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

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Before: The Hon. Mr Justice Waksman

Draft Judgment circulated: 8 December 2023
Date handed down: 21 December 2023

Claim No: CL-2017-000583

BETWEEN:

EURASIAN NATURAL RESOURCES CORPORATION LIMITED

Claimant

-and-

(1) DECHERT LLP
(2) DAVID NEIL GERRARD

Defendants

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Third Party

("the 2017 Action")

Claim No: CL-2019-000644

AND BETWEEN:

EURASIAN NATURAL RESOURCES CORPORATION LIMITED

Claimant

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

-and-

DECHERT LLP
DAVID NEIL GERRARD

Third and Fourth Parties

("the 2019 Action")

JUDGMENT

Hearing dates: 6-9 and 13-16 March 2023

Representation:

Clare Montgomery KC, Nathan Pillow KC, Anna Boase KC, Jack Rivett and Freddie Popplewell, (instructed by Hogan Lovells International LLP, Solicitors) for the Claimants

Richard Millett KC, Michael Bools KC, Edward Harrison and Mark Belshaw (instructed by Clyde & Co LLP, Solicitors) for the First Defendant in the 2017 Action and the Third Party in the 2019 Action

Michal Hain (instructed by Charles Fussell & Co LLP, Solicitors) for the Second Defendant in the 2017 Action and the Fourth Party in the 2019 Action

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

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INTRODUCTION

1. This case consists of two actions brought by the Claimant, Eurasian Natural Resources Corporation Limited ("ENRC") which have been managed together for some considerable time, and which have now been tried together. In the first action ("the 2017 Action"), ENRC made claims against two Defendants. The First Defendant, Dechert LLP ("Dechert"), is a well-known firm of solicitors. The Second Defendant, Neil Gerrard, is a solicitor now retired from practice. Between 23 April 2011 and 31 December 2020, he was a Partner in Dechert. Before that, he was a Partner in DLA Piper UK LLP ("DLA"), which he joined in 1995. Where it is appropriate to refer to both defendants together, I shall refer to them as the Dechert Defendants – ("the DDs"). Later in this judgment, and in particular where I am referring to submissions made by Dechert but which are also adopted by Mr Gerrard, I shall refer simply to Dechert. The context will make clear when that is.

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

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

4. This is my judgment following the second trial in these proceedings. This trial has been concerned with questions of causation and loss. I refer to it as "the Phase 1A Trial". The Phase 1A Trial took place following and consequent upon my lengthy judgment handed down after the first trial ("the Phase 1 Trial") on 16 May 2022 ("the Phase 1 Judgment"). The Phase 1 Trial itself took place on dates between May and September 2021.

5. While it will be necessary to have a clear understanding of the full Phase 1 Judgment and indeed to have a copy of it to hand in order fully to digest this judgment ("the Phase 1A Judgment"), it will suffice at this stage if I set out at paragraphs 6 to 29 below what are, in the main, the material parts of the Executive Summary of the Phase 1 Judgment.

THE PHASE 1 JUDGMENT

6. Over the period 2011 - March 2013, ENRC, an international mining conglomerate and at the time a FTSE 100 Plc, retained the services of Dechert which acted principally through its

then partner, Mr Gerrard. The initial purpose of Dechert's retainer was to lead an investigation into some of the activities of an ENRC subsidiary called SSGPO which operated in Kazakhstan. This had been prompted by a whistleblowing email from an employee in Kazakhstan in December 2010. Two further particular matters about SSGPO emerged in early 2011 with which Dechert was to deal, also.

7. On 9 August 2011, there appeared an article in *The Times* which was highly damaging to ENRC and clearly based on leaked documents, some of which were privileged ("the August Article"). Very shortly after, on 10 August, the Chief Investigator of the SFO, Mr McCarthy, wrote to ENRC ("the SFO Letter"). He referred to recent intelligence and media reports concerning allegations of corruption and wrongdoing by ENRC. He then referred to the SFO's own 2009 Guidance on corporate self-reporting of corruption, and urged ENRC to consider it when conducting any internal investigations. He added that in the meantime, he, and the current director of the SFO, Mr Richard Alderman, would like to meet with ENRC to discuss its governance and compliance programmes, and the allegations referred to. He confirmed that at that stage, the SFO was not conducting a formal criminal investigation into ENRC.

