respect of the period after the transfer of the team to Man on 30 June 2001. The primary claim against Man and Mr Bomford for the period after 30 June 2001 is a claim in deceit, the essence of which is that over a period of nearly eight months until 13 February 2002, Mr Bomford fraudulently misrepresented to Mr Gill and thereby to Tangent on a daily basis that the trading being conducted by Mr Gill was profitable and also made a series of fraudulent misrepresentations as to the amount of the funds in the account with Man (in particular a misrepresentation on 26 October 2001 that the account stood at £9.27 million whereas it was in fact at only £2.8 million and had been declining rapidly for months), all of which created the impression in Mr Gill's mind that the trading being conducted was profitable, whereas in truth it was not.

6. On Day 10 of the trial, Mr Brindle QC, Counsel for Man and Mr Bomford, admitted the allegations of fraud made against Mr Bomford (most critically, the fraudulent misrepresentations as to daily profitability and account balances, although other matters were admitted such as the cover up of unauthorised trades). This followed what can only be described as a disastrous three days in the witness box for Mr Bomford, during which he was exposed not just as a fraudster throughout the relationship between Tangent and Man but also as a persistent and inveterate liar in almost everything he said, both in evidence and elsewhere. The basis for the admission so far as Man was concerned was that Man accepted vicarious liability for the fraud of Mr Bomford. It was also made clear that, despite the admission of fraud, the defendants denied that Tangent and Mr Gill had been induced to act as they did by any fraudulent misrepresentation or that Tangent had suffered any loss as a consequence of the fraud.

7. Tangent claims damages for deceit on the basis of recovering not only the capital loss of the amount by which the trading fund was depleted as a consequence of the fraud but loss of profits (i) which Tangent would have made on investment in alternative trades during the actual period when it was being defrauded between July 2001 and February 2002, had it not been for the fraud; (ii) for the period after February 2002 until trial, essentially on the basis that as a consequence of the fraud, Tangent had a much smaller trading fund than it would have done, and has remained in the grip of the fraud and will remain so, until its fund is restored. Tangent's case is that, had it not been for the fraud, Tangent would have made profits which would have been reinvested until £5 million was reached. At that point profits over £5 million would have been transferred into investments in India. Tangent would then have traded in the next year with an opening fund of £5 million and again at the end of the year, profits over £5 million would have been transferred to investments in India, leaving a trading fund for the next year with an opening balance of £5 million and so forth.

8. In the light of the admission of fraud, the issues which remain for decision can be summarised as falling under the broad heads: (i) was Tangent induced by the misrepresentations made; (ii) what identifiable heads of loss have been suffered as a consequence of the fraud; and (iii) what measure of damages is recoverable as a direct

result of the fraud. In order to consider those issues in the correct context, it is necessary to consider the nature and circumstances of the fraud in more detail, which I will do after I have dealt briefly with my conclusions about the evidence of the two main witnesses, Mr Gill and Mr Bomford.

The two main witnesses

9. I formed the view that Mr Gill was an essentially truthful witness. There were areas where he was less impressive. For example in relation to his tax affairs, he was somewhat cagey about the reasons why an accountant's report was commissioned, although at the end of the day, despite the emphasis Mr Brindle placed upon it in closing, I am not convinced that the tax position is of any particular relevance to the issues I have to decide. Another aspect of his evidence which was less than wholly convincing was his insistence that from December 2001 onwards (in view of increasing warnings from Mr Bomford and other Man employees about not overtrading) he had reduced the volume of his trading. That was not borne out by the evidence of the actual trading conducted, which showed marginal reductions at best.

10. There is no question of Mr Gill having lied about this. The most likely explanation is that having lived and breathed this case for the intervening seven years, Mr Gill has convinced himself that he had reduced his trading when he had not, to any appreciable extent. One aspect of his evidence about his trading during the Man period about which he was consistent during four days of cross-examination was that the impression he was being given consistently as a consequence of Mr Bomford's fraud, was that his trading overall was profitable and that had he known the true position, he would have stopped trading in the particular types of contracts he was primarily trading. I found that evidence entirely credible and I accept it.

11. Mr Bomford was a very different proposition. Just as he had lied consistently to Mr Gill during their trading relationship, so he set about lying to the Court. It was perfectly obvious from the other materials in the case that he had practised a web of deceit over a period of at least ten months, just as it is obvious that Mr Gill was deceived by him and that he knew that Mr Gill was being deceived. Even if it had not been obvious from the transcripts and other evidence, it became obvious from his oral evidence, as time and again he trotted out the mantra that he had thought that representations as to profitability or the healthy state of Mr Gill's overall account had been correct when he made them and that he had made a mistake, for which he now had no explanation. The truth is that the explanation, as he well knew was that what he had told Mr Gill was untrue: he lied day after day about how much money Mr Gill had made trading the previous day and he also lied about the overall profitability of the account on several occasions.

12. Overall I formed the view that Mr Bomford was a complete stranger to the truth. He had acted fraudulently throughout, I suspect deceiving not only Mr Gill but his own senior management, for example in February 2002, when he told Mr Whitaker that he had never given Mr Gill an account valuation. When pressed in cross-examination as to why he had failed to tell Mr Gill that he was losing so much money, he resorted time and again to hiding behind the excuse that Mr Seaman, the compliance officer at Man had told Mr Bomford when the latter raised the point with him in November 2001 that it was not necessary to tell Mr Gill he was losing money. However, what Mr Bomford clearly did not tell Mr Seaman was that he had fraudulently misrepresented

to Mr Gill weeks earlier that his account had £9.27 million in it when it did not and that the reason Mr Gill did not know he was losing money was because he was being consistently deceived on a daily basis by Mr Bomford's lies. It is inconceivable that if Mr Seaman had known the true position, he would have advised Mr Bomford not to tell Mr Gill he was losing money.

Factual background

Mr Gill's trading success

13. As I have already indicated, Mr Gill started trading on the stock markets after leaving university. His substantial trading began in 1998 and between then and 2000, most of his trading was through a broker called Dealwise. The chief executive officer of Dealwise at the time was Mr Jeffrey Plowman, who acted as expert broking witness for Tangent. Although called as an expert, Mr Plowman was able to give the court valuable first hand insight into Mr Gill's trading and how successful it was, both before and after his involvement with Man. Mr Brindle sought to suggest at the outset of his cross-examination of Mr Plowman that the fact that he or his company had acted for Mr Gill meant that he could not be an independent expert. I reject that suggestion. I found Mr Plowman a careful and impressive expert witness.

14. Mr Plowman's evidence was that at Dealwise Mr Gill was known as "the 7 to 7 man" because he turned a starting fund of £7,000 into £7 million in two years. The amount of trading profits made by Mr Gill in all the years of his trading was agreed between the forensic accounting experts, Mr Creed and Mr MacGregor, in their joint report. On any view, his results prior to his involvement with Man were remarkable. Mr Plowman described him as the very best trader he has come across. The defendants' broking expert, Mr Mike Jones, essentially gave evidence to the same effect, albeit from a negative perspective, in that he was unable to understand or explain how a trader could consistently be profitable as Mr Gill has been (other than in the Man period), as in his experience, traders who try to beat the market end up losing, which Mr Gill has not.

15. In the years before his relationship with Union commenced, Mr Gill did not trade through either of the claimant companies, but on his own account, on behalf of his family, on behalf of his then girlfriend, a Brazilian lady called Andrea Navarro, or in the name of the Brazil Settlement, which was a trust which was set up on the advice of Coda Corporate Services Limited ("Coda"), an offshore corporate service provider based in the Isle of Man. Mr Gill met their representatives, Mr Francis Howard and Mr Adrian Leventhorpe (who gave evidence at the trial) in about November 1999. Mr Gill was the sole beneficiary of the Brazil Settlement. It was on their advice that the claimant offshore companies were incorporated in the Bahamas. Mr Gill was appointed as trading adviser and carried out all the trading on behalf of those companies through Union and subsequently Man, using funds originally derived from the Brazil Settlement as trading capital.

16. In 2003, some time after Mr Gill's relationship with Man ended, a firm of accountants Numerica, was instructed to prepare a report calculating, inter alia, the profits Mr Gill had made on his trading over the years. This was prepared because the Inland Revenue had discovered that Mr Gill had never paid income tax in the United Kingdom on his trading profits. In his evidence, Mr Gill tried to maintain somewhat

nonsensically that the commissioning of the report was nothing to do with his tax affairs but was because, after the Bomford fraud, his wife had suggested he should get his affairs in order. It is quite clear that in fact the report was commissioned because of concerns about a potential Inland Revenue investigation into Mr Gill's tax affairs and indeed Numerica was sufficiently concerned that there might be a fraud investigation that it required Mr Gill to provide a £5,000 deposit.

17. As I said earlier, Mr Gill's evidence about all of this was a little cagey, but nonetheless I do accept his evidence that the reason he had not paid tax was because he had been advised by Mr Howard of Coda that he did not need to do so and that, in the event, the Inland Revenue did not allege fraud against him and handled his case under Code of Practice 8 (cases where serious fraud is not suspected). The Numerica report produced in December 2003 assessed the trading profits he had made. Back tax and interest were paid accordingly by Mr Gill. Mr Brindle sought to use this material and in particular the fact that Mr Gill had been cagey about the reasons for the Numerica report to cast doubt on the accuracy of the trading profit figures and to suggest that there might have been further capital injections other than those identified by Numerica. I consider that there is nothing in this point.

18. As responsible and competent accountants producing a report for submission to the Inland Revenue, Numerica would hardly have set out trading profits for the various years unless satisfied with their accuracy and, equally, the Inland Revenue would not have agreed those figures unless satisfied that they accurately represented the profits in fact made. There is no evidential basis whatsoever for any suggestion that there may have been additional capital injections not identified by Numerica. It is true that there are some odd loose ends relating to the pre-Union period, such as the fact that although Mr Gill made some £4 million of trading profits on behalf of Ms Navarro, she apparently did not want that money. However, it simply does not follow from that oddity that the trading profits or the capital injections identified by Numerica were inaccurate.

19. Tangent's forensic accounting expert, Mr Creed used the Numerica report to produce the figures for trading profits, capital injections and withdrawals as set out in Amended Appendices 3 and 36 to his supplementary report. Furthermore, Man's forensic accounting expert Mr MacGregor accepted that, subject to minor caveats he had that are not relevant for present purposes, the figures in Amended Appendix 3 for trading profits represented the correct position. In Amended Appendix 36 Mr Creed used the same figures to produce trading results as follows for the pre-Man years:

Year ended	Opening fund	Capital injections	Withdrawals	Trading profit	Percentage profit
31.3.95	0	11,625	-7,224	-4841	-42%
31.3.96	-440	34,767	-25,708	20,918	61%

31.3.97	29,537	13,766	-102,853	71,397	165%
31.3.98	11,847	45,000	-45,351	138,052	243%
31.3.99	149,548		-250,985	740,446	495%
31.3.00	639,009	8,000	-309,204	6,505,841	1006%
31.3.01	6,843,646		-6,891,461	1,160,392	17%

20. In his reports Mr MacGregor cavilled at certain aspects of Mr Creed's approach to his calculation of the trading profit percentages, specifically the fact that these were assessed by reference to the opening figure for the fund for each period, plus capital injections and ignored withdrawals in the subsequent annual period. Mr Macgregor's preferred approach would have been to take an average over the annual period, taking into account both capital injections and withdrawals. However, as he accepted in cross-examination, his approach would in fact have led to higher profit percentages. To that extent although Mr McGregor quibbled at the word "conservative", it is quite clear that Mr Creed's approach was a conservative one, which, if anything, underestimated the percentage profits made by Mr Gill in each year of trading. Despite the forensic points made by Mr Brindle, I am quite satisfied that the table set out above represents as accurate a picture as is available in the circumstances both of the trading profits and of the profit percentages.

21. When he was trading through Dealwise Mr Gill traded in physical stocks. He did so to such an extent that in terms of the volume and success of his trades, Dealwise had a dedicated accountant who dealt with his account and was able to give him profit and loss figures for a previous day's trading. Notwithstanding this service, there came a time towards the end of 1999 when Mr Gill wanted more than Dealwise could offer, principally in the sense that he wanted to be able to trade on margin, that is to trade to a greater extent than his "fund" with Dealwise permitted under their arrangements.

22. As I have already noted, during the Union and Man periods, most of Mr Gill's trading was in CFDs. Through Man he also traded in FTSE futures and foreign exchange. Since terminating his relationship with Man, the trading he has conducted has continued to be mainly in CFDs. As with the trading before the Man period, that post-Man trading has been successful and profitable. I set out the results at a later stage of the narrative at paragraph 89 below.

23. Two aspects of Mr Gill's trading are particularly relevant to the issues which remain for decision. First, other than in the Man period, his trading has been predominantly in "market makers", whether in physical stocks or derivatives such as contracts for differences. A market maker is a brokerage or bank which makes a price on a stock, that is to say, it makes a bid to buy or an offer to sell the stock in question at a certain price. Market maker stocks were and are primarily those listed on the FTSE 350, the shares of smaller companies than on the FTSE 100. Mr Gill has a particular skill in

choosing and trading the right market maker stocks in the right sector at any given time, which was remarked on in evidence both by Mr Plowman and Mr Elms, a broker formerly employed by Man but now at ODL Securities Limited, who has handled Mr Gill's account since he left Man in 2002.

24. Mr Gill described the technique he used to trade market makers successfully in his main witness statement:

> "When I first started trading, I realised through watching the markets that sometimes the price of a stock would increase slowly, but then gain momentum. Where a stock rose in price by a small amount, and then the increases in price became higher with each consecutive movement, this indicated that the momentum in the stock was increasing, so I bought into this stock. The advantage of buying a stock in this momentum phase was that there was a high probability that the price would continue to rise. This meant that there was less risk associated with buying this stock, and more chance of making larger profits."

25. There was some debate during the trial as to whether this was accurately described as "momentum trading". Mr Plowman preferred to refer to Mr Gill "jumping on a wave". As he put it in cross-examination:

> "I think actually Mr Gill's trading was perhaps better described as jumping on a wave…… If already there was a trend there, he would add to that trend, increase the wave, and then normally, being blunt, bale out before it broke."

26. The other aspect of his trading is his sensitivity to losses, which manifested itself in a trading strategy of "running his profits and cutting his losses" a characteristic which was commented on both by Mr Plowman and Mr Elms. Mr Plowman and Mr Jones agreed that cutting losses was atypical of traders who would be more inclined, if a stock started declining, to continue to trust their original judgment that it was going to be a profitable stock and stay in it. In contrast, Mr Gill would tend to get out of declining stocks or go short in them, which contributed to his success as a trader.

27. Mr Jones was initially disposed to regard Mr Gill's trading as little better than gambling, but he had no explanation for the fact that Mr Gill traded market makers successfully whatever the market conditions (whether in "bull" or "bear" markets), as Mr Jones accepted he did. I agree with Mr Kitchener that, although Mr Jones was an independent, honest and likeable witness, the main problem with his evidence was his inability to reassess his *a priori* thinking about the nature of trading, even when faced with the overwhelming evidence of Mr Gill's success. Mr Plowman attributed Mr Gill's trading success to his skill in trading market makers rather than a gambler's luck and even Mr Jones resiled from the position in his expert report that trading market makers is always a 50/50 bet. Generally, I preferred the expert evidence of Mr Plowman where he and Mr Jones disagreed, although by the end of their evidence, it did not seem to me there was much they really disagreed about.

Mr Gill's trading with Union and Man

28. When Mr Gill first opened an account with Union, he told Mr Bomford that he would require "real time" up to date information about the profitability of his trading and that he needed this to assess his trading strategy. Mr Bomford agreed that he would provide Mr Gill orally each day with details of his profit and loss on the previous day's trading. He informed Mr Gill that it would not be necessary for him to keep his own records.

29. That is how matters then proceeded first at Union and then at Man. Mr Bomford gave Mr Gill a daily profit and loss ("P&L") figure for the previous day's trading and as one sees from the available transcripts of the tapes of conversations from mid October 2001 onwards (earlier tapes had not been preserved), Mr Bomford also gave Mr Gill frequent intra-day updates of how particular trades were doing. Mr Bomford knew that Mr Gill was relying on the information he gave in determining his trading decisions and strategy. That much is not only clear from the evidence, but the plea to that effect in paragraph 78 of the Re-Amended Particulars of Claim is now admitted by the defendants. As Mr Kitchener QC for the claimants said, that is a critical admission in the context of the issue of inducement.

30. The problem in hindsight with Mr Gill's trading during the Man period was his extensive and indeed, on occasions, frenetic trading of SETS. This is shorthand for trading of shares mainly in FTSE 100 companies, traded through the automated trading system. Mr Gill had not traded SETS before. SETS involve a much larger size of transaction that can be undertaken than with market makers and a much greater speed of execution of the trades than with market makers. Whereas in the case of market makers, Mr Gill would as often as not leave his positions open overnight or even for several days, with SETS the vast majority of the trades were "day trades" opened and closed on the same day, frequently with the particular stock being traded many times over.

31. It is clear that, as Mr Gill said in his evidence, it was Mr Bomford who encouraged Mr Gill to start trading SETS from about September 2000. Mr Gill was well aware that they were difficult to trade and was cautious. Initially he made some losses and cut back any SETS trading for a few months. However, by December 2000, encouraged by Mr Bomford's assurances that his SETS trading was profitable, Mr Gill then embarked on a course of SETS trading which, fuelled by Mr Bomford's fraudulent statements as to its profitability, he believed to be profitable, whereas in truth it was disastrously loss making from an early stage. From March 2001 the account was in decline and certainly from June 2001, namely in the Man period, it was declining sharply.

32. Although the motive of a fraudster is irrelevant to the issue whether the tort of deceit has been committed (see per Lord Herschell in Derry v Peek (1889) 14 App Cas 337 at 374), the circumstances in which this fraud was conceived have some bearing on the question of inducement. It seems to me likely that at some stage Mr Bomford alighted on SETS trading as a means by which, because of the volume and speed of the trades, substantial commissions for his employers would be generated, which would in turn mean that he would receive generous bonuses. Whether he first suggested SETS trading with a fraudulent intent or whether he worked out later that he could defraud Mr Gill through SETS trading and so encouraged it at that stage, will

never be known and, in so far as the claim against Man is concerned, when the fraud was conceived and first put into effect may not matter much, given the admission that Mr Gill was being defrauded at least from April 2001, before the Man period.

33. Furthermore, it will never be known whether the trading was always loss making, because of the impossibility of reconstructing the trades and the complete inability of Mr Bomford to tell the truth, either at the time or subsequently. What is striking is that there is some evidence that, even during the Man period when Mr Gill's trading was clearly driven off course by Mr Bomford's fraud, his trading in market makers continued to be profitable as it had been before the Man period and continued to be after. This evidence consists not only of contemporaneous statements made by both Mr Gill and Mr Bomford recorded on the tapes, that Mr Gill was making money on market makers. In addition, Mr Creed calculated the profits on market makers for the month of October 2001 as £35,772. His calculation was then corrected by Mr Gill in his third witness statement on the basis that Mr Creed had incorrectly categorised certain trades and Mr Gill put forward an increased figure of £66,668.16. This was not challenged in cross-examination. Tangent also conducted an exercise of computing the trading results on market makers for the eight days available at the end of each month during the Man period from the month end statements. Over those eight days, an overall profit of some £130,000 was made and on only one of those days, at the end of September 2001, was a loss made of some £6,000. It seems to me that that material is likely to be representative of what was happening throughout the Man period and that market maker trading continued to be profitable.

34. Nonetheless, it is clear that, certainly by the spring of 2001, the overall account from Mr Gill's trading with Union was static at around £4.5 million. Given that Mr Gill traded profitably on market makers, it is likely that the SETS trading was already loss making by then. Certainly by the time of the transfer to Man at the end of June 2001 it must have been, given the decline in the value of the overall account to £4.25 million at the end of June and then to £3.56 million at the end of July 2001.

35. It is also likely that Mr Bomford became aware at an early stage of his relationship with Mr Gill, that not only was Mr Gill reliant on the profit and loss information which Mr Bomford gave him, but that he was not receiving copies of the contract notes or monthly statements from the management company in the Isle of Man which managed Tangent's affairs. In fact, somewhat surprisingly but in my judgment entirely candidly and truthfully, Mr Leventhorpe of Coda and subsequently Aston, the offshore service providers, admitted in evidence that from a very early stage in the relationship with Union, the volume of documentation received in the Isle of Man in terms of contract notes and monthly statements was such that they simply did not open the envelopes after the first few and merely stamped the envelopes as received. This pattern of lassitude continued during the Man period. In the light of that evidence, whatever view one might take about the quality of the service Mr Leventhorpe was providing, there is no doubt that Mr Gill's only source of information as to his daily profitability or the overall state of the account was Mr Bomford and it is equally clear that Mr Bomford appreciated that from early on.

36. In those circumstances, deceiving Mr Gill as to the profitability of his trading and of the overall account was something Mr Bomford could do without any risk of being found out, at least in the short term. Whether he thought that at some point the trading would pick up so that Mr Gill's account would increase in amount is not clear. The

reasoning of dishonest people such as Mr Bomford is not always easy to discern. Given his statements later about doing it "for the desk" it seems likely that he was motivated at least in part by a perceived need to generate commission in circumstances where Mr Whitaker and his team had just arrived at Man and would be under scrutiny, particularly since they were described as a "two client" business and of those two, Mr Gill was by far and away the larger. Equally, Mr Bomford may just have lived for the moment, as glimpses of his lifestyle, such as his admitted use of illegal drugs, would suggest.

37. At all events, although no doubt the initial decision to start trading in SETS at all may well have been a decision made by Mr Gill (albeit prompted by Mr Bomford), it is clear that the encouragement to continue with and increase SETS trading once the Man period began and at all material times thereafter, came from Mr Bomford, evidently with fraudulent intent. Although Mr Brindle challenged Mr Gill on his evidence that he traded in SETS as a consequence of Mr Bomford's encouragement, Mr Gill was firm that his trading in SETS was as a consequence of active encouragement by Mr Bomford. I accept his evidence and reject any suggestion that Mr Gill was somehow determined to trade SETS irrespective of Mr Bomford's encouragement. Given his cautious approach to SETS trading at the outset in September 2000 (where having suffered some losses he reduced the trading) it seems to me overwhelmingly likely that had he not been deceived by Mr Bomford as to the profitability of that trading at the outset of the Man period, he would either have got out of SETS trading altogether or, at the very least, would have only conducted very carefully monitored and limited trading in SETS (in line with his sensitivity as a trader to making losses) to see if such trading was profitable and if it was not, would not have committed himself to SETS trading to the extent he in fact did, influenced in doing so by the fraud.

Fraudulent misrepresentations as to daily and weekly profitability

38. In the light of the admission that daily and weekly profit figures given by Mr Bomford were knowingly false, I do not need to set out the daily or weekly position in full. However, it is necessary to consider several examples from the transcripts of taped conversations to demonstrate the extent and seriousness of the deception in which Mr Bomford engaged, which is particularly relevant when considering the issue of inducement. In that context, it is also important to have well in mind that the regular deception about daily and weekly profitability did not stand alone. It was coupled with fraudulent misrepresentations about the overall amount in Mr Gill's account with Man, specifically misrepresentations in September 2001 that the account stood at £8 million and on 26 October 2001 that it stood at £9.27 million. I shall consider the detail of these "overall account misrepresentations" a little later, but their significance is really twofold. First, they were intended to and did give Mr Gill the impression that his account was continuing to grow because of his profitable trading whereas throughout the period from May 2001 it was in decline, sharply so after June. The true figures were £3.02 million at the end of September 2001 and £2.81 million at the end of October 2001. Second, they were intended to and did give Mr Gill the impression that his year-end target of £10 million, of which Mr Bomford was well aware, was achievable.

39. Turning to some of the representations about daily and weekly profitability in the period from Thursday 11 October 2001 when tapes of conversations are available, one

striking aspect of the fraud perpetrated is that time and again in the taped conversations, Mr Bomford gives the impression that he is getting the figures which he gives Mr Gill from the Rolfe and Nolan system on his computer. He also on several occasions (particularly in the last few months of the fraud when even he must have been having difficulty in covering up the real extent of the losses) refers to inaccuracies in the Rolfe and Nolan system or to problems with the computer system making it impossible to provide figures. Indeed Mr Brindle opened his case on the basis of those inaccuracies and difficulties, cross-examined Mr Gill at length about them and even called a witness, the back office manager of Man, Mr Paul O'Sullivan, part of whose evidence was concerned with problems that might be encountered with the system.

40. However, that whole case was literally blown out of the water when, at an early stage of cross-examination, Mr Bomford asserted that none of the figures for daily or weekly profitability had come from the computer system at all. Rather he claimed that each morning he spent twenty minutes or so computing the figures for all the trades from the previous day which he had written on his "blotter", an A4 pad on which he wrote trades and prices. Of course, given that all the figures were made up by him, that itself was a farcical lie. The truth (in so far as it is possible to discern it from anything Mr Bomford said or did) is that figures were simply plucked from the air.

41. Mr Bomford was in fact away on holiday from 12 October 2001, returning to work on Monday 22 October 2001. In the week that he was away, 15 to 19 October, Mr Gill thought at the time that he had had a bad week trading but on his return Mr Bomford told Mr Gill that in fact he was "up on the week" by 20 or 30 thousand, to Mr Gill's pleasant surprise. Mr Bomford firmed up this misrepresentation the following day 23 October 2001 by saying that he had added up the totals before he left work and got to £47,000 for the previous week. Mr Gill queried whether that was profit, which shocked him, to which Mr Bomford said:

> "I'll double check it but I think I got to 47, I know it wasn't 47 loss, I got to 47,000 maybe that was gross, I'll double check. But it was, you made 47,000 maybe there's commission to come off that which won't be much but I mean it will have to come off. But, you're probably looking at a minimum of 30 plus."

42. In fact Mr Gill's initial pessimism had been justified. There was a trading loss of more than £26,000, with the overall gross loss including commission in excess of £83,000. Mr Bomford made no attempt to correct the misleading impression he had given that the week had been profitable. The misrepresentation on 23 October 2001 was also significant because it gave another false impression, about commission, suggesting that even if the £47,000 were gross, the amount of commission to come off would not be enormous, leaving a net profit in excess of £30,000. In fact, as Mr Bomford knew, but never told Mr Gill, the volume of trading at least in SETS was such that even when gross profits were being made, they were swallowed up by commissions and converted to substantial net losses.

43. In cross-examination, Mr Brindle put to Mr Gill that he could not have believed the £47,000 profit in view of his own contemporaneous assessment the previous week that he had made a loss. Mr Gill's answer was that he had thought Mr Bomford may

have corrected some of the trades, but that in any event by this time he had stopped trusting his own judgement and trusted Mr Bomford implicitly. Given the web of deceit in which he had clearly been ensnared by Mr Bomford, I found that explanation entirely credible and I accept it.

44. At the end of the day's trading on the afternoon of 25 October 2001, Mr Bomford represented that on that day Mr Gill had made about £45,000 on his CFD trading plus about £5,000 or £6,000 on FTSE trades. He then said: "So you've had a blinding day. Back to the old 50 grand days", which Mr Gill said in evidence was a reference to the period in July to September 2001 when he thought he had been making that sort of amount per day (that perception of his trading always being as a consequence of what Mr Bomford was telling him which was almost certainly untrue). Mr Bomford did accept in cross-examination that there were days when Mr Gill had made £50,000 so there is no question of the ability to make that much income in a day being some fantasy of Mr Gill's. It was immediately after the misrepresentation about Mr Gill having made about £50,000 on that day that Mr Gill asked for an update on the overall position on his account. It was at the beginning of trading on the following day, 26 October 2001, that Mr Bomford made the £9.27 million misrepresentation, to which I return in more detail below.

45. At the opening of business on Wednesday 14 November 2001, in response to a question from Mr Gill as to whether he had made anything the previous day, Mr Bomford said that he had seen on the screen that Mr Gill had made £24,000. The true position was very different. There was a net loss after commission of some £6,700. This day typifies a point which arises generally in relation to profitability figures, as to whether they were gross or net of commission. At various stages in his oral evidence Mr Bomford tried to maintain that the figures he gave for the previous day's or week's trading profits were gross and that commission still had to be deducted. Mr Gill's evidence however was that, although figures for intra-day trading were gross, he always thought that any figures for profits given by Mr Bomford for the previous day's or week's trading were net of commission. I accept that evidence. Were it otherwise one would be left with the absurd anomaly, which Mr Bomford could not explain in his evidence that, although on a regular basis, he was giving Mr Gill figures for the previous day or week which were profitable and, in moments of particular hyperbole, describing them as "blinding", the net position was in fact loss making. It is quite clear that the figures given by Mr Bomford were intended to be net of commission and were so interpreted by Mr Gill.

46. Early on Friday 16 November 2001 Mr Bomford told Mr Gill that he had made £34,000 the previous day, albeit that may have included some trades from the day before. In stark contrast with what he had told Mr Gill, in a telephone conversation a little under two hours later, Mr Bomford told his girlfriend that Mr Gill was "haemorrhaging money" and had not made any money that week. In fact the gross loss for 15 November 2001 was over £20,000.

47. By December 2001, as Mr Brindle put to Mr Gill in cross-examination, he was having more difficulty trading. The numerous occasions when during conversations with Mr Bomford he referred to having had a "crap day" or a "shit day" or such like were put to him. His response generally was to point out that he had described the day in that way because he was not making as much money as he had been in the past or because he was angry with himself, since he thought he had not traded properly and, as a

consequence, had not made as much money as he should have. A good example of this was 5 December 2001. Mr Brindle put to Mr Gill that he and Mr Bomford had agreed that it had been a "shit day" because he had made a loss. However in fact the transcript showed that Mr Bomford had told him that the loss of £10,000 had been offset by profits on other trades and overall he had made a profit of £10,000. However, on the transcript Mr Gill is clearly frustrated with himself for only making that much, saying "I'm just gutted actually....I have probably made, made about 10 grand when it should've been a 100 grand day."

48. At the start of business on Wednesday 12 December 2001, Mr Gill asked how much he had made the previous day and Mr Bomford told him it was £12,000, although he indicated that that was an underestimate because an HSBC trade had been wrongly entered. This misrepresentation of the true position is an indication of the extent to which Mr Bomford was misleading Mr Gill. In fact the overall trading loss on 11 December 2001 was in excess of £76,000 and with commission the gross loss was nearly £98,750.

49. The extent of the subterfuge being practised by Mr Bomford can also be seen from the tapes available for the week 17-21 December 2001, the last week of trading before Christmas. On 18 December Mr Bomford told Mr Gill he had made a profit the previous day of about £3,000 (in fact there was a trading loss of about £1,000 but £23,000 in commission, making a gross loss of more than £24,000). On 19 December no tapes are available of any conversations with Mr Bomford. On 20 December at the outset of trading, in response to Mr Gill's question as to whether he had made anything the previous day, Mr Bomford said he had not had a chance to look yet. He said he would do so, but never came back to Mr Gill, creating the impression that at least the previous day had not been loss-making. In fact the gross loss was some £26,000. Again on 21 December 2001, Mr Bomford made the same excuse that he could not tell yet whether Mr Gill had made a profit or a loss the previous day, but never came back to him. The gross loss was some £25,500.

50. Later on 21 December 2001, Mr Bomford had a conversation with Mr Whitaker who was away from the office and who asked what Mr Gill was up to. When told by Mr Bomford that he was "on page 7" meaning the seventh page of his blotter for trades that day, Mr Whitaker said that Mr Gill was "doing his bit for the Christmas bonus". Mr Bomford then told Mr Whitaker that Mr Gill had lost £30,000 the previous day and was losing money every single day. Mr Bomford said that he did not think he should bring up the losses with Mr Gill and Mr Whitaker agreed, saying in effect that Mr Bomford should let Mr Gill raise the issue. Of course Mr Whitaker was unaware of the deceit which Mr Bomford was practising on Mr Gill whereby he was leading Mr Gill to believe that his trading overall was profitable. If Mr Whitaker had known the true position, it seems to me inconceivable that he would not have taken steps to inform Mr Gill.

51. On the following Monday morning, Christmas Eve, Mr Gill raised the question of the overall balance of the account and said he thought it was at about £9.8 million (which of course was on the basis of what he thought he had made since the end of October 2001, when he was told by Mr Bomford that the account stood at £9.27 million). Mr Bomford did not contradict him, but said that he would have a look. He also said the Rolfe and Nolan system was "knackered", giving the impression that it might be difficult to give any figures that day. Mr Bomford did not come back and tell Mr Gill

that he was making losses or that in fact, far from being at almost £10 million, the overall account was then only at about £1.5 million. Mr Gill conducted some trading between then and New Year on the basis of which Mr Brindle suggested to him that he was a compulsive trader. However, as Mr Gill said in re-examination, the extent of the trading in that period was pretty limited. From 23 December 2001, Mr Gill was on holiday in India and Thailand for over a month.

52. Monday 7 January 2002 was one of the relatively few days on which, when Mr Gill asked about the previous day's trading (Friday 4 January), Mr Bomford told him he had made a loss, albeit of only £1,500. In fact the trading loss was more than £35,000 with an equivalent amount of commission making a gross loss for 4 January of nearly £71,000. Mr Bomford never told Mr Gill the true position, but he quite brazenly discussed it that day in a telephone conversation with Mr Colin Bovis, a former colleague who had left Man in about November 2001. In that conversation he referred to Mr Gill "losing his arse" trading. There was also discussion between the two of them about the fact that Mr Bomford was due for another bonus that month.

53. On Thursday 10 January 2002, in response to Mr Gill's question whether he had made or lost the previous day, Mr Bomford said that he had made £8,000, not including FTSE trades. In fact the overall gross loss was some £41,000. On that day Mr Gill also made the point (correctly as it happened) that he made most of his money on trading market makers. Mr Bomford agreed and said: "[if] you have a bad day on SETS you can always rely on a couple of market makers that'll bring you back up" the implication of which was twofold, that not every day trading SETS was a "bad day" and that, even on such days, profits on market makers would outweigh losses on SETS. Of course neither implication was true but this demonstrates the way in which Mr Bomford at this stage was dishonestly inducing Mr Gill to continue trading in SETS.

54. Similarly on 11 January 2002, Mr Bomford told Mr Gill that he had made an overall profit of £6,000 the previous day. In fact the gross loss was almost £25,000. Of course Mr Bomford knew that Mr Gill was only continuing to trade because he was dishonestly telling him that he was making profits overall, albeit at a reduced level. In contrast with what he was telling Mr Gill, also on 11 January 2002, during another unedifying conversation between Mr Bomford and Mr Bovis, this exchange took place:

> "CB: I think he's given up hasn't he really? He's resigned to the fact that you're gonna spunk it all.
>
> MB: Oh I don't think he even knows to be honest. He's been out travelling for god knows how long.
>
> CB: He's mad.
>
> MB: Oh I give up on him.
>
> CB: Yeah, what can you do? You …
>
> MB: He does my head in."

55. Tuesday 15 January 2002 was another day on which Mr Bomford told Mr Gill that he had made a loss the previous day, of £7,000 (whereas the actual gross loss was nearly £46,000). However any suggestion that this was a pattern was dispelled by telling him on the following day, 16 January 2002, that he had made profits on 15 January of £14,000. That was another complete lie, as there was in fact a gross loss of just short of £38,000. In the transcript for 16 January 2002, Mr Gill admitted that he was overtrading. When he was cross-examined about this and other similar statements on the transcripts (such as on 30 January when he said "it is mad… mad. I'm just bloody… I'm just basically gambling literally now"), he claimed that he had reduced his trades and realigned his trading strategy in January 2002 in response to warnings from Mr Bomford. In my judgment, Mr Brindle was able successfully to demonstrate that whatever Mr Gill may think now about having changed his strategy in January 2002, he did not really do so, although it is correct that at least in February 2002 he traded a number of market makers which he had not previously traded. However, even if he did not change his trading strategy until the very end of his trading through Man, as Mr Gill said in evidence (and I accept) the most important factor which explains why he was trading in the way he was is that he was not told by Mr Bomford that he was in fact making substantial losses. In other words, throughout this period of what he accepted at the time was overtrading, he remained in the grip of the fraud.