8. Following advice from Mr Gerrard, on 9 November 2011 ENRC wrote to the SFO to say that it wished to engage with it. As a result, the investigation work to be done by Dechert substantially increased. It covered not only the existing Kazakhstan investigation but also an investigation into ENRC's activities in Africa, principally its prior acquisitions of three companies, namely CAMEC, Camrose and Chambishi. The first two had operations in the Democratic Republic of Congo and the latter in Zambia.

9. Over the period from October 2011 until 28 March 2013, there were 8 formal meetings between the SFO, representatives of ENRC and (in all cases) Mr Gerrard. These are referred to in the judgment as "open meetings" (OMs). In addition, there were 30 contacts, either at meetings or by telephone, between the SFO (mainly, but not exclusively, one or more of Mr Alderman, Mr Mark Thompson and Mr Dick Gould) on the one hand, and Mr Gerrard on the other. No representative of ENRC itself was present. These are referred to in the judgment as Disputed Contacts ("DCs").

10. There were further damaging newspaper articles about ENRC and the involvement of the SFO, in December 2011 ("the December Article") and in March 2013 ("the March 2013 Article") both, again, based on confidential leaked information.

11. As at March 2013, Dechert had produced to the SFO a lengthy and detailed report on Kazakhstan. The investigation into Africa was still ongoing. On 27 March 2013, ENRC terminated Dechert's retainer. On 25 April, 2013, the SFO announced a criminal investigation into ENRC focusing on allegations of fraud, bribery and corruption in relation to its activities or those of its subsidiaries in Kazakhstan and Africa ("the Criminal Investigation"). As at the time of the Phase 1 Trial and Phase 1 Judgment, the Criminal Investigation was still ongoing.

12. Dechert's total fees for its work in relation to the investigation were £13m exclusive of VAT.

13. In June 2013 a collection of papers relating to ENRC was sent anonymously to the SFO in a brown envelope ("the June 2013 Material"). It contained confidential and in some cases privileged information.

The Claims: Dechert and Mr Gerrard

14. The allegations against both sets of Defendants were of the most serious kind. The core allegation against Dechert and Mr Gerrard was that over the period of the retainer (and in one case beyond it) Mr Gerrard acted not merely negligently but deliberately or at least recklessly, without the authority of ENRC and plainly against its interests.

15. ENRC said, first, that Mr Gerrard was himself the instigator of one or more of the leaks which led to the August, December, and March 2013 Articles. In this context it is said that he had one or more unauthorised communications with Mr Alderman (DC1) in which, at the very least, he told him that the August Article was forthcoming. Moreover, following the termination of the retainer it was he who sent the brown envelope containing the June 2013 Material to the SFO.

16. Second, and in relation to the 30 DCs, ENRC said that all of them were either themselves unauthorised or at the very least, what Mr Gerrard communicated to the SFO in them included information which was plainly against his client's interests and unauthorised.

17. Third, it was said that Mr Gerrard's conduct of the entire investigation was negligent, indeed reckless, in numerous respects.

18. The upshot of all the above, according to ENRC, was that the fees of Dechert and third parties on the investigation were massively more than they should have been. Dechert's own fees should have been no more than £2m, so there were unnecessary fees of £11m. There were also said to be £11m worth of unnecessary third-party fees, along with around £232,000 worth of lost management and employee time. These are claimed as damages.

19. ENRC said that in acting as he did, Mr Gerrard was for the most part motivated by a desire to secure as much fee revenue as possible with a secondary motive, at times, being to ingratiate himself with the SFO. In relation to the leak leading to the August Article and first engagement with Mr Alderman, this was done to provoke interest on the part of the SFO which was likely to (and did in fact) hugely expand the work which Dechert would then have to do.

The Claims: the SFO

20. ENRC alleged that the various representatives of the SFO (including Mr Alderman) were complicit with Mr Gerrard in the DCs, in that they knew or were reckless as to the fact that he was acting without authority and plainly against his client's own interests. In relation to DC1, which came before the publication of the August Article and then the SFO Letter, it is said that Mr Alderman knowingly took information from Mr Gerrard about (at least) the August Article and subsequently (at least) tipped him off about the forthcoming SFO Letter.

21. It is said that all of the above involved the SFO committing the tort of inducement to breach of contract on the part of Mr Gerrard, and/or the tort of misfeasance in public office.

Findings in the Judgment: Dechert and Mr Gerrard

22. In the Phase 1 Judgment, I found that Mr Gerrard was indeed the instigator of all three leaks to the press. I further found that he engaged with Mr Alderman without authority prior to the August Article, at least alerting Mr Alderman to it. Mr Alderman then tipped Mr Gerrard off about the forthcoming SFO Letter and Mr Gerrard was informed about it on the day it was sent.

23. I further found that Mr Gerrard was in at least reckless breach of duty in respect of DCs 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 15A, 17, 18, 19A, 20, 21, 23, 24, 25 and 25A.

24. As for the other allegations against Mr Gerrard I found that he was negligent (and for the most part reckless) in relation to his:

(1) failure to record in writing his own advice;

(2) wrong advice about ENRC's potential criminal liability, the risk of raids by the SFO, potential penalties, the risks involved in engaging with the SFO in the way that ENRC did, and not suggesting a different course;

(3) failing to determine the scope of the SFO's concerns in relation to ENRC in the context of the investigation;

(4) unnecessary expansion of the investigation;

(5) wrong advice about bringing documents into this jurisdiction;

(6) failing to protect ENRC in relation to privilege;

(7) failing to disclose to ENRC his knowledge of the fact that Mr Cary Depel, ENRC's then Head of Compliance had been interviewed by the SFO on 16 May, 2012; here, Dechert and Mr Gerrard admit those facts and that they amount to a reckless breach of duty; and

(8) being the sender to the SFO of the June 2013 Material.

Findings in the Judgment: the SFO

25. As for the SFO, I found that, acting by Mr Alderman and/or Mr Thompson and/or Mr Gould, it was in serious breach of its own duties in relation to 15 out of the 30 DCs, which included engaging with and taking information from Mr Gerrard which was plainly unauthorised and against his client's interests. These DCs were DCs 1, 4-11, 13, 15, 19A, 20, 23 and 24. They have been referred to in submissions for the Phase 1A Trial as "the Induced DCs". I shall refer to them as "IDCs". On the facts, I found that in relation to the IDCs (and subject to proof of causation and loss) the tort of inducement to breach of contract on the part of Mr Gerrard had been established. Some but not all of the elements of misfeasance in public office were also established, but not sufficient to make out the tort itself.

26. As for the other allegations against the SFO, I found that none of them was established. They were:

(1) failing to deal with a whistleblowing letter sent in July 2012, referred to in the judgment as "WB2";

(2) leaking to the press its decision to launch the Criminal Investigation before it had been made public;

(3) making use of the June 2013 Material being at least reckless as to its privileged nature;

(4) deliberately suppressing or destroying a notebook of Mr McCarthy's which covered the period July to December 2011, referred to in the judgment as the Beige Notebook; and

(5) failing to remove any reference to Kazakhstan on the SFO website until January 2016.

27. I also found that in acting wrongfully as the SFO did, this was not because it had a particular desire to assist Mr Gerrard to earn more fees, rather, it was what I have referred to in the Phase 1 Judgment as "bad faith opportunism" in relation to the relevant pieces of information wrongfully communicated to it by him.