56. Thursday 17 January 2002 was a day when Mr Gill was aware at the time that he had made a loss. When he asked Mr Bomford at the beginning of the following day how much the loss was, Mr Bomford claimed that he couldn't tell because "the system's buggered up" but said that it was one of the first days when Mr Gill would have a "DR" [i.e. a debit] against him. Of course nothing could have been further from the true position, which was that Mr Gill was losing money day after day. On that Friday, 18 January 2002, Mr Bomford continued to be broadly encouraging about Mr Gill's trading generally. At the end of the day Mr Gill said that he thought he had made about £14,000 that day and Mr Bomford agreed that he had had a good day and that had been from trading market makers. Mr Bomford said that it had been a very difficult week, to which Mr Gill responded that he had still made about £20,000 that week. That is a clear indication, confirmed in his evidence, that although there were occasional loss-making days, he still believed his trading was profitable overall. Mr Bomford did nothing to dispel that false impression. In fact on that day alone the gross loss was nearly £26,000.

57. On Wednesday 23 January 2002 Mr Bomford again dishonestly told Mr Gill he had made profits on the previous day of £12,000 not including FTSE trades (the true position was a gross loss of almost £26,000). Mr Gill was disappointed about this as he thought he should have made £50,000. Later that day, Mr Gill was in effect complaining that he would only make about £100,000 that month. Mr Bomford's response was not to tell him that he was in fact going to make a substantial loss in January (in January 2002 his account declined by over £500,000) but to make encouraging noises about how, given the state of the market, that would not be bad and you had to take your hat off to anyone who was making money in that market. The overall impression he was creating was that Mr Gill was still doing well and was making money, unlike others.

58. Mr Gill considered at the time that he had made losses on 23 January itself and when he asked the following day, 24 January 2002, what the position had been, Mr

Bomford feigned an inability to get into the Rolfe & Nolan system. When Mr Gill said, half jokingly, that Mr Bomford was doing this deliberately, Mr Bomford said: "No, no, no, don't worry. I'll tell you when you lose, don't worry." Of course, nothing can have been further from the truth, but Mr Gill trusted Mr Bomford implicitly to tell him if he was making losses and believed that Mr Bomford was telling him the truth when he gave him the daily or weekly figures.

59. On Tuesday 29 January 2002, Mr Bomford told Mr Gill that he had made £17,000 the previous day (whereas the true position was a trading loss of nearly £11,000 and a gross loss after commission of in excess of £32,000). In a discussion between them later that day, this exchange took place:

> "RG: ....I can't believe 20 grand or 10 grand a week now is a lot.
>
> MB: Well, don't forget we are still in the first 3 weeks of the month, like 4 weeks of the year, so it's still a relatively early time. I mean we could easily see a move in February and March, back to old times."

It is quite clear from that exchange both that, at that stage, Mr Gill still believed that overall, week on week his trading was profitable, albeit at a lower level of profitability than before (and Mr Bomford did not disabuse him of that mistaken belief) and that Mr Bomford was encouraging him to believe that the market might well pick up in the next few months, enabling him to make massive profits again. In evidence Mr Gill said that he took the reference to "old times" to be to the times before October 2001 and to making huge amounts of money again, which is clearly what Mr Bomford wanted Mr Gill to believe. In my judgment, this is a clear example (a matter of only a fortnight before Mr Gill discovered that his account, far from being near £10 million, had whittled away to less than £1 million) of the extent to which Mr Bomford was still practising his deceit and Mr Gill was being misled by it.

60. On Saturday 2 February 2002, Mr Gill returned to London after being in India and Thailand since Christmas. On the following Monday 4 February 2002, a conversation took place between Mr Bomford and Mr Gill about how much money Mr Gill had made in January. Mr Gill said he had calculated that he had made £170,000 in January and was making only about £50,000 a week, which disappointed him. Mr Bomford's response was not to contradict him or tell him the true position (which was that he had lost on average £200,000 a week in January) but to encourage him by telling him that £50,000 a week was "still pretty good though [in] a flat market".

61. At the beginning of trading on Tuesday 5 February 2002, Mr Gill referred to the difficulty of trading in the market and not wanting to overtrade and "screw it up again" to which Mr Bomford replied "no exactly, there's no point giving money away". Later the same day in a conversation with Mr Andy Bass, another broker at Man, Mr Gill refers to "way overtrading" and to being a "nutter" and to becoming a broker and finding someone like himself to trade for and make a lot of commission. In fact on that day and the following day, despite warnings from Mr Bomford about not overtrading, Mr Gill traded strenuously, doing 266 trades on 5 February and 287 on 6 February.

62. Mr Bomford continued to misrepresent the position as regards the profitability of Mr Gill's trading up until 13 February 2002, when the true state of the account emerged. On 7 February 2002 he told Mr Gill he had made net profits the previous day of £7,000. The actual position on 6 February 2002 was a trading loss of £21,000, with commission payable in an equivalent amount, making an overall trading loss of £42,000. 7 February itself was another day on which Mr Gill believed that he had made losses overall. On the morning of Friday 8 February 2002, when Mr Gill asked how much he had lost the previous day, Mr Bomford purported to be unable to give him a figure because of a power cut. Mr Brindle relied upon the reference by Mr Gill to making a loss on that day to suggest to him that the position by this stage was that he was making losses every day and knew it. However on analysis of the taped conversations, that is clearly not correct. The number of days on which Mr Gill thought he had made a loss, let alone when Mr Bomford told him he was making a loss, remained the exception rather than the rule.

63. On Monday 11 February 2002, Mr Bomford told Mr Gill that "I had a good look earlier on" and Mr Gill had made a profit of £1,600 on Friday 8 February. In fact the gross loss was over £32,000. The following day, 12 February 2002, Mr Bomford told Mr Gill that he had made £18,500 trading on the previous day. In fact there was a trading loss of £12,000 and a gross loss of some £28,000. It was there that the fraudulent misrepresentations ended, since on 13 February 2002, Man made a margin call on Mr Gill and it emerged that his account had only £800,000 in it. I will consider the events of 13 February 2002 in slightly more detail later in this chronology, having considered the other aspects of the deceit.

64. Mr Brindle relied upon days such as 5 and 6 February 2002, shortly before the true state of the account emerged, as demonstrating that notwithstanding warnings not to overtrade, Mr Gill continued to do so, because he was a compulsive trader. When cross-examined about his overtrading at this time Mr Gill made the point that he had just returned to the United Kingdom and that one of the reasons why he thought he had only made £170,000 in January was because, being abroad, he had not been able to have a full grasp of the market, hence trading actively on his return. He made the point that in fact the FTSE rose in January and he had been frustrated not to be able to take advantage whilst he was abroad of something of a "bull run", thinking that he should have made £500,000 where he only made £170,000. Mr Gill also referred to Man having become sloppy around this time in executing his instructions, so that trading opportunities had been missed.

65. Mr Gill also maintained in cross-examination that he had cut down on the volume of his trades and increased his trading in market makers. Although Mr Gill may have convinced himself that he cut down on his trading volumes after December 2001, as I have already said, the evidence of his actual trading does not support this. The reduction in trading volumes (from figures which he produced himself during the trial) between December and January was only about 5% which was pretty marginal. His point about increasing market maker trades at around this time was more convincing. Not only did Mr Bomford himself say to Mr Gill on 8 February 2002 that he was trading a lot of market makers, but the month end statement for the end of February 2002 also shows that he had started trading a lot of new market makers, which he said in evidence he had not traded before.

Fraudulent misrepresentations as to overall balance of the account

66. As I have said, in parallel with daily or weekly misrepresentations as to the level of profitability of Mr Gill's trading, on several occasions Mr Bomford gave Mr Gill an overall figure for what was in his account with Union or Man as applicable. These statements all exaggerated the state of the account and fraudulently gave the impression that the account was increasing in value. The first two were prior to the Man period, one in about March 2001 when Mr Bomford told Mr Gill that there was about £5 million in the account (whereas in fact there was about £4.5 million) and the other in May 2001 when Mr Bomford told Mr Gill that there was £6.9 million in the account (whereas throughout May 2001 there was in fact slightly under £4.5 million in the account). During the Man period, at some point in September 2001, Mr Bomford represented that there was £8 million in the account (whereas the amount in the account was in fact fractionally over £3 million throughout that month).

67. The most serious and egregious fraudulent misrepresentation as to the overall balance was on 26 October 2001 when Mr Bomford gave Mr Gill a figure of £9,276,800. The context in which this arose was that Mr Bomford had been away the previous week of 15 to 19 October 2001 on holiday. Upon his return, Mr Gill was pressing him for an overall figure, because as Mr Gill made clear to Mr Bomford, for example in a taped conversation on 23 October 2001, he wanted to know how close he was to £10 million, which was his target to reach by the end of the year. On that day Mr Bomford said he would have to check with Man's back office but "it's got to be 9.5 or 9.4". On the Friday of that week, 26 October, Mr Bomford said to Mr Gill at the beginning of the day:

> "I've got your consolidated figure actually for your account. Hang on a minute, I'll just go and get it."

68. After a short delay, Mr Bomford came back to him with a figure of 9.27 million. It is worth quoting the short conversation in full:

> "MB: Hi, mate. Yeah, sorry about that …9.27.
>
> RG: Bollocks.
>
> MB: Yeah. And that could be out by a couple, not … well it won't be out by millions. It could be out by, you know, 40 or something. But … so it could be at 9.3.
>
> RG: Okay.
>
> MB: But it's getting there.
>
> RG: Yeah.
>
> MB: That's not too bad. … you've got two …looking….on my desk. So you've got um, you've got 2 months.
>
> RG: Yeah.
>
> MB: 700, 600, 700 grand you can do that.

RG: Well hopefully.

MB: So it's pretty good though.

RG: Yeah, it's okay.

MB: It's okay. I think it's blinding. But no, excellent, excellent trading, yeah. So okay, that could be out by 4, it could be out by 40."

69. About ten minutes or so later another short conversation took place in which Mr Bomford gave a more precise figure:

"MB: It's at 92, 927 68 or something.

RG: Does it include the rebate account on that?

MB: No."

The reference to the "rebate account" is to another aspect of the fraud perpetrated by Mr Bomford on Mr Gill. Following the debacle over the Eagle Eye shares, Mr Gill thought that first Union and then Man were compensating him for the losses which he suffered on the Eagle Eye transactions by "rebating" to him 50% of the commissions they were making on his trading up to a total of £1 million and that these rebated amounts were being held in a separate "rebate account". In fact, the chief executive of Union would not countenance this arrangement, nor was it ever agreed by Man. However, Mr Bomford clearly deceived Mr Gill into thinking both that commissions were being significantly rebated (which in turn contributed to Mr Gill's lack of awareness of how much commission was being generated and that it was in truth causing him losses) and that the amounts rebated were being held in a separate account. This was entirely false.

70. The true state of the account was, as Mr Bomford well knew, nowhere near £9.27 million at that time. It was in fact at about £2.8 million and had been declining rapidly for several months. Mr Bomford's attempt in his evidence to explain away the £9.27 million misrepresentation was particularly shameful. In his witness statement he said that he was distracted at the time because his father had died the previous week. That was a lie and he must have known that it was. Although his father was ill, he did not die until June 2002. No doubt Mr Bomford hoped no-one would query such a personal matter. Far from being distracted by grief, he had spent the previous week on holiday at Sandy Lanes in Barbados, presumably spending some of the bonus he had gained through his prolonged deception of Mr Gill. When found out in this lie, he produced a further witness statement explaining that his father had been ill at the time although he had not died until later. Of course his father's illness had not prevented him from taking a luxury holiday. He still had no explanation in his oral evidence for having told the lie in the first place.

71. What the conversations on 26 October 2001 which I have quoted demonstrate is, not only that Mr Bomford was giving Mr Gill what he was representing was an accurate figure for the overall balance, evidently from the computer screen (whereas in truth like his daily profitability figures, it was plucked from the air), but that he was well

aware of Mr Gill's £10 million target and encouraged him in his belief that he could reach it. This encouragement continued after 26 October 2001. Just over a month later on 3 December 2001, Mr Bomford said to Mr Gill that if he made half a million pounds on a trade, "you'd have done your Christmas target" clearly maintaining the false impression that the account balance was about £9.5 million. As late as 23 January 2002 after a period when, as Mr Gill accepted in evidence, his trading had not been as profitable as in the period before September 2001, he still said to Mr Bomford that he would be happy if his account was at 9.8. Mr Bomford did not contradict him but instead made a joke about making up the difference (up to the £10 million target) from Mr Whitaker's salary.

72. Although, as I have already discussed in the context of the daily and weekly figures given by Mr Bomford, Mr Brindle sought to make much in his cross-examination of Mr Gill of the fact that in the period from about mid December 2001 until the truth emerged in mid February 2002, Mr Gill was often gloomy about his trading, referring to losses and losing, it is clear that this reflected his sensitivity to the fact that he was not making the profits he had been used to making historically. As he said in his evidence and I accept, these gloomy comments on a regular basis did not reflect an appreciation that he was in fact making losses overall. Although it is clear he was dissatisfied with some of his trading, he still thought that, whilst some trades were making losses, overall his trading remained profitable, albeit not at previous high levels. This was borne out by his statement on 23 January about being happy if it was 9.8 million. That demonstrates, as he said in evidence, that he thought that in the three months since the 9.27 million misrepresentation, he had made about £500,000 overall on his trading. Mr Bomford did nothing either on 23 January 2002 or any other day to dispel the false impression he had created.

73. It is clear that Mr Bomford managed to deceive Mr Gill about the overall balance on his account without his colleagues at Man becoming aware of this deception. Indeed Tangent's case does not involve any allegation of fraud other than by Mr Bomford, nor is there any allegation of conspiracy. As to how Mr Bomford achieved this, it appears, both from certain of the transcripts and from Mr Gill's evidence, that Mr Bomford led him to believe that he had two trading accounts with Man, one the CFD ("contracts for differences") account and the other the futures account, but that in addition there was an account in which the bulk of his funds was held, which Mr Bomford described as the "forex" or "fx" account. Mr Bomford referred on a number of occasions to difficulties in getting the figures for this account. Both those difficulties and the account itself were figments of his imagination, evidently designed to cover his tracks if Mr Gill asked anyone else at Man for figures on his account.

74. How successful this particular subterfuge was can be demonstrated from discussions Mr Gill had with Mr Bomford (and in his absence with Mr Bovis) in the days leading up to the 9.27 million misrepresentation. On 18 October 2001 when Mr Bomford was away on holiday, Mr Gill asked Mr Bovis for the account balance. Mr Bovis gave him a figure of 2.217 million for the CFD account. Mr Gill's evidence was that he thought that figure was in sterling and that a similar amount was in the futures account. Mr Brindle put to him that in the light of his acceptance of that figure from Mr Bovis without demur, he could not possibly have believed what Mr Bomford told him about there being an overall balance of £9.27 million just over a week later. However, as Mr Gill said when this was put to him, he had thought that whilst there were similar

amounts in the CFD and futures accounts (about £2 million in each), most of his money, some £5 million, was in the so-called "forex" account because that was what Mr Bomford had told him from the beginning.

75. This was borne out by what Mr Bomford said when Mr Gill raised the question of the balance in the account with him on 23 October 2001. Mr Bomford said:

> "2 million [unclear] er 4 I'll round it up plus and then the CFD account is at, see I can't do the FX one which is the big one, well where the most money is tied up cos of the option things. And that is at 2,272 - 2,720,436 so that adds up 5,557…five million, five hundred and fifty seven thousand. Then yeah you're probably not far away cos the I can't tell the FX but I'll get them to do that tonight and I'll have it for you in the morning....
>
> So yeah that's those two, so you have got 5,5, 5.5 million in those two and then you've got more in the other one. So you've had a blinding year though haven't you?"

That passage gave the impression that there were similar amounts in the CFD and futures accounts, broadly in line with the information Mr Bovis had given him about the CFD account a few days earlier. It also gave the impression that most of his money was in the fx account, which was a complete fabrication, but one which clearly enabled Mr Bomford successfully to deceive Mr Gill about the overall balance on his account, even when other Man employees such as Mr Bovis gave him correct figures for the CFD or futures account.

Deceit as to effect of commission

76. The deceit extended beyond these two types of misrepresentation as to the profitability of the account. Another aspect of the deceit which I have already touched on concerned commission and the impression which Mr Bomford gave Mr Gill, through the fiction of the rebate account, that the amount of commission being charged by Man on Mr Gill's trading was not disproportionate to the gross trading profits and that, in any event, 50% of the commission was being rebated into a separate account for Mr Gill's benefit. Mr Gill's evidence, which I accept, was that at the outset of his relationship with Mr Bomford, Mr Bomford told him that commission would be relatively minor. That impression was maintained by what Mr Bomford told Mr Gill at various stages, for example on 23 October 2001, in the conversation which I have referred to in paragraph 41 above, where Mr Bomford said that, even if the profit figure of £47,000 which he gave Mr Gill did not take account of commission, even after commission, the profit would be in excess of £30,000. The reality is that trading profits were frequently swallowed up by commission which exceeded the profit and that net losses were often more than doubled by the effect of commission.

77. An example of Mr Bomford's use of the fiction of the rebate account to create the impression that the amount of commission payable was not disproportionate to the amount of trading profit Mr Gill was making, is his fraudulent misrepresentation on 5 November 2001 that the amount in the rebate account was then £328,000. Mr Gill

understood this to mean that in the nine months since he believed the rebate account had been set up, the commission in total was slightly in excess of £650,000 which equated to about £800,000 a year. Although in his evidence Mr Gill said this was more than he expected, he recognised that he had been trading to a significant extent. It is also important to have in mind that the context was not only that he believed half that commission was being rebated to him, but that on the basis of the misrepresentations by Mr Bomford as to the amount in his account overall, he believed that over the relevant nine month period, his net trading profits had increased by the best part of £5 million.

78. Towards the end of the trading by Mr Gill through Man, when Mr Gill asked Mr Bomford for information about what was in the rebate account, Mr Bomford resorted to the same lies about the system being down or about being unable to access the figures, as he did in relation to providing figures for the previous day's trading profits or losses. This happened on 23 January, 8 February and 11 February 2002. There is no doubt that, by that stage, Mr Gill had more of a sense of the amount of commission that was being generated for Man than he had done previously. I have already referred to his conversation with Mr Bass on 5 February 2002 about wanting to become a broker to make commission. In cross-examination, Mr Gill accepted that by this time he was aware that if he made losses on a day of substantial trading they would be increased by commission. In answer to a question I asked him, he accepted in relation to 7 February 2002, when Mr Bomford said that he had to take commission into account, that Mr Bomford was telling him that if he did 150 trades it would be £15,000 commission, so if he lost £10,000 on those trades, the overall loss would be £25,000. However, as he pointed out correctly in re-examination, the context in which Mr Bomford was telling him he had to take commission into account was a fraudulent misrepresentation that he had made £7,000 net profit. What is quite clear is that at no stage did Mr Bomford tell Mr Gill that, in reality, the amount of commission which Mr Gill's trading generated meant that on a net basis his trading was consistently loss-making.