28. I also dealt with two particular questions of causation in relation to the SFO only. Here, I found that:

(1) It is <u>not</u> the case that, but for the SFO's wrongful conduct in relation to DC1, it would not have sent the SFO Letter; and

(2) It is <u>not</u> the case that, but for the SFO's wrongful conduct in relation to DC1 and/or DC4-DC7, ENRC would not have engaged with the SFO as it did, beginning with the 9 November Letter.

29. I also found that in respect of any claims established against the DDs, there was no real (i.e. more than *de minimis*) contributory fault on the part of ENRC.

30. It will be seen, therefore, that the Phase 1 Judgment was essentially concerned with questions of "liability" in the sense that almost no questions of causation or loss were determined. I, of course, accept that, strictly speaking, no claim in tort is made out until the claimant shows that at least some loss has been caused.

31. As an important postscript to those findings, I should record that on 24 August 2023, the SFO reported that it had now closed the Criminal Investigation ("the CI"). The material part of the announcement read as follows:

> "Our investigation focused on the suspected payment of bribes by the company and individuals connected to it to secure access to lucrative mining contracts in the Democratic Republic of the Congo (DRC) between 2009 and 2012.
>
> We conducted a comprehensive investigation spanning multiple jurisdictions to examine the alleged conduct and exhausted all reasonable lines of enquiry.
>
> We review all our cases on an ongoing basis to help us deliver justice for victims and value to the public.
>
> As a responsible prosecutor, we must ensure all our cases meet the stringent evidence and public interest tests set by the Code for Crown Prosecutors.
>
> In August 2023, following our latest review of the investigation, we concluded that we have insufficient admissible evidence to prosecute, and closed the case."

THE PHASE 1A TRIAL

Introduction

32. It was always intended that there would have to be a further trial after the Phase 1 Trial to deal with questions of loss, if liability was otherwise established. That further trial was, and remains known as, the Phase 2 Trial. It has yet to take place. However, it became clear in the course of the Phase 1 Trial that certain questions of causation and loss which might otherwise have been the subject of determination following that trial were best deferred until after the Phase 1 Judgment. This was because submissions on those questions would be much more focused and useful if they were made against the backdrop of findings already made in that judgment. Accordingly, it was agreed that there should be a further trial, prior to the Phase 2 Trial, to deal with those questions. This was to be the Phase 1A Trial.

33. However, it was also agreed that there should be no new witness evidence adduced at the Phase 1A Trial. Nor would any documents be referred to which had not been in the trial bundle for the Phase 1 Trial (unless otherwise agreed or permitted). However, if a document referred to was in the trial bundle, it did not matter whether it was actually referred to in the Phase 1 Trial. Accordingly, the Phase 1A Trial itself consisted entirely of oral submissions which followed the lodging of extensive written submissions by the parties. The submissions made at the Phase 1A Trial thus referred back to (a) what I had found in my Phase 1 Judgment, (b) evidence given at the Phase 1 Trial both in witness statements ("WSs") and orally and (c) documents from the Phase 1 Trial bundle.

34. Following the hand-down of the Phase 1 Judgment, Mr Gerrard was no longer jointly represented with Dechert. He instructed his own solicitors and counsel, who appeared on his behalf at the Phase 1A Trial.

35. Prior to the Phase 1 Trial, there was an agreed list of issues covering the entire case and in respect of both the 2017 and 2019 Actions. Some of those issues then became the issues for the Phase 1A Trial. As revised and as still material to the matters I now have to decide, the present issues are as follows:

2017 Claim Issues

36. Under Unnecessary legal fees:

> **64. If Dechert and/or Mr Gerrard breached their obligations (in all or any of the seven Categories of breach alleged), did such breach(es) cause the investigation to be of greater length and/or complexity than was required?**

The Phase 1 Judgment found that they did and Dechert does not dispute this.

> **66. If Dechert and/or Mr Gerrard breached their obligations (in all or any of the seven categories of breach alleged), what would have happened but for such breach(es)? In particular, would ENRC have incurred the same level of legal fees in any event?**

ENRC says No to the second question and Dechert agrees, but the first question is in dispute.

> **67. What was the Necessary Work? What would ENRC have had to pay for it?**

This is in dispute.

37. Under Unnecessary third-party fees:

> **68. If Dechert and/or Mr Gerrard breached their obligations (in all or any of the seven categories of breach alleged), did such breach(es) cause ENRC to incur greater fees and costs on third-party advice and assistance than it would otherwise have done?**

ENRC says Yes and Dechert agrees, but quantum is in dispute.

> **70. Did any third-party advisers give ENRC different advice to that of Dechert or advise that Dechert's work was not appropriate? If so, (a) did ENRC decide not to follow such advice and (b) was any loss caused by ENRC's own decision, such that the loss is not recoverable from the Defendants?**
>
> **71. Did Bridge2 act in negligent or deliberate breach of its duties towards ENRC? Did ENRC continue to instruct Bridge2 against Dechert's advice in respect of Africa? If so, did any additional fees result from either such matter?**
>
> **72. What work by third-party advisers was done? What work by third-party advisers was necessary? How much would ENRC have had to pay for such work? Would ENRC have incurred the same level of third-party fees in any event?**

This is in dispute.

38. Issue 69 is not now pursued by Dechert as an issue, save that the advice of others is relevant to the counterfactuals deployed on causation issues here.

39. Under Head of loss (3): Lost management and employee time:

73. If Dechert and/or Mr Gerrard breached their obligations (in all or any of the seven categories of breach alleged), did such breach(es) cause ENRC's management and/or employees to lose or waste valuable time? If so, how much management and/or employee time was allegedly lost or wasted and what is the economic or financial value of such time?

74. Did the Defendants' work give ENRC the opportunity to prevent future and/or recover past losses as a result of any wrongdoing? How, if at all, is this relevant?

40. Under Relief and interest:

91. Is ENRC entitled as against Dechert and/or Mr Gerrard to damages, and/or equitable compensation under any of heads (1) to (4), and if so, in what sum?

92. Is ENRC entitled to a declaration that "Due to the breach of its contractual, tortious and fiduciary duties to ENRC, Dechert's entitlement to charge ENRC in respect of the period September 2011 to March 2013 was limited to such reasonable fees as it would have incurred in carrying out the Necessary Work"?

2019 Claim Issues

41. Under Causation, loss and damage:

33. But for the SFO's allegedly wrongful conduct:

…

(2) Alternatively, would the Review Process have been substantially narrower in scope and duration?

(3) Would the SFO have announced a criminal investigation into ENRC in April 2013 or pursued an investigation thereafter?

34. What, if any, loss and damage in each of the following categories has ENRC incurred as a result of the SFO's conduct, and is the Defendant liable to compensate ENRC for the same:

(1) Unnecessary legal fees in relation to the Review Process and (after 25 April 2013) the SFO's criminal investigation?

(2) Unnecessary fees/expenses incurred/paid to others in relation to the Review Process and (after 25 April 2013) the SFO's criminal investigation?

(3) Management and employee time spent liaising with, responding to, collating information for, attending meetings and interviews with and otherwise engaging with Mr Gerrard, Dechert and the SFO?

35. Has ENRC failed to mitigate its losses by failing to control Dechert's costs and/or instructing an unreasonable number of law firms and other advisers?

36. If ENRC has suffered any loss as a result of any breach of duty by the SFO, was ENRC the sole cause of its own loss, alternatively did ENRC cause or contribute to its loss by its own fault, by failing to act on indications of behaviour by Mr Gerrard/Dechert which (on ENRC's case) were inappropriate?

36A. To what extent:

(a) was the SFO aware of Dechert's costs and the costs of the other law firms and advisers instructed by ENRC; and

(b) did the SFO require or request ENRC to undertake the steps to which those costs relate?

37. Was the conduct of the SFO arbitrary, oppressive and/or unconstitutional such as to merit an award of exemplary damages?