Deceit as to failure to carry out instructions and as to unauthorised trades

79. The other aspect of the deceit which contributed to the creation of what was, in effect, a parallel universe in which Mr Gill was operating, concerns the extent to which Mr Bomford and Man failed to comply with Mr Gill's instructions. This has two particular aspects. First, Mr Bomford lied consistently to Mr Gill about the prices at which trades ordered by Mr Gill had been executed, representing that the trade had been executed at a more favourable price than that at which it had in fact been executed, so as to conceal that the trade had not been carried out at the price at which it should have been executed. Second, Mr Bomford failed to execute trades ordered by Mr Gill or failed to execute stops on trades at the correct instructed price. Mr Bomford covered up for these failures by engaging in unauthorised trades. At no stage did Mr Bomford inform Mr Gill that he had failed to carry out his instructions.

80. These aspects of the fraud emerged from the analysis conducted of the trades carried out on the four sample days, as ordered by the court at a case management conference prior to the trial. What emerged from that analysis is that, at the beginning of the trading day, Mr Bomford and Mr Gill would go through his open positions overnight. Mr Bomford would tell Mr Gill what was shown on the Rolfe & Nolan screen for the particular stock, so much short or so much long or flat. He and Mr Bomford would

frequently agree that what was shown on the system was wrong. Mr Bomford agreed in cross-examination that these errors (which ostensibly were input errors) related principally to trading in SETS rather than market makers, because SETS stocks were traded at a much higher rate. Mr Bomford would assure Mr Gill that the problems identified would be dealt with, but it appears that none of the errors was corrected. Either Mr Bomford must have carried out unauthorised trades to square the position or somehow confused Mr Gill subsequently as to what the position was.

81. Although the analysis has not gone beyond the sample days, I have little doubt that the deceit involved was widespread and continued throughout the relevant period. That much is essentially admitted in the Re-Amended Defence and, even if it were not, having seen and heard Mr Bomford give evidence, I find that those aspects of the fraud did continue throughout the relevant period and were not confined to the sample days.

82. As a consequence of these aspects of the deceit, combined with the fraudulent misrepresentations as to the profitability of the trading and the account, Mr Gill did not know the true prices at which trades had been executed or what his open positions in fact were, particularly on SETS stocks. This was admitted by Mr Bomford in cross-examination:

> "Q. So Mr Gill will have been trading under a complete
>
> misapprehension as to what his actual open positions
>
> were in relation to those shares, won't he?
>
> A. If they hadn't been corrected, then yes.
>
> Q. But they weren't corrected.
>
> A. Okay."

83. In this way, Mr Bomford was able to deceive Mr Gill over a prolonged period into believing that the trading was profitable, when in truth it was loss-making. Mr Kitchener submitted that one other consequence of this wholesale misleading is that it is impossible to say whether Mr Gill would in fact have made the losses he did (even trading SETS stocks) if Mr Bomford had acted according to his instructions and had not carried out unauthorised trades. I consider that there is considerable force in that submission.

13 February 2002

84. At the beginning of trading on the morning of 13 February 2002, Mr Bass (Mr Bomford being away from the office that day) informed Mr Gill that the open market maker positions on his account were such that there would be a margin call on his account and that the amount in the account was £817,000. Mr Gill's spontaneous and immediate reaction to that news speaks volumes as to the extent to which he had been comprehensively misled by Mr Bomford for months:

"AB: I think all of the positions that we've got on at the moment, all these market maker positions, they're giving your account … er, putting your accounts on call.

RG: What?

AB: Yeah.

RG: They can't be.

AB: I think so mate.

RG: I've got ten million over there.

AB: How many?

RG: I've got ten million cash in the account.

AB: Ten million?

RG: Yeah, altogether I've got ten million in everything.

AB: Um, I don't think so mate. I've got ...

RG: Unless I've lost like five million.

AB: Right well … let's have a look, let's have a look, but it doesn't look like that. Um …

RG: Where's the money gone then?

AB: Well it's … I don't think … certainly haven't got that sort of money, that sort of cash there.

RG: I've got ten million, over ten million all together in …

AB: Ten million?

RG: Yeah in the Tangent account.

AB: In the Tangent account?

RG: Altogether yeah.

AB: [Pause] We've got, er, eight hundred and seventeen thousand at the moment.

RG: What? Where's the money gone?"

85. In view of the admissions now made by Man and Mr Bomford, for example the admission in Paragraph 67B of the Re-Amended Defence that Mr Bomford knew that

the balance of the account was declining and that Mr Gill was unaware of the losses, it is not necessary to dwell at length on what Mr Bomford said to his colleagues on 13 February 2002. Nevertheless, two passages in exchanges between Mr Bomford and Mr Whitaker that day are worth quoting:

> "PW: He wants me to speak to you. Can you remember what valuation you did give him?
>
> MB: I have never given him a valuation. I've never given him a valuation, because, I mean … I've been very, very careful never given him a valuation because, I mean, it was going downhill all the time.
>
> PW: I mean he's completely devastated.
>
> MB: I know, I told you he would be.
>
> PW: He said 'I can't believe it, I can't believe it…and everything. I mean, this is going to wipe me out'.
>
> MB: Yeah. I told you there would be absolute hell would break loose, he had absolutely no idea."

A little later Mr Bomford said:

> "I mean I feel really sorry for the guy, actually. You know, he thought he was doing an incredible job."

86. Those exchanges are of some significance for two principal reasons. First they demonstrate the extent to which Mr Bomford misled his colleagues about the fraudulent misrepresentations as to the overall balance of the account. He would presumably have gone on maintaining that he had never given Mr Gill an overall balance, had it not been for the fortuitous discovery by the claimants' then solicitors on 24 April 2003 of the relevant tape of the 26 October 2001 conversation. Second they are of some assistance in relation to the issue of inducement in the sense that they demonstrate the extent to which Mr Bomford himself was aware that he had successfully misled Mr Gill into believing that his trading was profitable.

Mr Gill's trading activities after February 2002

87. A few days after he learnt the true state of his account, Mr Gill also learnt that in fact the rebate account had never existed. He immediately took steps to close out all his open positions, which took some weeks because he wanted to minimise the losses that might have resulted from premature liquidation of the portfolio. That task was completed by 7 March 2002 and Mr Gill instructed Man to transfer Tangent's outstanding funds, which stood at £521,644, to other brokers, ODL Securities Limited, through whom primarily he has traded since that time.

88. An inevitable consequence of the fact that Mr Gill had severely depleted funds available to him with which to trade (£521,644 when compared with the amount of

the fund at the beginning of the Man period, some £4.25 million) has meant that his trading has been more limited after March 2002 than it would have been had he been trading with a larger fund available to him. His evidence (confirmed by Mr Elms and Mr Plowman) is that after the Man period (as he had done before the deceit of Mr Bomford began) he has traded primarily in market makers.

89. That trading, all of which has been carried out by Mr Gill using Tangent (now renamed Aria) as his investment vehicle, has been successful and profitable. With the exception of the year ended 5 April 2003, the trading profits for the relevant periods since the Man period ended are set out in Revised Appendix 36 to the Supplementary Report of Mr Creed. The figures for the year ended 5 April 2003 are derived from Mr Creed's assessment of the opening fund and capital injections explained in his letter of 6 April 2003. Although Mr Brindle complained about the fact that the letter came after Mr Creed had given his evidence and involved increasing the profit percentage given in Mr Creed's revised appendices from 5% to 10%, Mr Brindle did not ask for Mr Creed to be recalled for cross-examination. Furthermore the assessments on the basis of which the 10% was reached were very much "worst case scenario" and therefore extremely conservative. Those assessments seem to me entirely reasonable. The trading profits and percentages are set out in the table below:

Year ended	Opening fund	Capital injection	Withdrawals	Trading profit	Percentage profit
5.4.03	1,745,515	1,275,000	-1,214,928	302,960	10%
5.4.04	955,511	113,285	-1,695,264	1,169,967	109%
5.4.05	543,499	274,449	-328,530	239,390	29%
5.4.06	728,808		-654,046	781,397	107%
5.4.07	856,159		-987,337	190,592	22%
5.4.08	59,414		-324,692	521,083	877%

90. In his evidence, Mr McGregor accepted that the figures for trading profits were as accurate figures as could be produced in the circumstances. As with the figures for percentage profits before the Man period, he cavilled at Mr Creed's approach of taking the opening balances plus capital injections and ignoring withdrawals. However, as emerged in cross-examination, his own averaging approach would have led to higher percentage figures for profits. Furthermore the differences between the forensic accountants turned out to be limited in scope and ultimately of little if any significance, in terms of the way the claim for loss of profits was put by the end of the trial.

91. In the period after 5 April 2008, the state of the market has been such that Mr Gill has only engaged in limited trading on stock markets. In the period from the end of March 2008 up until the date of his main witness statement, 24 November 2008, he made trading profits of £15,997. This figure was agreed between the forensic accounting experts.

92. In addition to trading in stocks and CFDs since the Man period and notwithstanding limited funds, Mr Gill has made investments in property and investments in other ventures and companies both here and India, most but not all of which have been successful. Again in view of the way the claim for loss of profits was put by the end of the trial, it is not necessary to look at those other investments in any great detail. What is noteworthy, since the claimant is Tangent, not Mr Gill, is that those investments have not been made in the name of Tangent, but of Mr Gill or other members of his family. Mr Gill explained that the reason for this was that, after the fund was seriously depleted by the fraud, he had had to start doing things like obtaining a mortgage, but he had no credit history and so started to invest in property in his own name. I am not sure I followed entirely the logic of this point, but ultimately it may not matter.

93. In the context of the claim which the claimant puts forward for loss of profits, what is of particular significance is that, notwithstanding the profitable trading since leaving Man, Mr Gill and Tangent have still not recouped a fund the size of the one they had before the fraud for which Man are vicariously liable started i.e. the £4.25 million in the account at the end of June 2001. Tangent's case is that if it had had the fund which it should have had from the end of June 2001 onwards, it would have used that fund for further trading, up to £5 million. Mr Gill's evidence (which I accept) was that although his "target" was the £10 million (to which he referred several times during conversations with Mr Bomford) he would in fact have diversified all funds over £5 million into other investments, specifically in India.

94. Mr Gill maintained that he would have continued to use Tangent as the investment vehicle for those diversified investments, setting up a subsidiary Indian company (about the practicalities of which some evidence was given by Mr Rohit Sethi, an expert Indian accountant called by Tangent). I was not convinced by this. In particular, I simply did not understand Mr Gill's evidence that in some way investment through an Indian subsidiary of Tangent would have been "more transparent". Whilst I am satisfied that trading in stocks and CFDs would have continued to be conducted by Mr Gill through the vehicle of Tangent (which is now accepted by Man), I consider it far more likely that Mr Gill would either have set up a separate Indian company to invest in India or invested through members of his family who are Indian nationals (specifically his wife and brother in law), which of course is what he in fact did.

95. However, apart from the limited investments which he has undertaken, that diversification did not occur, because, as I have said, the fund has never reached £5 million, let alone his £10 million target. Thus, in a very real sense, Tangent has suffered the adverse consequences of the fraud right the way through the period since February 2002, and will continue to do so until it receives full compensation for its losses by virtue of this judgment. I accept Mr Kitchener's submission that, notwithstanding that the deceit itself ceased on 13 February 2002, Tangent has remained in the "grip of the fraud" at all times since, right up to trial.

96. Having considered the factual background to the fraud in some detail, I turn to the issues remaining for decision, which as stated in paragraph 8 above are: (i) was Tangent induced by the misrepresentations made; (ii) what identifiable heads of loss have been suffered as a consequence of the fraud; and (iii) what measure of damages is recoverable as a direct result of the fraud.

Inducement

97. The Court of Appeal in Dadourian v. Simms and others [2009] EWCA Civ 169 (at paragraphs 99 and 101), recently confirmed the correct legal test of inducement, approving the approach of the trial judge Warren J.:

> "As to that, the judge directed himself in law, at J(1) 543 - 546, as follows: (1) it is a question of fact whether a representee has been induced to enter into a transaction by a material misrepresentation intended by the representor to be relied upon by the representee; (2) if the misrepresentation is of such a nature that it would be likely to play a part in the decision of a reasonable person to enter into a transaction it will be presumed that it did so unless the representor satisfies the court to the contrary (see Morritt LJ in Barton v County NatWest Limited [1999] Lloyd's Rep Banking 408 at 421, paragraph 58); (3) the misrepresentation does not have to be the sole inducement for the representee to be able to rely on it: it is enough if the misrepresentation plays a real and substantial part, albeit not a decisive part, in inducing the representee to act; (4) the presumption of inducement is rebutted by the representor showing that the misrepresentation did not play a real and substantial part in the representee's decision to enter into the transaction; the representor does not have to go so far as to show that the misrepresentation played no part at all; and (5) the issue is to be decided by the court on a balance of probabilities on the whole of the evidence before it….'

98. Whilst Mr Brindle recognised in a realistic fashion that this test poses serious obstacles in the way of the argument that Mr Gill was not induced to engage in the disastrous trading by the deceit practised by Mr Bomford, he nonetheless contends that, on a careful analysis, there was no inducement in the present case. I have already set out in some detail in the section of the judgment dealing with the facts, what the basis is for this contention.

99. In essence it has two aspects: (i) that contrary to the conflicting evidence in his witness statement and his oral evidence, Mr Gill did not change his trading strategy in reaction to the £9.27 million misrepresentation either immediately after the misrepresentation on 26 October 2001 or on 13 November 2001, the date when, in his oral evidence, he said he had changed his strategy. Rather he continued trading, specifically in SETS, exactly as before; (ii) that despite a series of warnings from Mr Bomford about the difficulties of trading SETS in the particular market conditions in December 2001 to February 2002, Mr Gill continued to trade in SETS to a very significant extent and any reduction in the number of shares traded and the size and value of the trades was marginal. Mr Gill did not accept this in his evidence and

sought to maintain that he was reducing the number of SETS traded in this period, but, as I have already said, the evidence both as to the number of shares traded and the amount of commission paid to Man tended to support the defendants' case that any reduction was indeed marginal.

100. The difficulty with the contention that this continued SETS trading in the face of warnings demonstrates absence of inducement, is that the context in which Mr Bomford told Mr Gill that he was making losses on SETS or told him to slow down his SETS trading or even not to trade at all on particular days, was the continuing deceit that nonetheless overall Mr Gill was making net profits, if not every day, certainly every week. As I have already found, Mr Bomford had created what was in effect a parallel universe in which a great deal of what he told Mr Gill about his trading, whether as to its profitability or even as to what trading had been done (given the unauthorised trading in which Mr Bomford engaged), was a lie. Everything that Mr Bomford told him about his trading was probably part of an overall plan on his part to induce Mr Gill to continue trading for as long as possible, generating commission for Man and a Christmas bonus for himself and his colleagues. That emerges from the conversations that Mr Bomford had with Mr Bovis and Mr Whitaker at around this time, to which I have referred above. At no stage did Mr Bomford tell Mr Gill that he was not only making losses day after day on SETS trading, but had been doing so for months. Mr Bomford either continued to lie or to make excuses for not being able to provide a P&L figure.

101. Accordingly, in my judgment, considerable caution needs to be exercised in relation to the suggestion made by Mr Brindle that Mr Gill carried on trading SETS in a disastrous fashion from December 2001 until February 2002, notwithstanding warnings from Mr Bomford about the difficulty of such trading and that he would have done so in any event irrespective of the fraud. It has to be remembered that, however foolish Mr Gill's conduct may appear in hindsight (as he himself was constrained to accept it was in evidence), throughout this period he was literally in the grip of Mr Bomford's fraud and contributory negligence has never been a defence to the tort of deceit. It also has to be borne in mind that, for a substantial proportion of that two month period, Mr Gill was abroad, not always with access to a computer screen, which no doubt explains in part how Mr Bomford was able to go on deceiving him. It simply does not follow from the fact that despite warnings from Mr Bomford, Mr Gill continued to trade SETS during this period, that he would have done so had he known the true position, despite Mr Brindle's attempt to suggest the contrary.

102. Of considerable significance in the context of the issue of inducement is that Mr Gill said over and again when cross-examined about this period, that as a consequence of the misrepresentations made to him by Mr Bomford, he still thought that overall his trading was profitable throughout the period, albeit on a much reduced scale compared with his trading in earlier periods. He also said that he would have stopped trading SETS straight away if he had known the true position. To the extent that his evidence on that was challenged, that challenge defies common sense and I reject it. It is perfectly obvious that Mr Gill is not some manic or compulsive trader who would have driven himself, lemming like, over the cliff if he had known the true position. I accept that he is rational and sensible and that he is particularly sensitive to making losses. If during the Man period he was less rational and sensible than at other times, that demonstrates how effectively he was being deceived by the fraud.

103. I have no doubt that if, at any stage from 1 July 2001 onwards, he had learnt the true position on his account, namely that it was declining rapidly and that, far from being profitable, the SETS trading was disastrous, he would have stopped such loss making trading, just as he did on other occasions. The reason why he did not cease trading SETS before he learnt the true state of the account on 13 February 2002, is quite simply that Mr Bomford's deceit remained effective. Mr Gill still believed until then that, however difficult it was to trade, overall the trading continued to be profitable (albeit on a lesser scale than in previous months).

104. It might be thought, at first blush, that it is difficult to imagine clearer evidence that Mr Gill was induced to continue with the frenetic and disastrous SETS trading by the consistent fraudulent misrepresentations that his trading was profitable, than that he would have ceased such trading if he had been told the true position. Not so, submitted Mr Brindle. He contended that asking what would have happened if Mr Gill had been told the truth is not the correct question. In support of that submission, he relied on a passage in the judgment of Hobhouse LJ in Downs v Chappell [1997] 1 WLR 426:

> "The plaintiffs have proved what they need to prove by way of the commission of the tort of deceit and causation. They have proved that they were induced to enter into the contract with Mr. Chappell by his fraudulent representations. The judge was wrong to ask how they would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful; they induced the plaintiffs to act to their detriment and contract with Mr. Chappell. The judge should have concluded that the plaintiffs had proved their case on causation and that the only remaining question was what loss the plaintiffs had suffered as a result of entering into the contract with Mr. Chappell to buy his business and shop."