38. What rate and type of interest (if any) should ENRC receive on any sums awarded to it?

42. If the Defendant is liable to ENRC, are Dechert and/or Mr Gerrard liable to ENRC in respect of the same damage? If yes, to what contribution (if any) is the Defendant entitled from Dechert and/or Mr Gerrard pursuant to s. 1(1) of the Civil Liability (Contribution) Act 1978?

42. The quantum of any award of exemplary damages is a matter for the Phase 2 Trial. Equally, if I were to find that the CI would not have taken place but for the SFO's breach of duty, the quantification of ENRC's losses arising therefrom would be a matter for the Phase 2 Trial. ENRC has articulated two species of losses flowing from the CI. The first consists of legal fees and other costs incurred by it in dealing with the CI. As at 1 March 2019, ENRC says that the total of those fees and costs, together with the losses due to Unnecessary Work and Unnecessary Costs amount to some $93m. The second form of losses claimed consists of consequential losses arising out of ENRC's inability to raise funds for its various businesses or raise funds at what would otherwise be lower rates of interest. In a letter from its solicitors, Hogan Lovells, dated 10 January 2020, an example was given of such diminished fund-raising ability by reference to a rise in interest payable on loans obtained equating to more than $90m per year. Finally, the Phase 2 Trial will deal with a discrete claim for losses arising out of separate litigation with the SFO, referred to in the Phase 1 Judgment as the "Privilege Proceedings".

THE PARTIES' POSITIONS IN OUTLINE

Further Statements of Case

43. The original statements of case for the entire 2017 and 2019 actions, which have been amended on a number of occasions, remain relevant for the Phase 1A Trial in certain respects, particularly on questions of loss.

44. However, I ordered that there be further statements of case directed solely to the issues arising in the Phase 1A Trial. To that end, the following were served:

    (1) ENRC's Statement of Case ("the ENRC SOC");

    (2) Dechert's Statement of Case ("the Dechert SOC");

    (3) Mr Gerrard's Statement of Case ("Mr Gerrard's SOC");

    (4) The SFO's Statement of Case ("the SFO SOC");

    (5) The SFO's Reply on Contribution ("the SFO Reply");

    (6) Dechert's Reply to the SFO SOC ("the Dechert Reply");

    (7) ENRC's Reply to the Dechert SOC ("ENRC's Dechert Reply");

    (8) ENRC's Reply to Mr Gerrard's SOC ("ENRC's Mr Gerrard Reply");

    (9) ENRC's Reply to the SFO SOC ("ENRC's SFO Reply");

(10) Mr Gerrard's Reply ("Mr Gerrard's Reply"); and

(11) The SFO's Rejoinder to ENRC's Reply to the SFO ("the SFO Rejoinder").

45. In addition, particular reference needs to be made to two of the original statements of case in the 2017 Action, namely:

(1) ENRC's Re-Amended Response to Request 21 of the Dechert Defendants' Request for Further Information of the Amended Particulars of Claim which deals with Unnecessary Work, dated 23 January 2023 ("the Unnecessary Work Further Information"); and

(2) ENRC's Re-Amended Response to Request 23 of the Dechert Defendants' Request for Further Information of the Amended Particulars of Claim which deals with Unnecessary Costs, also dated 23 January 2023 ("the Unnecessary Costs Further Information").

46. Although the latest versions of those documents were served on 23 January 2023, their substance had already been set out in the previous versions thereof dated 5 May 2021.

47. In this particular case, all of the statements of case referred to above have played a greater role than one might have expected at a normal trial. This is because all parties, to a greater or lesser extent cross-referred to their own statements of case, or those of others, where the detail of particular claims or points was set out and which was not repeated in the written submissions.

Breaches of duty relied upon by ENRC for the purposes of its damages claim

48. Although not technically accurate I shall refer collectively to all the legal wrongs which I found to have been committed by Dechert, Mr Gerrard and the SFO as "breaches of duty". So far as the SFO is concerned, there is only one set of breaches of duty and this consists of the incidents of inducements to breach of contract by the DDs constituted by the IDCs as set out in paragraph 25 above.