105. In my judgment, reliance on this passage in support of the submission that Mr Gill's evidence that, if he had been told the true position he would have stopped trading in the loss making trades, is insufficient to establish inducement, is misconceived for a number of reasons. First, as Mr Kitchener pointed out, it is important to have in mind the context of what Hobhouse LJ said. That was the attempt by the defendants in that case to argue that the claimant was not induced by the fraudulent misrepresentation, because even if he had known the true position, he would still have proceeded with the purchase, which was the basis upon which the judge at first instance concluded that the claimant had not been induced. Thus, as Mr Kitchener puts it, the context in which Hobhouse LJ said this was to protect the victim of fraud from the argument by the fraudster that the fraud had not induced the victim, because he would have done the same thing even without the fraud. Hobhouse LJ was in effect saying the fraudster cannot be heard to say, even if I had told you the truth, you would still have acted as you did. What he was not saying was that, if the claimant demonstrates by cogent evidence (as in the present case) that it would not have acted as it did if it had known the true position, that evidence cannot be relied upon by the claimant as demonstrating inducement by the fraudulent misrepresentation(s).

106. The second reason in a sense follows on from the first. It is that where the evidence is that, had the claimant known the true position, he would have acted differently, that in itself demonstrates that the fraudulent misrepresentation, which by definition does not reveal the true position, "was actively present to the mind" of the victim of the fraud to a sufficient extent to establish inducement: per Bowen LJ in his classic judgment in Edgington v Fitzmaurice (1885) 29 Ch D 459 at 483. If a modern example of that principle at play were required, in my judgment it is to be found in Barton v County NatWest Limited [1999] Lloyd's Rep Banking 408 at paragraphs 55 and 56 of the judgment of Morritt LJ:

> "Thus the first question is whether the representation made by Mr Murphy was of such a nature as would be likely to induce a person to enter into a contract. If so then the presumption will apply. But in connection with both this and the third submission made by counsel for the Guarantors it is necessary to appreciate the width of the concept of inducement. First the misrepresentation does not have to be the sole inducement. Second it is not essential that its effect should be to induce some positive action. The abstention from something bearing on the material interests of the plaintiff is enough. Halsbury's Laws of England 4th Ed. Vol 31 1998 Reissue paras 771 and 779. Thus in Australian Steel & Mining Corpn Pty Ltd v Corben [1974] 2 NSWLR 202 the plaintiff was misled by the representation of the agent for the purchaser to grant him an option to purchase land which the plaintiff had already determined to sell. The Court of Appeal of New South Wales considered that the plaintiff had been induced by the misrepresentation to grant the option which was therefore liable to be set aside even if he had already determined to sell the land because the misrepresentation caused the plaintiff to persevere in a decision already made.
>
> 56. In my view, given the width of those principles, the misrepresentation must be regarded as one to which the presumption applies. The Guarantors were dependent on the Bank for finance. Whether or not they were right in thinking that they were getting a bargain it would be most material to the decision to buy to know that the valuation condition the Bank thought was important had been complied with. For if it were not then the financial viability of the project could be affected by pressure from the Bank." (my emphasis)

107. Although I accept that Mr Brindle is right in saying that Mr Gill's suggestion that he changed his trading strategy in reliance on the £9.27 million misrepresentation was shown to be mistaken, in my judgment it was not a necessary precondition of having been induced by that misrepresentation that Mr Gill should have changed his strategy. As those passages from Barton make clear, it is sufficient inducement if, in consequence of the misrepresentation, the claimant abstains from doing something bearing on his material interests. Here it is clear that, as a consequence of the continuous misrepresentations as to the profitability of the trading and the amount of

money in the account, the claimant and Mr Gill carried on with trading which unbeknownst to them was disastrous financially, in circumstances where they would otherwise have ceased that trading. That is sufficient inducement.

108. The third reason why the passage in the judgment of Hobhouse LJ in Downs v Chappell is not laying down some universal principle that the fact that the claimant would have acted differently if he had known the truth, cannot be sufficient to establish inducement, is to be found in the contrast between that case and the present case on the facts. That case involved an isolated fraudulent misrepresentation inducing a single transaction. The present case can be said without exaggeration to involve hundreds if not thousands of individual misrepresentations and acts of deceit of various kinds (whether daily misrepresentations as to prices at which trades were done and as to the profitability of the previous trading or periodic misrepresentations as to the overall account balance) combined with another aspect of the overall deceit, that Mr Gill was not told that his instructions about stops were not always executed and that Mr Bomford covered that up by unauthorised trading.

109. The overall effect was to create the intricate web of deceit, perpetrated over a lengthy period, that the trading being carried out was profitable and was building up a fund worth approaching £10 million by the time the truth came out, whereas in fact the fund was diminishing rapidly throughout the period of the deceit. By the deceit Mr Bomford did create the parallel universe in which Mr Gill thought he was trading profitably whereas the truth was, as Mr Bomford colourfully and cynically but correctly described it in conversations with others, Mr Gill was "haemorrhaging money" and "losing his arse".

110. Against that background, part of the ongoing deceit is the failure of the defendants to correct previous fraudulent misrepresentations. An obvious but stark example is to be found in the various occasions after 26 October 2001 when Mr Bomford continued to reinforce the fraudulent misrepresentation that, as at 26 October 2001, Mr Gill had £9.27 million in the account, by telling Mr Gill (or concurring in Mr Gill's view based upon the delusion created by the fraud) that his target of £10 million was achievable. Implicit in what Mr Bomford said on those occasions was that the original statement of what was in the account was accurate and truthful. To the extent that he did not correct that false impression, what he said on those subsequent occasions was itself fraudulent. The same point can be made about the daily misrepresentations about profitable trading on the previous day. Because Mr Bomford never corrected on day 3 the fraudulently misleading impression on day 2 that there had been profitable trading on day 1, he was repeating by way of implied representation on day 3 when he made the fraudulent misrepresentation as to profitable trading on day 2, that the previous representation on day 2 about trading on day 1 had also been true, whereas it was not. And so it goes on.

111. This point about an important part of the deceit being the failure to correct the fraudulent misrepresentations in the past, is an example of the principle, long recognised by the law, that a failure to correct a fraudulent misrepresentation in the past is itself a continuing fraudulent misrepresentation: see Spencer Bower Turner and Handley: Actionable Misrepresentation (4th edition) para. 89. That Mr Gill was induced to continue trading in the way in which he did by that failure to correct the fraudulent misrepresentations of the past cannot seriously be in doubt.

112. However, even if Mr Brindle were right that somehow the concept of inducement is to be interpreted narrowly and artificially, by looking only at what the position would have been if the fraudulent misrepresentations had not been made at all, on all the evidence there can be little doubt that, from the outset of the relationship with Man, the claimant was induced to act as it did by the fraudulent misrepresentations being made by Mr Bomford. As I have already held, Mr Gill continued in and increased his disastrous SETS trading from December 2000 until February 2002 in reliance on the encouragement to do so from Mr Bomford and the constant misrepresentations that overall the trading was profitable. Mr Gill also relied from the outset upon the daily figures as to profitability in determining his trading strategy, as was well known to Mr Bomford and as is now admitted by Man in its Re-Amended Defence.

113. It follows that whether one takes the narrow view of what constitutes inducement for which Mr Brindle contends or the broader view, which in my judgment is the correct one, there can be little if any doubt that the claimant was induced to enter the loss making transactions which it did, at least from 1 July 2001 (the beginning of the Man period) and in fact from an earlier point in time, by the representations being made by Mr Bomford as to profitability of the account overall and on a daily basis. In the circumstances, it is not necessary for the claimant to rely on the presumption of inducement in fraud cases recognised in Barton. However, even if it were, none of the matters identified in that case as capable of rebutting the presumption could conceivably be said to apply here and there is nothing else put forward by the defendants evidentially which is even remotely capable of rebutting the presumption.

114. In all the circumstances, I have no doubt whatsoever that Tangent has established the requirement of inducement on the facts of the present case. Ultimately, the contrary argument was not pressed all that hard by Mr Brindle in his oral closing submissions.

The heads of loss

115. The second and third issues, what identifiable heads of loss have been suffered as a consequence of the fraud; and what measure of damages is recoverable as a direct result of the fraud are both aspects of the quantum of loss and can be dealt with together.

116. Tangent's case is that it has suffered the following losses as a consequence of Mr Bomford's fraud: (i) the diminution in the value of the fund during the period of the fraud from some £4.25 million at the end of June 2001 to £521,644 in March 2002 and (ii) loss of profits which Tangent says it could and would have made on trading stocks and CFDs had it not been for the fraud. Tangent's contention, which I accept, is that, had Mr Gill not been ensnared into trading in SETS by Mr Bomford, Mr Gill would have continued to trade predominantly in market makers, which is what he had done extremely successfully in the past and which he also did successfully, albeit with much depleted funds after February 2002. Tangent claims the loss of profits which it says it would have made on that alternative trading not only during the Man period of the fraud, but for the period of time since February 2002 up until the trial, during the whole of which time, as I also accept, Tangent has continued to suffer the adverse consequences of the fraud.

117. As I have already set out above, Mr Gill's evidence was that all profits above £5 million generated by such trading would have been diverted into alternative

investments in property and other ventures, specifically in India. Tangent's claim for loss of profits as pleaded and originally presented was put on the basis of a bewildering number of alternative scenarios, twenty six in all, some of which included a claim for the loss of profits on such alternative investments. Mr Gill set out in his witness statement a number of properties and business ventures in India in which he said he had had the opportunity to invest in the period since February 2002, but had been unable to do so because of a shortage of funds. Tangent also called expert evidence from Mr S.K. Jain, an Indian valuer and Mr Rohit Sethi, an Indian chartered accountant who gave evidence about the value of these potential investments. Notwithstanding all that evidence, I formed the firm view that the claim for the loss of the profits which it is said would have been made on those investments is far too speculative to be recoverable. In any event, since as I have already held, it seems to me more likely that Mr Gill would not have used Tangent as the vehicle for such investments, I do not see how Tangent can say it suffered those lost profits.

118. Ultimately at the end of the trial Mr Kitchener recognised the difficulty which his client faced in seeking to recover the loss of profits on alternative diversified investments. The claim as put forward by the last day of trial was for loss of profits on stocks/CFD trading in each annual period, but so far as concerns sums in excess of £5 million, which it is contended would have been made in each annual period had it not been for the fraud, the claim was for that amount in excess of £5 million at the end of each annual period, together with interest on that amount from the end of the relevant annual period until judgment. The basis for putting the claim in that way is that Mr Kitchener accepted that it was not possible to say how the excess over £5 million would have been invested at the end of each annual period, but that Tangent was entitled in respect of each annual period to recover the excess of £5 million together with interest on it, which would compensate Tangent for loss of the use of that money. I will set out the detail of the calculations of that claim later in this judgment.

119. It was accepted by Mr Brindle on behalf of Man that if Man's case on absence of inducement failed, then it was liable in damages to reimburse Tangent the difference between the value of the trading fund at the beginning of the Man period on 30 June 2001 (£4,248,936) and its value at the termination of the relationship with Man in March 2002 (£521,644) less withdrawals of £505,000 made by Mr Gill during that period. This figure rounded up slightly is £3,222,000.

120. Man also accepted that it is liable to pay interest on that sum from the end of March 2002 until the date of judgment. Because of the vagaries of interest rates over that period, Tangent is better off claiming simple interest at an average borrowing rate of the Bank of England base rate plus 3.25% than claiming compound interest. Man does not cavil at this and accepts that it is liable to pay interest on the £3,222,000 for that period at that average borrowing rate.

121. However, that is where any acceptance by Man of Tangent's damages claim ends. Mr Brindle contended that recovery of the "lost fund" together with the generous rate of interest which was conceded fully compensated Tangent for all loss it had suffered as a direct result of the fraud. Particular objection is taken by Man to the claim for loss of profits from 30 June 2001 to the date of judgment which it categorised variously as "extravagant" and "speculative". In its closing submissions, Man distinguished two periods or stages of the loss of profits claim. Stage 1 was the period during which Tangent was actually trading though Man and Stage 2 was the period thereafter from

the end of March 2002 until judgment. Man's objections to the claim for loss of profits during the two stages or periods were not the same, although there was a degree of overlap.

122. In relation to Stage 1, the objection was essentially that cases of deceit, where loss of profits has been held to be recoverable, were all cases where what had been awarded was loss of profits on a specific alternative transaction which would have been entered had it not been for the fraud, whereas that was not so in the present case. Tangent's claim related to a whole series of hypothetical alternative transactions, which it said it would have entered had it not been for the fraud. Furthermore, trading in stocks or derivatives was in its nature speculative and, far from the authorities recognising that loss of profits was recoverable in such situations, there were authorities which established that loss of profits was not a recoverable head of loss in the case of such speculative trading.

123. In relation to Stage 2, the same objection as in relation to Stage 1 was raised. In addition, Mr Brindle submitted, in his written closing submissions, that the claim for loss of profits after February 2002 was in effect a claim for "profits on profits", which went beyond anything recognised by the law as recoverable by way of damages. The appropriate indemnity for loss of the use of money was interest on the restored fund as at March 2002 and anything else would be completely speculative and would over-compensate the claimant. In oral submissions, the argument was refined somewhat and was put on the basis that the further trading that occurred after February 2002 was not an "alternative transaction" in the sense understood by the cases on recovery of loss of profits in deceit. The alternative transactions were those alternative trades which Tangent said it would have undertaken during the period of the fraud i.e from June 2001 to February 2002. In so far as at Stage 2 the claim was for loss of profits on transactions which it was said would have been entered thereafter, it was entirely speculative and did not flow directly from the fraud.

124. It will be necessary to consider those objections in more detail hereafter, but first I propose to consider the question of the recoverability of loss of profits in cases of deceit as a matter of principle.

Loss of profits recoverable in principle

125. Mr Kitchener submits that the correct starting point in considering what damages are recoverable in deceit, as so often in the law of damages, is the classic statement of Lord Blackburn in Livingston v Rawyards Coal Co (1880) 5 App Cas 25 at 39:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who is injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise—such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the

> person doing it was doing wrong. There could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer—many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong, and various things of that sort."

126. The second and third sentences of that passage, which are directly relevant to a claim in fraud such as the present one, are perhaps not as familiar as the first sentence, but the whole passage was quoted with approval by Lord Browne-Wilkinson in Smith New Court Securities v Citibank NA [1997] AC 254 at 262-3. In that case the House of Lords reversed the decision of the Court of Appeal, which had applied the so-called "date of transaction" rule derived from 19th century Court of Appeal decisions, to the effect that, "where a fraudulent misrepresentation has induced the plaintiff to enter into a contract of purchase, the measure of damages is, in general, the difference between the contract price and the true open market value of the property purchased, *valued as at the date of the contract of purchase.*" (per Lord Browne-Wilkinson at 261). In doing so, the House of Lords approved the judgment of the Court of Appeal in Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158, as having correctly stated the law as to damages recoverable in cases of deceit. Lord Browne-Wilkinson stated that Doyle v Olby established four points, on all of which he regarded it as correctly decided:

> "First, that the measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for all the actual damage directly flowing from (i.e. caused by) entering into the transaction. Second, that in assessing such damages it is not an inflexible rule that the plaintiff must bring into account the value as at the transaction date of the asset acquired: although the point is not adverted to in the judgments, the basis on which the damages were computed shows that there can be circumstances in which it is proper to require a [plaintiff] only to bring into account the actual proceeds of the asset provided that he has acted reasonably in retaining it. Third, damages for deceit are not limited to those which were reasonably foreseeable. Fourth, the damages recoverable can include consequential loss suffered by reason of having acquired the asset." (264-5).

127. Lord Browne-Wilkinson set out his reasons for departing from the "date of transaction" rule in a passage at 266C-G on which Mr Kitchener placed some emphasis, particularly on the last part of the passage (which I have underlined below):

> "In the light of these authorities the old 19th century cases can no longer be treated as laying down a strict and inflexible rule. In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser

> being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act. The transaction date rule has one manifest advantage, namely that it avoids any question of causation. One of the difficulties of either valuing the asset at a later date or treating the actual receipt on realisation as being the value obtained is that difficult questions of causation are bound to arise. In the period between the transaction date and the date of valuation or resale other factors will have influenced the value or resale price of the asset. It was the desire to avoid these difficulties of causation which led to the adoption of the transaction date rule. But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influences the conduct of the plaintiff after the transaction is complete or where the result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired."

128. At 266H-267D, Lord Browne-Wilkinson summarised the principles applicable in assessing damages for fraud as follows:

> "In sum, in my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property: (1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) is assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

129. Of particular relevance to the arguments about damages in the present case are principles (1), (2) (5) (b) and (6), for reasons I will come on to later. One of the decisions of the Court of Appeal as to recoverability of consequential losses in deceit which was approved by the House of Lords was East v Maurer [1991] 1 WLR 461. It will be necessary to examine the facts of that case in a little more detail later, but, for the present, it should be noted that it is a case which recognises that although a claim in deceit is a claim in tort (so that any loss of profits on the particular transaction induced by fraud is not recoverable being "expectation" loss only recoverable in contract), a claimant can recover as damages in deceit the loss of profits he would have made on a hypothetical alternative transaction he would have entered into if he had not been induced by the fraud to enter the disadvantageous transaction.

130. East v Maurer was followed and applied by the Court of Appeal, in a case decided after Smith New Court, Clef Aquitaine v Laporte Minerals (Barrow) Limited) [2001] QB 488. That case on one view attenuates the distinction between the contractual measure and the tortious measure of damages almost to vanishing point, for which it has received some academic criticism (particularly in an interesting article to which I was referred Poole & Devenney: Reforming Damages for Misrepresentation [2007] JBL 269), although it seems to me to be no more than an application of Lord Browne-Wilkinson's sixth principle to its own somewhat unusual facts. It is probably not necessary for present purposes to consider Clef Aquitaine further. Of more significance to the present debate is the recent decision of David Richards J in 4 Eng Ltd v Harper [2009] Ch 91, to which I refer in more detail later.