49. So far as the DDs are concerned, ENRC rely on all of the breaches of duty set out at paragraphs 22 - 24 above. As for the DCs where I found the DDs were also in breach of duty, ENRC does not rely on all of them, as set out in paragraph 23 above. It only relies on those DCs which constituted IDCs (see footnote 4 to ENRC's POC). In that sense, and as far as breaches of duty in relation to the DCs are concerned there is parity as between the SFO, Dechert and Mr Gerrard in terms of which DCs are relied upon, namely the IDCs only.

ENRC says that it has taken this position as a matter of convenience rather than because, on a proper analysis, the other DC breaches of duty committed by the DDs did not cause any loss.

ENRC's claims for losses arising from Unnecessary Work, Unnecessary Costs and Wasted Management Time

50. ENRC's losses consist of amounts which it says it has paid either to Dechert by way of fees or to third parties by way of their costs which were unnecessary and would not have been incurred but for the breaches of duty on the part of ENRC and the SFO. In other words, they are the cost of work done by Dechert or third parties which would not have been done but for their breaches of duty. These losses were incurred when the relevant invoices were paid. The first group of such losses is referred to as Unnecessary Work. The second is Unnecessary Costs. The fees and costs paid by ENRC which it accepts were necessary, in that they would have been paid in any event, are referred to as Necessary Work or Costs as the case may be.

51. In addition, ENRC claims the costs of wasted management time which would not have been incurred but for the breaches of duty on the part of the DDs and the SFO ("WMT").

52. In respect of these losses, ENRC has divided them up into the losses incurred over 5 different periods being:

    (1) Period 1: August - December 2011;

    (2) Period 2: January - May 2012;

    (3) Period 3: June - November 2012;

    (4) Period 4: December 2012 - mid-March 2013; and

    (5) Period 5: Mid-end March 2013.

53. For each of those periods, discrete amounts are claimed by way of Unnecessary Work, Unnecessary Costs and WMT. In the first two instances, the amounts attributable to each are derived from invoices claiming the work done over those periods. Typically, the relevant invoice will be issued some time after the end of the relevant period.

54. As against the DDs, ENRC claimed the following sums:

    (1) £11,248,875.98, being Unnecessary Work charged for by Dechert; out of a total charge of £13,075,226.30;

    (2) £9,422,869.21 being Unnecessary Costs paid to third parties, out of a total charge of £11,900,523.54;

(3) £232,156.98 in respect of WMT.

55. Dechert's response is as follows:

(1) Necessary Work in fact amounted to £7,085,154.78; Dechert therefore agrees that there was Unnecessary Work amounting to £5,993,624.87;

(2) Necessary Costs were £8,961,675.07; it therefore agrees that there were Unnecessary Costs of £2,938,848.47;

(3) It disputes the WMT claim altogether.

56. Mr Gerrard's response is to adopt Dechert's response, add some further points of his own, and to make an additional point in relation to the March 2013 Leak.

57. As against the SFO, ENRC claims:

(1) £10,616,710.63 in respect of Unnecessary Fees;

(2) £8,859,275.94 in respect of Unnecessary Costs; and

(3) £214,952.30 in respect of WMT.

58. The reason why the claim as against the SFO is slightly less than that against Dechert is because ENRC has decided not to pursue the SFO in respect of potential losses arising in Period 1 which were the result of IDCs committed during that period. Those IDCs are however relevant, on ENRC's case, to the claims it makes for losses incurred in later Periods. In the case of the DDs, the position is, of course different because, apart from the IDCs in Period 1, there was the DDs' breach of duty in relation to the August Leak and their non-DC breaches of duty as well.