131. Returning briefly to the House of Lords in Smith New Court, the other main speech was given by Lord Steyn. He also approved Doyle v Olby and East v Maurer of which he said at 282:

> "*Doyle v. Olby (Ironmongers) Ltd.* was subsequently applied by the Court of Appeal in two Court of Appeal decisions: *East v. Maurer* [1991] 1 W.L.R. 461 and *Smith Kline & French Laboratories Ltd. v. Long* [1989] 1 W.L.R. 1. *East v. Maurer* is of some significance since it throws light on a point which arose in argument. Counsel for Citibank argued that in the case of a fraudulently induced sale of a business, loss of profits is only recoverable on the basis of the contractual measure and never on the basis of the tort measure applicable to fraud. This is an oversimplification. The plaintiff is not entitled to demand that the defendant must pay to him the profits of the business as represented. On the other hand, *East v. Maurer* shows that an award based on the hypothetical profitable business in which the plaintiff would have engaged but for deceit is permissible: it is classic consequential loss."

132. Another passage in Lord Steyn's speech at 284, in which he considers why the date of transaction rule should not be applicable, is of some importance in the context of the present case:

> "Moreover, and more importantly, the date of transaction rule is simply a second order rule applicable only where the valuation method is employed. If that method is inapposite, the

> court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it. An example of such a case is to be found in *Cemp Properties (U.K.) Ltd. v. Dentsply Research & Development Corporation* [1991] 2 E.G.L.R. 197, 201, *per* Bingham L.J. There is in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants. The analogy of the assessment of damages in a contractual claim on the basis of cost of cure or difference in value springs to mind. In *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] A.C. 344, 360G, Lord Mustill said: "There are not two alternative measures of damages, as opposite poles, but only one; namely, the loss truly suffered by the promisee." In an action for deceit the price paid less the valuation at the transaction date is simply a method of measuring loss which will satisfactorily solve many cases. It is not a substitute for the single legal measure: it is an application of it." (my emphasis)

133. The importance of that passage is that it demonstrates that there are no hard and fast rules in determining damages recoverable in deceit, beyond the overriding principle that the court should strive to award damages which compensate the claimant fully for loss flowing directly from the fraud, which brings one back again to Lord Blackburn's statement of principle.

134. Applying that principle and the principles as stated by Lord Browne-Wilkinson and Lord Steyn, Tangent submits that, since on a balance of probabilities, had it not been for the fraud perpetrated on it, Mr Gill would have gone on trading market makers profitably throughout the period of the fraud and beyond, as indeed he did before, during and after the fraud, there is no reason in principle why Tangent should not recover that loss of profits. Rather there is every reason in principle why it should, because otherwise, Tangent contends, it will have been under compensated for the real loss it suffered flowing directly from the fraud.

135. Furthermore, Tangent submits that, since it was deprived of the fund it should and would have had but for the fraud-in effect as Mr Kitchener put it graphically its money had been stolen-and has not made up an equivalent fund in the period since the deceit ceased in February 2002, it has continued to suffer from the adverse consequences of the fraud in the period since February 2002 right the way up to the trial. In just the same way as the claimant in East v Maurer, Tangent has been "locked into the transaction". Accordingly continued loss of profits which would have been earned but for the fraud should be recoverable in principle until trial. Smith New Court demonstrates that, in an appropriate case (of which Tangent submits this is one), the court will assess the damages suffered at the date of the trial.

136. Tangent submits that the court should not in effect be lured into accepting Man's submission that, merely because the claim for loss of profits is a substantial one (in

excess of £20 million gross of tax), it is "exaggerated" or "grotesque", to use the words of Man's written opening submissions. Tangent submits that the size of the claim is a function of Man having failed to reimburse Tangent the amount of the depleted fund in February 2002 and, instead, having fought the case to a trial seven years later and only admitted the fraud during the course of the trial.

137. As I have already indicated, Man takes issue with all of those submissions, contending that the claim for loss of profits is not recoverable either at Stage 1 or at Stage 2. I now turn to consider the arguments about this in more detail.

Loss of profits during the period of the fraud not too speculative to be recoverable

138. Man's argument as to why loss of profits is not recoverable for the period of the fraud for which Man assumes vicarious liability from June 2001 to February 2002 raises two interlinked submissions advanced by Mr Brindle: (i) that the cases which have recognised recoverability of loss of profits in deceit are all cases of specific alternative transactions which were necessarily profitable and (ii) that in any event, any alleged profits from this sort of trading in CFDs are far too speculative to be recoverable. The first point is heavily dependent upon the analysis which Man seeks to put forward of the decision of the Court of Appeal in East v Maurer [1991] 1 WLR 461.

139. That case was one in which the claimant, who had run successful hairdressing businesses in Oxford, purchased a salon in Canford Cliffs, Bournemouth from the defendant (who retained another salon in the town), in reliance on a representation that the defendant would not work in his other salon except in an emergency and that he intended to open a salon abroad. That was a deliberate and fraudulent misrepresentation as to his intentions. He intended to and did work in the other salon and, as a consequence, his well-established clientele followed him there, which meant that the salon the claimant had purchased was not a success. She tried to make it profitable over a period of some three years without success and made several attempts to sell it, eventually doing so.

140. The judge awarded loss of profits, in fact on the basis of the profits which the business might have made if the representation had been true. In the Court of Appeal, it was argued on behalf of the defendant that damages for loss of profits were not recoverable in deceit. The Court of Appeal rejected that argument and held that, in an appropriate case, such damages were recoverable. However, a majority of the Court of Appeal at least considered that the judge had awarded such damages on the wrong, contractual basis and that such damages should have been assessed on the basis of the profits which the claimant could have expected to make from an alternative salon in the Bournemouth area bought for a similar sum.

141. Beldam LJ put the matter thus at pp 467-8:

> "It seems to me that he should have begun by considering the kind of profit which the second plaintiff might have made if the representation which induced her to buy the business at Exeter Road had not been made, and that involved considering the kind of profits which *she* might have expected to make in another hairdressing business bought for a similar sum…..

> The judge left out of account the fact that the second plaintiff was moving into an entirely different area and one in which she was, comparatively speaking, a stranger. Secondly, that she was going to deal with a different clientele. Thirdly, that there were almost certainly in that area of Bournemouth other smart hairdressing salons which represented competition and which, in any event, if the first defendant had, as he had represented, gone to open a salon on the Continent, could have attracted the custom of his former clients.
>
> The judge, as Mr. Nicholson has pointed out, had two clear starting points. First, that any person investing £20,000 in a business would expect a greater return than if the sum was left safely in the bank or in a building society earning interest, and a reasonable figure for that at the rates then prevailing would have been at least £6,000. Secondly, that the salary of a hairdresser's assistant in the usual kind of establishment was at this time £40 per week and that the assistant could expect tips in addition. That would produce a figure of over £7,000, but the proprietor of a salon would clearly expect to earn more, having risked his money in the business. It seems to me that those are valid points from which to start to consider what would be a reasonable sum to award for loss of profits of a business of this kind. As was pointed out by Winn L.J., in Doyle v. Olby (Ironmongers) Ltd. [1969] 2QB 158 , 169, this is not a question which can be considered on a mathematical basis. It has to be considered essentially, in the round, making what he described as a "jury assessment."
>
> Taking all the factors into account, I think that the judge's figure was too high; for my part I would have awarded a figure of £10,000 for that head of damage"

142. Butler-Sloss LJ agreed with Beldam LJ. Mustill LJ dealt with the issue of loss of profits somewhat differently as follows at 468:

> "In the present case the act complained of is the making of the fraudulent representation, coupled with the reliance placed upon it by the plaintiffs in concluding the bargain. If this had not happened the plaintiffs would, on the judge's findings, have sold the Oxford business and bought a new business in Bournemouth, albeit not the one in Exeter Road. Thus, by the time the writ was issued they would have had the capital asset constituted by the new business, plus the profits made by that new business in the intervening period. One may assume the value of this capital asset to be the same as the value which the plaintiffs placed on the Exeter Road business, namely £20,000. In the event, the plaintiffs' position is that they have no business; they are out of pocket in respect of the legal fees, improvements and accumulated losses on Exeter Road, and they are in pocket to the extent of £7,500 made on the

> realisation of the premises. If one then subtracts the one from the other, the plaintiffs' loss is shown to be £20,000 minus £7,500, namely £12,500, plus accumulated losses and resale expenditures and the profits which would have been derived from the putative new Bournemouth business. This is what the judge has in fact awarded.
>
> It is objected that the loss of profits is not properly recoverable because it is appropriate not to a claim in fraud but to a claim based on a contractual warranty of profits, for in such a case the loss of profits does not stem from the making of the contract but from the fact that the profit made was not what was anticipated.
>
> I should have thought this argument sound if the judge had included an item for loss of the Exeter Road profits; but he has not done so. The loss of profits awarded relates to the hypothetical profitable business in which the plaintiffs would have engaged but for buying the Exeter Road business, and the profits of the latter are treated by the judge solely as some evidence of what the profits of the other business might have been. In my judgment there is no error of principle here."

143. Mr Brindle submitted that the loss of profits had been recovered in East v Maurer because this was a necessarily profitable business, in a way in which trading in CFDs was not. Despite some amusement in argument as to whether he was contending that running a hairdressing salon was always bound to be profitable, I did not understand that to be the real point. Rather the point was that, on the facts of that case, the claimant would have made a profit on the alternative business which she would have purchased had the fraudulent misrepresentation not been made. That is how Mustill LJ appears to have viewed the matter when he said: "The loss of profits awarded relates to the hypothetical profitable business in which the plaintiffs would have engaged but for buying the Exeter Road business".

144. However, in my judgment, the fact that what was being considered was a hypothetical alternative business means that no specific alternative business or transaction had been identified, let alone one which was "necessarily" profitable, as Mr Brindle contends. The truth is that the evidence there was no more than that the claimant had been successful in running hairdressing businesses in Oxford in the past, so that it was assumed that she would have been successful in running an alternative business to the one she purchased from the defendant. I agree with Mr Kitchener that, if anything, that was a much more speculative case, on the evidence, than the present case. Nothing in the judgments in that case supports Mr Brindle's proposition that loss of profits are only recoverable in deceit where the alternative transaction would always have been "necessarily profitable". Indeed the majority of the Court of Appeal (in the second paragraph of the passage cited from Beldam LJ's judgment above) were expressly recognising the risks inherent in such a business in a new area, with new clientele and that it might not have been profitable all the time, hence as I see it the reduction in the amount of damages which they awarded.

145. In 4 Eng Limited v Harper [2009] Ch 91, the claimants had been induced by the fraudulent misrepresentation of the defendants to buy a particular business, Excel. The claimants' case was that if they had not bought Excel, (which was loss making) they would have bought another company Tarvail (which would have been profitable). Summary judgment was entered for the claimants and David Richards J was concerned with assessment of damages, including a claim for loss of profits which the claimants would have made if they had purchased Tarvail. There was substantial evidence that, at the time the claimants were looking to buy Excel, they were also investigating the purchase of Tarvail and that they would have sought to buy one or the other. There was also evidence as to the profits which would have been made from Tarvail because figures for its actual profits in the relevant period were available. Because the claimants' ability to buy Tarvail was dependent upon whether its owners would have been prepared to sell it to them, there was an element of "loss of a chance" applicable in that case, not relevant for present purposes.

146. However, although that was a case where there was strong evidence concerning the alternative transaction that would have been entered and the profits which would have been made from it, I agree with Mr Kitchener that David Richards J was not purporting to suggest that loss of profits were only recoverable in deceit if the evidence was of the same quality as that in the case before him, let alone that they were only recoverable where the alternative transaction was shown to be "necessarily profitable". I shall have to return to 4 Eng in the context of Mr Brindle's Stage 2 argument.

147. In my judgment, there is no such restrictive principle as that for which Mr Brindle contends. Rather each case depends upon its own facts. Obviously there will be cases where, on the evidence, it is not possible for the claimant to show on a balance of probabilities that any alternative transaction or business would have been profitable. The decision of the Court of Appeal in Davis v Churchward (1993) unreported was such a case. However, where, on a balance of probabilities, the court concludes that some profits would have been made from an alternative transaction or transactions, which the claimant would have entered but for the fraud, then the court can and should award damages for such loss of profits, if necessary discounting the amount recovered to reflect the element of risk (as appears to have happened in East v Maurer). There is simply no added requirement before such damages are recoverable that the alternative transactions(s) be shown to be "necessarily profitable".

148. Furthermore, the suggestion that, before any damages for loss of profits are recoverable in deceit, the claimant must have identified a specific alternative transaction into which he would have entered had it not been for the fraudulent misrepresentation(s), is also contrary to the decision of the majority of the Court of Appeal in Esso Petroleum Limited v Mardon [1976] 1 QB 801. That was a case of negligent rather than fraudulent misrepresentation. Lord Denning MR (with whom Shaw LJ agreed) considered that the claimant was entitled to recover damages for the loss of the profits which he would have made had he not been induced by the defendant's misrepresentation to enter the disadvantageous transaction which had given rise to the loss.

149. It is quite clear from Lord Denning MR's judgment that no specific alternative transaction had been identified by the claimant. On the contrary, the damages recoverable were assessed on the general basis of what would have been likely to

happen if the relevant transaction had not been entered as a "rough and ready estimate" as in cases of personal injury:

> "Mr. Mardon is not to be compensated here for "loss of a bargain". He was given no bargain that the throughput would amount to 200,000 gallons a year. He is only to be compensated for having been induced to enter into a contract which turned out to be disastrous for him. Whether it be called breach of warranty or negligent misrepresentation, its effect was not to warrant the throughput, but only to induce him to enter into the contract. So the damages in either case are to be measured by the loss he suffered. Just as in the case of Doyle v. Olby (Ironmongers) [1969] 2 QB 158, he can say: "...I would not have entered into this contract at all but for your representation. Owing to it, I have lost all the capital I put into it. I also incurred a large overdraft. I have spent four years of my life in wasted endeavour without reward: and it will take me some time to re-establish myself".
>
> For all such loss he is entitled to recover damages. It is to be measured in a similar way as the loss due to a personal injury. You should look into the future so as to forecast what would have been likely to happen if he had never entered into this contract: and contrast it with his position as it is now as a result of entering into it. The future is necessarily problematical and can only be a rough-and-ready estimate. But it must be done in assessing the loss." (820G-821B)

150. That passage demonstrates that, the fact that the claimant was unable to identify any specific alternative transaction into which he would have entered but for the misrepresentation, was no bar to recovery of damages in tort for negligent misrepresentation. In terms of the alternative transaction which would have been entered, what Lord Denning MR said (at 821G-822B) was this:

> "The initial capital of £6,270 was not provided by Mr. Mardon personally out of his own bank account. It was provided by a private company in which he and his wife held all the shares. It was suggested that this, in some way, prevented Mr. Mardon from claiming for the loss of it. The Judge rejected this suggestion: and so would I. The business of this filling station was undoubtedly the personal business of Mr. Mardon. The money put into it might be obtained by overdraft at the bank or by loan from his own private company - but wherever it came from, it was a loss to him: and he can recover that loss. It is no concern of Esso where it came from, c.f. Dennis v. London Passenger Transport Board [1948] 1 All ER 319.
>
> If Mr. Mardon had not been induced to enter into the contract, it is fair to assume that he would have found an alternative business in which to invest his capital. (The Judge said so). It is also fair to assume (as he is a very good man of business) that

> he would have invested it sufficiently well so that he would not have lost the capital. Nor would he have incurred any overdraft or liabilities that were not covered by his assets. And it may be assumed that he would have made a reasonable return by way of earnings for his own work (in addition to return from his capital). But equally it must be remembered that, after March, 1967 (when he gave up the site at Southport) he should have been able (if fit) to take other employment or start another business and thus mitigate his loss: and gradually get restored to a position equal to that which he would have had if he had never gone into the Esso business. It would take him some time to do this. So the loss of earnings could only be for a limited number of years."

151. As I have said, that analysis that the claimant was entitled to loss of profits, was on the basis of a hypothetical alternative transaction about which there was no specific evidence in that case. That was a case of negligent misrepresentation and the position must be an *a fortiori* one in a case such as the present of fraudulent misrepresentation.

152. So far as the second point of objection to the claim for loss of profits in the period of the fraud is concerned (that any alleged profits from this sort of trading in CFDs are far too speculative to be recoverable), the defendants' argument is heavily reliant upon the decision of Kerr J in E. Bailey & Co v Balholm Securities [1973] 2 Lloyd's Rep 404 (as followed and approved by CA in Ata v American Express (1998) unreported).

153. Bailey was not a case of deceit. It was a case in which a dispute arose under a contract between the claimant commodity brokers and the defendant traders (who were speculating in cocoa and sugar futures traded through the claimant) where, the defendant having failed to pay a margin call, the claimant closed the transactions and terminated the contract. One of the disputes concerned a counterclaim by the defendant for damages on the basis that, by terminating the contract, the claimant had wrongfully prevented the defendant from trading in cocoa and sugar. Of course since that case involved trading in futures, there is a superficial similarity with the present case which involved trading in derivatives and futures, but there any similarity ends, and the cases could not be more different on their facts. The counterclaim was plainly hopeless for a number of reasons. Kerr J prefaced this part of his judgment by saying (at 415 rhc): "There are so many answers to any contention on these lines [that substantial damages were recoverable] that it is difficult to know where to start." Quite apart from the fact that the judge held that the claimant was entitled to terminate the contract anyway, so that the counterclaim was bound to fail, it was also clear that the defendant had not in fact been prevented from trading in futures since it had been dealing through two or three other brokers at the relevant time and could have traded in futures if it wished.

154. It was against that background that Kerr J came to his third and final answer to the defendant's counterclaim for substantial damages (at 415 rhc-416 lhc):

> "Finally, even if the defendants had been able to establish that the plaintiffs acted wrongfully in refusing to give them further credit or to deal with them, I should in any event have awarded

> the defendants no more than nominal damages for their counterclaim under this head. Mr. Staughton contended that they were entitled to substantial damages on the ground that they had lost the chance of making a profit. He relied on cases such as Chaplin v. Hicks [1911] 2 KB 786 which deal with the measure of damages for the loss of a chance. But those were all cases in which the plaintiff might or might not have obtained some pecuniary advantage or benefit and lost the chance of doing so as the result of the defendant's wrongful act. He therefore lost the chance of being better off than he was, but he was not exposed to the risk of being worse off. In cases like the present, on the other hand, a person who is prevented from speculating in cocoa or sugar futures may have lost the chance of making money or may have been saved from losing money. A cynical view would be that there is an equal chance either way. No doubt experience and skill play a large part, and to this extent there may be said to be a better chance of winning than losing. But in my view this is not the kind of situation which the law should recognize as giving a right to damages for the loss of a chance. Even though in law trading in commodity futures does not amount to gambling, the loss of a general opportunity to trade — as opposed to the loss of a particular bargain — is in my view much too speculative to be capable of having any monetary value placed upon it. A wrongful refusal to trade with a person in futures would therefore in my judgment normally only give rise to the recovery of nominal damages."

155. It would appear from the judgment that there was in fact no evidence in that case that the defendant had engaged in profitable trading, either in the past or subsequently, let alone as to the results of trading through other brokers. Ata v American Express Bank Limited (1998) is another case where there was no such evidence, indeed on the contrary, the evidence was that the claimant's trading to date had been unsuccessful. In that case the claimant claimed against the defendant bank in respect of a trading relationship over a eight month period in which he speculated on a massive scale in high risk markets, mainly foreign exchange, suffering substantial losses. His claim was rejected in its entirety by the judge at first instance, Rix J. The claimant originally pursued a detailed appeal challenging all the findings of fact, but that was abandoned on the day before the hearing in the Court of Appeal leaving only limited grounds of appeal. That sets the tone for the context in which the matter came before the Court of Appeal (Hirst, Morritt and Brooke LJJ).

156. As Hirst LJ said, central to the appeal was a contention that the defendant was in breach of fiduciary duty in failing to tell the claimant that it would sideline his open positions and that if it had done so, the claimant would never have agreed to give it any discretion at all. This allegation had been unpleaded but Rix J had dealt with it. He held that a discretion to trade was just that and not an obligation. As for the submission that the claimant had suffered a loss because the defendant had failed to trade his open positions, that was rejected by Rix J in strong terms:

> "In my judgment such a submission flies in the face of common-sense. If the bank had traded Dr Ata's open positions, it seems to me as likely that it would have suffered further losses as that it would have made any profits, and I say that with the benefit of hindsight. All trading involves the expense of trading (spreads and interest), so that the first result of trading is to incur a loss. The more frequent the trading, the greater this element of loss. I see no reason for thinking that this initial loss would have been recouped, let alone turned into profit. In the circumstances I am unwilling to entertain this claim, unless authority compels me to do so…
>
> …common sense suggests that no lost profits can be presumed in Dr Ata's favour. Dr Ata had been unsuccessful so far."

157. It was against the background of that finding, no longer challenged on appeal, that the Court of Appeal came to consider and dismiss what was, on any view, a wholly unmeritorious appeal. As Hirst LJ put it:

> "…the judge's finding that if the bank had traded Dr Ata's open positions, it was as likely that it would have suffered losses as that it would have made any profits, is unquestionably a finding of fact, which on Mr Padfield's [the claimant's counsel] concession is unassailable…
>
> …
>
> The very notion that there is any element of certainty at any stage in this very speculative trade does not bear examination, as was illustrated by Kerr J in E. Bailey & Co v Balholm Securities [1973] 2 Lloyd's Rep 404"

158. Hirst LJ then cited the passage from Kerr J's judgment which I have quoted above and continued:

> "As Mr Hochhauser [counsel for the defendant] pointed out, the fundamental fallacy in Mr Padfield's submission under this heading was that he confused or elided proof of breach (which was pleaded and established) with proof of loss (which was neither pleaded nor established). If there was no loss established, assuming an obligation to trade, then, a fortiori, no loss could be established for breach of an obligation to consider from time to time whether or not to trade."

159. Man also relies on a passage in Jackson & Powell: Professional Liability (6th edition) at para 15-071, where Bailey and Ata are cited and said to "present claimants with an insuperable obstacle to recovery of damages on a lost chance basis in an investment context". However, as I see it, despite that somewhat gloomy prognostication by the editors of Jackson & Powell, neither case establishes that as a matter of law, loss of profits from CFD trading which would have taken place but for the tort are not recoverable, on the basis that they are always too speculative. Man's submission to

that effect seems to me to confuse the element of speculation inevitably present in trading of this kind, with the separate question whether the prospects of making a profit trading those derivatives is so speculative that the court should regard that as not a recoverable loss. If, in an appropriate case, the court concludes that, on a balance of probabilities, the alternative trading in which the claimant would have engaged but for the tort would have been profitable overall, I see no reason in principle why the court should not award damages for such lost profits, albeit possibly with a discount for the possibility that some of the trading was loss making or less profitable.

160. Mr Brindle placed particular emphasis on the passage in Kerr J's judgment where he refers to the claimant being exposed to the risk of being worse off. It was contended that this case was analogous to Bailey, since it too involved speculative trading. Accordingly, the defendants submitted that as in that case, the court should conclude that the alleged possibility of profit was too speculative to be recoverable. However despite what Kerr J said, I do not see the fact that there is a risk of the claimant being worse off as a complete bar to recovery, if on a balance of probabilities the claimant would have been better off. After all, there are many other situations in which courts have recognised that damages are recoverable for loss of the opportunity to recover profits or other financial advantages, notwithstanding that there is a risk of the claimant being worse off. The classic example occurs in solicitors' negligence cases, where through the negligence of the solicitor the claimant is deprived of the opportunity to pursue an action against a third party. In all such cases, there is always a risk that the claimant might have been worse off, in the sense that the action against the third party might not have succeeded and he could have ended up paying the other side's costs. However that is no bar to damages being recovered for the loss of the opportunity to pursue that claim, provided that there is a real or substantial chance of profits or a financial advantage being gained. The position is an a fortiori one if on a balance of probabilities a profit or financial advantage would have been gained.

161. As I have already concluded, I am satisfied that, had it not been for Mr Gill being ensnared in the web of deceit which began, on the defendants' own admission, even before the move of the desk from Union to Man, Tangent would have made profits on Mr Gill's trading. In particular, had the fraudulent misrepresentations about the profitability of SETS trading not been made from the outset, I am convinced that, as in the period after September 2000, Mr Gill would have reduced his SETS trading, if not eliminated it all together, and would have concentrated on trading market-makers, on which he made money before, during and after the Man period.

162. That is what distinguishes this case from cases like Bailey and Ata, in neither of which was there any evidence that the claimant had made money in the alternative trades in which he was contending he would have engaged. Indeed, on the contrary, in Ata the judge had found that the claimant had been unsuccessful so far in his trading. In contrast, in this case, not only is there the evidence of the previous and subsequent success, but the fact that on market makers Mr Gill continued to trade profitably through the Union/Man period despite the fraud. There is also the evidence of Mr Elms, Mr Plowman and Mr Bomford himself as to Mr Gill's skill and success in trading market-makers. To that extent, this case is markedly different from Bailey and Ata where there was no evidence that the alternative trades would have been profitable and any suggestion they would was wholly speculative.

163. In circumstances where, as I conclude there is here, there is strong evidence that had Mr Gill not been deceived, he and Tangent would have continued to trade successfully on market makers, it seems to me that it would offend common sense and justice to ignore that strong evidence and conclude that, because of the nature of the trading, the whole claim for loss of profits is too speculative to be recoverable. For the reasons I have given, I do not consider that prior authority requires me to reach that conclusion.

164. Man sought to make much of the fact that Mr Gill might well have continued with FTSE trades and Forex trades, which might well have made a loss. This is a false point for two reasons:

(1) The claimant's computation of the profits it would have made but for the fraud necessarily takes account of the losses that would have been made on whatever trading was conducted, hence the percentage figures. I will return to the conservative nature of that computation in considering the quantum of the claim below.

(2) It is impossible to extricate the question of whether trades in futures would have been profitable from the fraud, in the sense that the wholly misleading picture of ostensible profitability created by the deceit covered all the trades and it is difficult to establish whether, but for the fraud, that trading would have been successful or loss-making. However, in circumstances where Mr Gill says that he would have traded in market-makers and it is the defendants who are contending that he would still have traded in futures and Forex trades it seems to me that the burden is on the defendants to establish that such trading uninfected by the fraud would have been loss-making. That burden is an impossible one to discharge.

165. Mr Brindle also contended that it was not safe to use Mr Gill's trading performance as it in fact was after the fraud to assess what his performance would have been but for the fraud. The reason for this was said to be the extent to which the way in which he traded was bound to have been affected by his experience of the fraud, which would have made him more cautious and risk averse than he otherwise would have been. It did not seem to me that there was anything in this point. As I noted earlier in this judgment, one of the striking characteristics of Mr Gill's trading was that he was always sensitive to making losses and his initial venture into SETS in late 2000 shows that he was cautious moving into new trades, all irrespective of the fraud. Furthermore, since the evidence is that but for the fraud, he would have traded predominantly in market makers, which is where his particular skill lies, I can see no reason for concluding that his trading of market makers would have followed a different and less profitable pattern had it not been for the fraud, which was the implication of Mr Brindle's submission.

166. Accordingly, in all the circumstances, I consider that Tangent is entitled in principle to recover loss of profits during the period of the fraud on the alternative trading it would have carried out but for the fraud. I consider the detail of the quantum below.

Loss of profits after February 2002 remain recoverable

167. Turning to the question of the recoverability of loss of profits after the deceit ceased in February 2002, aside from the objections in principle to the recovery of loss of profits at all, with which I have dealt, Man raises two particular objections to the recoverability of loss of profits for the post-February 2002 period: (i) that the claim is one for "profits on profits", a head of loss not recognised by English law save by an award of interest and (ii) that such profits do not relate to any relevant alternative transaction and are too speculative to be recoverable.

168. The claim is said to involve "profits on profits" because Tangent contends that year on year the increased trading fund (increased as a consequence of that year's successful trading) would have been used to trade in the following year, giving Tangent a larger fund with which to trade in the forthcoming year and therefore a larger fund on which to earn the relevant profit percentage. Man objected to this method of calculating the loss of profits both on the basis that it was too speculative and on the basis that in any event it went further than any basis for claiming loss of profits recognised by English law. In fact, given that by the end of the trial, the claim was being put forward on the basis that once the trading fund reached £5 million in any given year, the surplus above that figure would have been diverted into other investments (in respect of which Tangent now accepts that it can only claim the surplus in the given year plus interest on it) this point is actually of much less significance than it appeared at the outset of the trial. Nonetheless the point remains of relevance for the first few years until the trading fund would have reached £5 million for the first time. Accordingly it is still necessary to deal with the point.

169. The very clear and firm evidence of Tangent's expert Mr Plowman was that if Mr Gill had had more trading capital at his disposal, the probable result would have been that he would have made more profits, with the increase in profits being at least proportional to the increase in the capital fund. Mr Plowman made the point that there was some basis for saying that with a larger fund, Mr Gill would have traded in other types of trades which would have been even more successful in terms of percentage profits than the profits he made trading primarily market makers. I could see the force of that point but it was somewhat speculative and, ultimately, Tangent limited itself to submitting that with a larger fund Mr Gill and Tangent would have traded the same type of trades i.e. market makers and made greater profits, assuming throughout the same profit percentage as was in fact made with the much depleted fund available.

170. As Mr Kitchener pointed out this was an aspect of the case with which the defendants' broking expert, Mr Jones did not deal in his reports. The only challenge to the expert evidence of Mr Plowman on this point was from the defendants' forensic accounting expert, Mr MacGregor in the joint report. Mr Kitchener submitted that his evidence on this was inadmissible since he was not a broking expert. It is perhaps somewhat extreme to say that his evidence was inadmissible. I would prefer to say that it was of no real weight and of little assistance to the court.

171. In any event Mr Plowman was very firm in his oral evidence that despite Mr MacGregor's views, he considered that with a larger trading fund, Mr Gill would have made more profit with at least the same profit percentage:

> "Q. Does Mr MacGregor's analysis cause you to re-think the views expressed in your report at paragraphs 192 to 194?
>
> A. No, I stand by those.
>
> Q. Can you tell us why?
>
> A. Because the amount of money you have doesn't necessarily mean to say you are going to make more money in any particular market, but if you've demonstrated that you can make money in that market with that amount of money, then de facto if you have more money you are likely to make more money, but in the same percentage. I mean, I could argue that certainly in the stocks that Mr Gill was trading, particularly market-maker stocks, the ability to have more money and, if you like more, fire power to take on the market-makers…..he could've actually got better returns."

172. On the basis of Mr Plowman's evidence and the other evidence as to Mr Gill's success at trading other than in the Man period, it seems to me that, on a balance of probabilities, with a larger fund available, Mr Gill would have traded just as successfully as he did in the years after the Man period with a depleted fund and would have made profits with at least the same percentage of profits annually as he in fact made. Thus, Mr Gill would have traded profitably in year 1 thereby generating a larger fund at the beginning of year 2 with which to earn the relevant percentage of profits in year 2, and thus leading to a larger starting fund in year 3 and so forth.

173. Furthermore, there is no legal obstacle to the recovery of damages on this basis. In this context, Mr Kitchener relied upon two authorities in support of Tangent's case. First, he relied on the decision of the House of Lords in Sempra Metals Limited v Inland Revenue Commissioners [2008] 1 AC 561, submitting that that case recognised that in cases of late payment of a debt, interest losses can be recovered as damages, including where appropriate an element of compound interest. He referred to a passage at paragraph 95 of the speech of Lord Nicholls of Birkenhead:

> "In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law." (my emphasis)

174. Mr Kitchener submits that the passage I have underlined is directly in point, in the sense that, if Mr Brindle were right that, in relation to the post February 2002 losses, Tangent was limited to recovery of the fund as it stood at the end of the relationship plus interest, it would not be recovering what it had lost and the recovery of what Mr Brindle describes as the "profits on profits" at least until the fund would have reached £5 million, is no more than an application of the principles recognised by the House of Lords. I accept that submission.

175. I also consider that the same point emerges, at least by analogy, from the second authority relied upon by Mr Kitchener, the decision of David Richards J in 4 Eng Limited v Harper [2009] Ch 91 where the claimant recovered not only the income it had lost on the alternative business it had bought, but damages by reference to the capital value of that alternative business at trial (see paragraphs 46 and 52). As Mr Kitchener points out, the capital value of any business is at least in part a function of re-invested profits. It was not suggested in that case that the value attributed to the re-invested profits should be stripped out of any damages.

176. Accordingly, I can see no reason in principle why the so-called "profits on profits" should not be recoverable, given that I am satisfied that, on a balance of probabilities, the profits which Tangent would have made in the years ended 31 March 2002 and 31 March 2003 had it not been for the fraud, would have been reinvested to increase the trading fund, and the same percentage of trading profits would have been made with that larger fund as Tangent made with the smaller fund in fact available to it.

177. In so far as the objection raised by Mr Brindle was that loss of profits after the period of the deceit are not recoverable, because they do not relate to any relevant alternative transaction or because the law does not recognise such "profits" because they are too speculative, it seems to me the objection is unprincipled and wrong. A number of the cases recognise that where the adverse effects of a fraudulent misrepresentation continue after the fraud has been discovered, then in principle the claimant can recover as damages the losses he suffers as a consequence of those adverse effects for so long as they remain operative, whether loss of profits or additional expenses or other losses.

178. The starting point for this part of the analysis is the judgment of Lord Denning MR in Esso v Mardon. The passage which I quoted in paragraph 150 above recognises that the misrepresentation may have an adverse effect which extends for a number of years, for example because it induces the claimant to enter a disadvantageous transaction, from which he takes some time to extricate himself. This is the same point as the claimant in East v Maurer being unable to sell the unsuccessful business for three and a half years and recovering loss of profits for that period.

179. It was because of what Lord Denning had said in Esso v Mardon that, in his oral closing submissions Mr Brindle accepted that, in principle, there might be a claim for a period of time, which Mr Brindle said would be necessarily short, that somehow or other there was what he described as "a temporary disablement in the ability of the claimant to mitigate." Although this was not a formal concession, it seems to me that the recognition by Mr Brindle of this principle was in a very real sense fatal to his argument that loss of profits suffered after the date the deceit ceased are somehow not recoverable as a matter of law. To begin with, there is no justification for seeking to limit the time during which the adverse effects of the fraud operate to a "necessarily

short" period of time. It all depends on the circumstances of the case. In Esso v Mardon itself, the claimant was unable to extricate himself from the disastrous business he entered in reliance on the defendant's misrepresentation from about May 1963 (or at latest September 1964) until March 1967. In East v Maurer as I have said, the claimant could not sell the unsuccessful business for three and a half years and recovered loss of profits for that period.

180. It may well be that the adverse effect of the fraud is still operating at the time of the trial, in which case there is no reason in principle why the claimant may not recover losses suffered as a consequence of that adverse effect up until trial. This is illustrated by the decision of David Richards J in 4 Eng Limited v Harper [2009] Ch 91 (paragraphs 54 and 55):

> "54 The alternative date for assessment of the loss is, the defendants submit, the date on which 4 Eng was able to extricate itself from the Excel transaction. At a late stage, the defendants have accepted that this did not occur until 9 January 2006 when Excel went into administration. It is submitted that on that date 4 Eng was freed from the consequences of the defendants' deceit.
>
> 55 The date on which the claimant is or could be extricated from the transaction induced by the deceit is important in a case where it relates to readily marketable assets. The usual rule would be that the loss is fixed as at the date of the transaction because the claimant could immediately have sold the asset and any deferment in a sale is his own choice. This will not be the case, even with readily marketable assets, where the claimant is in effect locked into the transaction. In such a case, the appropriate date for assessment of the loss is the date on which he could extricate himself from the transaction: Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] AC 254. I could follow the defendants' submission if on 6 January 2006 4 Eng recovered substantial funds which it could then invest in an alternative acquisition. In fact, of course, Excel was insolvent and 4 Eng recovered nothing. It was no more able then to make an alternative acquisition than it had been in the past or would be in the future. The consequences of the defendants' deceit did not stop then but continued until trial. The choice of 6 January 2006 would be arbitrary and unconnected with 4 Eng's loss."

181. In my judgment that passage is an example of the application of the principles set out by the House of Lords in Smith New Court, and in particular the passages from the speeches of Lord Browne-Wilkinson and Lord Steyn which I have underlined in the quotations at paragraphs 127 and 132 above. These authorities demonstrate that there is no reason in principle why, if the claimant is able to demonstrate, on a balance of probabilities, that it is still suffering from the adverse effects of the fraud at the date of the trial and has still not made the profits from its business that it would have made had the fraud not occurred, damages should not be assessed at the date of the trial and those lost profits should not be recoverable as damages for the entire period until the

trial. The fact that the period of time in the present case runs from February 2002 until the date of trial more than seven years later is no reason why the principle should not apply, particularly in circumstances where there is no suggestion whatsoever that Tangent has failed to mitigate its loss.

182. Furthermore, for reasons I have already given in analysing the decisions of the Court of Appeal in Esso v Mardon and East v Maurer in the previous section of the judgment, there is no justification for limiting the recoverability of loss of profits in deceit to cases where there is an identifiable alternative transaction, nor is there anything in 4 Eng Limited v Harper which leads to that conclusion. The reference in the passage I have quoted above from paragraph 55 of the judgment to the claimant being "locked into the transaction" is not some condition precedent to recovery of loss of profits. It is no more than an example on the facts of that case of the wider principle, that the claimant can recover all losses which flow as a direct result of the fraud, including losses as a consequence of continuing to suffer from the adverse consequences of the fraud, of being in effect "locked in" to a disadvantageous situation.

183. In the present case, had it not been for the fraud perpetrated on it in the Man period by Mr Bomford, Tangent would have had a fund of £4.25 million at the end of June 2001 with which to trade CFDs, instead of which it had only the depleted fund of £521,644 in March 2002. On a balance of probabilities, I am satisfied that had the fraud not occurred, Tangent through Mr Gill would have gone on conducting its business of trading primarily in market makers throughout the Man period and thereafter and that business trading would have been profitable overall. To the extent that some individual trades conducted would have been loss-making, that is no reason to conclude that the trading overall is too speculative for loss of profits to be recoverable. The fact that losses would have been suffered on individual trades is catered for in the average percentage trading profit figures, on the basis of which the claim is presented, to which I turn in the next section of the judgment.

184. I am also quite satisfied that, since Tangent has yet to recoup that fund of £4.25 million which it should have had (and which was effectively stolen from it), notwithstanding the successful trading conducted with much smaller resources, Tangent has continued to suffer from the adverse effects of the fraud. In a very real sense, Tangent has been "locked in" to a much depleted trading business, a disadvantageous situation, as a consequence of the fraud throughout the period since June 2001. The fact that it cannot (because of the nature of the business which has been damaged) identify a specific alternative transaction, is neither here nor there and should not affect the recoverability of damages for loss of profits.

Quantum of damages

185. As I have already said, Man does not challenge Tangent's entitlement to recover the difference between the fund as it was at the beginning of the Man period and as it was at the end of the relationship, that is the figure of £3,222,000 (which also excludes the withdrawal of £505,000 made by Mr Gill). Man also accepts that Tangent is entitled to recover simple interest on that sum at the Bank of England base rate plus 3.25% from 7 March 2002 (when the relationship ended) until judgment.

186. So far as concerns the claim for loss of profits during the period of the fraud, these are claimed by Tangent on the basis of an annual profit percentage of 50% which is then pro-rated downwards to take account of the fact that the period in question is some nine months, covering the period of the fraud and slightly after. Accordingly, the claim is put forward on the basis that the opening fund of £4,250,000 would have increased to £4,601,250, after deduction of sums for the actual withdrawal of £505,000 plus an assumed further withdrawal for living expenses of £100,000, together with deduction at the rate of 40% for the tax on the profits. In its overall calculation of damages Tangent has added back in both the tax deducted, on the basis that tax will be payable by Tangent on any damages awarded and the £100,000 annual withdrawal.

187. The principle of adding back the tax was accepted by Mr Brindle on the basis of Mr Kitchener's assurance that tax would be payable on the damages, in accordance with the principle of law that damages for loss of profits are taxable if the profits themselves would have been taxable. Mr Brindle submitted that there was no basis for adding back the withdrawal, but the short answer to that as I see it, is that perhaps more relevantly in the subsequent years after 2002, the annual withdrawal of £100,000 has been deducted from the profits, as has the tax which would have been payable, in order to arrive at a net profit figure so as not to overinflate the profit percentage. However, the amount of the withdrawals still represents monies which Tangent has lost as a consequence of the deceit which would otherwise have been available to it and thus is a proper element of its damages claim.

188. As for the figure of 50% annual profits, Mr Plowman's evidence was that it is a conservative figure, and that was accepted by Mr Brindle in his closing submissions. It is not in fact derived from the profit percentages made by Mr Gill from his trading in the pre-Man years, which even if one left out of account the enormous 1006% profit in the year to 31 March 2000, the year of the dot com boom, would generate a far higher average percentage figure. Coincidentally, the figure of 50% also approximates to the average percentage profit figures calculated by Mr Creed for the post Man years, again leaving out of account the 877% profit percentage for the year to 31 March 2008. I agree that the figure of 50% is appropriately conservative as an annual percentage of profit which could have been earned to 31 March 2002. It is pitched at a level which takes sufficient account of the inherent risks in any trading, such as that certain trades would probably have been loss-making.

189. So far as the claim for loss of profits after the termination of the relationship with Man is concerned, the amount of trading profits that would have been made in any given year are assessed by applying to the opening fund in each year the percentage profit figure in fact made by Mr Gill from his trading in that year, in accordance with Mr Plowman's evidence about his ability to generate at least the same percentage profit figures with a larger trading fund. The figures are set out in the table below. From the profit figures have been deducted assumed annual withdrawals for living expenses of £100,000 and tax on the profits at the rate of 40% in order to arrive at the net profits which, up to £5 million would have been added to the fund to be traded in the next year. As with the year to 31 March 2002, the amounts deducted for tax and annual withdrawals are added back into the eventual calculation of damages.

190. Above £5 million, in accordance with Mr Gill's evidence, monies would have been diverted to other investments in India. As I have also indicated, Mr Kitchener now

accepts that so far as those monies are concerned, the claim for loss of profits on Indian investments is too speculative to be recoverable. He limits the claim to recovering the surplus funds plus interest, again at the Bank of England base rate plus 3.25%. Accordingly the figure in the column headed "Transferred to other investments" in the table below is recoverable as damages with interest at that rate from the relevant 31 March until the date of this judgment. The figures in the table below are derived from the work done by Mr Creed and I accept that they are as accurate as possible in the circumstances and based upon conservative assumptions. As with the 50% figure for the year to 31 March 2002, the annual profit percentages (which derive from Mr Gill's actual trading results) necessarily take into account the fact that some trades would have been loss-making.

191. In two respects the figures for profit percentages differ from those set out in paragraph 89 above and I should explain those differences. First, although the actual percentage profits for the year to 31 March 2007 were 22%, based upon further figures for trading which increased the profit percentages from the original figure of 5%, the percentage has been left at 5% because of Mr Gill's concern about the circumstances of the discovery of the further figures. Second, for the year to 31 March 2008, the actual percentage profit of 877% has not been taken, but rather a much more conservative figure of 47% which is an average of the profit percentages for the preceding three years.

192. Thus, as I see it, these projections for loss of profits are being put forward on a cautious and conservative basis. I accept Mr Kitchener's submission that they represent a minimum amount that, on a balance of probabilities, Mr Gill would have earned with greater trading capital than he in fact had because of the fraud.

Year ended	Opening fund	Profit	Tax	Annual withdrawals	Transferred to other investments	Closing fund	Annual profit percentage
31.3.02	4,250,000	1,593,750	(637,500)	(605,000)	-	4,601,250	50%
31.3.03	4,601,250	460,125	(184,050)	(100,000)	-	4,777,325	10%
31.3.04	4,777,325	5,207,284	(2,082,914)	(100,000)	(2,801,696)	5,000,000	109%
31.3.05	5,000,000	1,450,000	(580,000)	(100,000)	(770,000)	5,000,000	29%
31.3.06	5,000,000	5,350,000	(2,140,000)	(100,000)	(3,110,000)	5,000,000	107%
31.3.07	5,000,000	250,000	(100,000)	(100,000)	(50,000)	5,000,000	5%
31.3.08	5,000,000	2,350,000	(940,000)	(100,000)	(1,310,000)	5,000,000	47%

193. I shall leave it to the parties to agree the detailed calculation of damages and interest upon the basis of the figures set out in the table.

Alternative claims

194. Since I have determined that the claim for substantive damages succeeds it is not necessary to consider in detail most of the other claims advanced by Tangent, since with one exception, they are alternative claims to the claim for substantive damages for the tort of deceit. I should deal briefly though with the so-called "estoppel" argument since this took up some time in argument.

195. The basis for this argument was an alternative claim that if Tangent was not entitled to substantive damages for deceit, it was entitled to an account of the funds in the Man account (on the basis that Man was a trustee of the funds or under a fiduciary duty to account for the funds), alternatively to payment of the balance in the Man account in debt. In respect of both these concurrent causes of action, Tangent contends that Man is estopped from denying that the balance in the account was less than the £9.27 million represented by Mr Bomford to have been in the account on 26 October 2001.

196. There are a number of problems with this way of putting the case. First, as Mr Brindle rightly points out, a claim that seeks to recover on the basis that Man is estopped from denying that the £9.27 million misrepresentation was true is wholly inconsistent with the claim in deceit that that was a fraudulent misrepresentation. Any such claim would involve a waiver of the tort and on the well-established authority of the House of Lords in United Australia Limited v Barclays Bank [1941] AC 1, Tangent would have to elect between what are wholly inconsistent rights before judgment. Although in his submissions, Mr Kitchener referred to this claim as a "minimum" to which Tangent is entitled, it seems to me that cannot be right. Having pursued the claim for damages in the tort of deceit to judgment, it is too late for Tangent now to pursue an alternative claim in debt or for an account, even if the damages recovered were less than the claim using this estoppel.

197. Second, as Mr Brindle also points out, if Mr Kitchener were to choose to pursue an alternative claim in debt or for an account having waived the tort, on the basis of the supposed estoppel, Man would have a complete answer based on clause 12 of the Client Agreement, which provided:

> "Confirmation of the execution of orders and transactions (whether by formal contract note, difference account, letter, telex, cable or otherwise) and statements of account shall be conclusive and deemed acknowledged to be correct unless [Tangent] gives [Man] written notice to the contrary within 7 days of Man dispatching such confirmations or statements…."

On the alternative hypothesis that the tort of deceit has been waived, I agree with Mr Brindle that, as a consequence of this clause, the amounts shown on the month end statements (which were of course the true amounts actually in the account from time to time) would be conclusive, which is a complete answer to the estoppel argument.

198. Third, despite Mr Kitchener's strenuous protestations to the contrary, I do consider that this argument involves using an estoppel to found a cause of action, using it as a sword rather than a shield, which has never been permissible as a matter of English law. Mr Kitchener contended that his approach was supported by the decision of Harman J in Re Exchange Securities & Commodities Ltd [1988] Ch 46. That was a case in which a company which was now in liquidation had previously made clear representations to its creditors as to the position between itself and those creditors. It was argued on behalf of the creditors that the company was estopped from denying that that was the position. Harman J seems to have been sympathetic to that argument, but since he held that the estoppel argument failed because the liquidator was not bound by estoppels which might bind the company, anything he said on the subject of what the position would have been against the company was only obiter dictum in any

event. I have to say that I have considerable doubt whether Harman J could ever have intended in a case such as the present that Tangent could have a claim in debt for the best part of £10 million based upon an entirely fictitious figure. However if that is what he intended, I disagree with that approach and decline to follow it.

199. Finally, in so far as this part of the alternative case is put on the basis that Tangent is entitled to an account, I have considerable doubts whether Man was ever a trustee or under a fiduciary duty so as to be under an obligation to account. Mr Kitchener relied upon the decision of Toulson J Brandeis Brokers Ltd v Black [2001] 2 Lloyd's Rep 359. In that case the learned judge upheld an arbitration award against the applicant, brokers on the London Metal Exchange. The relationship there was an "advisory" not an "execution only" one, as in the present case. Toulson J agreed with the arbitrators that in certain respects, the relationship between the parties gave rise to fiduciary obligations.

200. Mr Brindle contended that in a case such as the present, where the contractual relationship was on an "execution only" basis, the reasoning of Gloster J in JP Morgan Chase Bank v Springwell Navigation [2008] EWHC 1186 (Comm) was to be preferred to that of Toulson J. That was also a case of an "execution only" relationship. At paragraphs 571 to 577 of her judgment, Gloster J rejected the argument that the relationship was a fiduciary one or that Chase had come under any fiduciary obligations. Although it is not necessary to decide the point, it seems to me that Mr Brindle is right in contending that the reasoning of Gloster J is to be preferred.

201. Tangent had another alternative claim that Man and Mr Bomford should disgorge the commission and bonuses made on the trading in the Man period. However, it is not necessary to deal with that claim since Mr Kitchener accepted that in circumstances where Tangent recovered damages for the tort of deceit, it could not also recover such commissions and bonuses. That would be an example of impermissible approbation and reprobation.

Exemplary damages

202. The one additional claim which is not alternative to the claim for damages in deceit is the claim for exemplary damages. Notwithstanding that Tangent will, as a consequence of my judgment, recover compensatory damages, Mr Kitchener submits that the court should also order exemplary damages to express its disapproval of and displeasure at the fraud perpetrated on Tangent and Mr Gill. He relies on the decision of the House of Lords in Kuddus v Chief Constable of Leicestershire [2002] 2 AC 122, which has removed any artificial limitation of the situations in which the courts can award exemplary damages to causes of action where the law would have awarded such damages before the decision in Rookes v Barnard [1964] AC 1129, which had been thought to be the effect of the subsequent decision of the House of Lords in Broome v Cassell [1972] AC 1027.

203. Mr Brindle accepts that there is no longer any such artificial limitation on the law as to exemplary damages, but he submits that even after Kuddus, the courts can only award exemplary damages in certain defined categories of case, of which this is not one. He also submits that, since the purpose of exemplary damages is to express the court's displeasure at the defendant's conduct, it is doubtful whether such damages should be awarded where the defendant is only liable on the basis of vicarious

liability, as Man is here. Finally, since the award of such damages is in the discretion of the court, he urges me not to make such an award, since in any event (as Mr Kitchener accepts) such awards are normally limited to £10,000 to £15,000, and in the context of a case where the claimant will recover millions of pounds in compensatory damages, a further award of exemplary damages will hardly have any disapproving or deterrent effect.

204. I agree that, although exemplary damages are no longer limited to what might be described as pre-1964 recognised causes of action, they will still only be awarded in three defined categories of case identified by Lord Devlin in Rookes v Barnard. Two of those are not applicable here: oppressive, arbitrary or unconstitutional action by servants of the state and cases where statute provides for exemplary damages, such as landlord and tenant legislation where exemplary damages may be awarded against a landlord who wrongfully seeks to evict a tenant. The third category is cases where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff" (per Lord Devlin at 1226).

205. As Mr Brindle submitted, Tangent has not even begun to demonstrate that, however serious Mr Bomford's fraud was, this case falls into that category. It is true that, as my own researches and enquiries have revealed, exemplary damages have been awarded in cases of deceit, primarily in the case of fraudulent insurance claims by insureds dealt with in the county courts. This is no doubt because such cases do fall into that category, as the insurer's remedy is rejection of the claim coupled with avoidance and retention of the premium and it would not expect any compensation as such.

206. Furthermore, I do have serious doubts as to the appropriateness of an award of exemplary damages against a defendant, even in a case of fraud, where the basis for that defendant's liability is vicarious liability. This was an issue which clearly troubled some of their Lordships in Kuddus: see per Lord Mackay of Clashfern at paragraph 47 and Lord Scott of Foscote at paragraphs 126-137, in particular 131:

> "The objection to exemplary damages awards in vicarious liability cases seems to me to be fundamental. The only acceptable justification of exemplary damages awards in cases falling within Lord Devlin's first category (Rookes v Barnard [1964] AC 1129 , 1226), "oppressive, arbitrary or unconstitutional action by the servants of the government", including police officers, is that the conduct complained of has been so outrageous as to warrant a punitive response. As Lord Devlin said, at p 1227: "the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour." The other side of the coin is, in my opinion, equally valid: the defendant should not be liable to pay exemplary damages unless he has committed punishable behaviour. This principle leaves no room for an award of exemplary damages against an individual whose alleged liability is vicarious only and who has not done anything that constitutes punishable behaviour."

207. Mr Kitchener sought to avoid this problem by raising a number of criticisms about Man's conduct. However, since he expressly eschewed throughout the trial any allegation of fraud against any individual at Man other than Mr Bomford, those criticisms were necessarily concerned with Man's conduct after the deceit ceased and specifically with Man's conduct in its defence of the claim. I do not propose to make any finding about those allegations at this stage, since it seems to me that if there were any substance in them, that is better addressed by an appropriate costs order (on which I have yet to hear any submissions) rather than by an award of exemplary damages.

208. In general I have considerable sympathy with the view of Lord Scott in Kuddus that exemplary damages are anomalous and that, since the common law has moved on since Rookes v Barnard in 1964 and now provides remedies which are much more appropriate (whether restitutionary damages or compound interest or indemnity costs), the time has come to abolish exemplary damages. However that was a minority view and the general principle was not argued in Kuddus, so the court has to proceed on the basis that such damages can still be awarded in an appropriate case. However, in my judgment this is not such a case. Quite apart from the inappropriateness of such an award against a defendant who is only liable vicariously, there seems to me something faintly absurd in the suggestion that, in this case where Tangent will recover substantial compensatory damages, the additional award of even £15,000 exemplary damages will express the court's outrage and displeasure at the fraud perpetrated on Tangent and Mr Gill. I decline to make any award of exemplary damages.

Conclusion

209. In the event I am satisfied that the case for Mr Gill and Tangent having been induced by the numerous fraudulent misrepresentations made by Mr Bomford, is an overwhelming one. Tangent is entitled to recover all its losses which flow directly from that fraud, which consist not only of the depletion of its trading fund and loss of profits it would otherwise have made on that fund in the period of the fraud, but the loss of profits it has suffered up until the trial. As a consequence of having been deprived of that fund and only had a smaller fund with which to trade, Tangent has continued to suffer from the adverse effects of the fraud up until the trial.

210. In the event that the damages recoverable and interest on those damages at the Bank of England base rate plus 3.25%, cannot be agreed between the parties in the light of this judgment, I will hear further submissions.