59. The SFO's response is to deny the claim altogether on the basis that none of the breaches of duty established against it led to any of the loss suffered by ENRC or that the losses were not reasonably foreseeable. It also takes some points on quantum as well. It further alleges that there has been a failure to mitigate on the part of ENRC and/or that the DDs' disproportionate conduct or recklessly bad advice constituted an intervening act. If the Court were to accept any of those submissions, the SFO says that the quantification of any consequent reduction in damages should be determined hereafter.

60. On 10 February 2023, Dechert paid to ENRC the sums which it accepted were due for Unnecessary Work and Costs, being £5,993,624.87 and £2,938,848.47 respectively, giving a

total paid of £8,932,473.34. This followed the acceptance by Dechert in its SOC that at least some of the Unnecessary Work and Costs alleged was indeed correctly so described.

61. This means that ENRC's maximum claim as against the DDs now in respect of these matters is for:

    (1) £5,255,251.11 for Unnecessary Work;

    (2) £6,450,151.85 for Unnecessary Costs and, as before,

    (3) £232,156.98 for WMT.

62. The position is essentially the same for the claim against the SFO although the Unnecessary Work and Unnecessary Costs figures are slightly less.

63. So the total quantified claim, so far as this trial is concerned, is just under £12m.

64. I refer to the claims for Unnecessary Work, Unnecessary Costs and WMT collectively as "the Primary Claims".

Contribution

65. The DDs and the SFO make contribution claims against each other pursuant to section 1 (1) of the Civil Liability (Contribution) Act 1978 ("the Act"). The DDs make no claim against the SFO for contribution in respect of Unnecessary Work. However they do make a claim against the SFO for a contribution of 50% of such Unnecessary Costs and WMT as ENRC succeeds in obtaining judgment for against the DDs. For its part, the SFO denies that it should make any contribution to the DDs. On the contrary, it submits that it should have a complete indemnity from the DDs, both in relation to any damages and costs awarded against the SFO and in respect of its own costs of these proceedings.

The Criminal Investigation

66. ENRC alleges that but for the SFO's breaches of duty, the CI would never have been commenced. The SFO denies this and contends that it would have been commenced in any event. This matter does not concern the DDs directly since damages allegedly flowing from the opening of the CI are claimed by ENRC only against the SFO.

Exemplary Damages

67. These are claimed by ENRC from the SFO on the basis of its alleged oppressive, arbitrary and unconstitutional conduct. The SFO denies that any such award is justified.

STRUCTURE OF THIS JUDGMENT

68. Going forwards, I shall consider below the following matters which will sufficiently capture the particular Issues for determination set out in paragraphs 36 - 41 above:

(1) ENRC's methodology in respect of causation and loss on the Primary Claims;

(2) Dechert's methodology in respect of causation and loss on the Primary Claims;

(3) The Law;

(4) Factual Causation as against the SFO generally;

(5) Factual Causation as against Dechert generally;

(6) Factual Causation: the Chronology;

(7) The Criminal Investigation;

(8) Defences raised by the SFO;

(9) Approach to the determination of Quantum;

(10) Quantum analysis: Unnecessary Work in the Earlier Period on Kazakhstan and Africa;

(11) Quantum analysis: Unnecessary Work in the Later Period on Kazakhstan;

(12) Quantum analysis: Unnecessary Work in the Later Period on Africa;

(13) Quantum analysis: Unnecessary Work in the Earlier Period on Both;

(14) Quantum: Unnecessary Costs;

(15) Wasted Management Time;

(16) Contribution;

(17) Exemplary damages.

69. I should add that where I have used abbreviations in the Judgment on the Phase 1 Trial, they are repeated here. Further, I refer to paragraphs from that judgment by using the appellation "J/" followed by the paragraph number.

70. When recounting some of the narrative history, I have used, where appropriate uncontroversial passages from the parties' various written submissions.

71. In this judgment, I have not dealt with every single point raised by the parties. It is not necessary for me to have done so. However, I have considered all of the points that have been raised and have dealt in this judgment with all of the key points that have emerged.

ENRC'S METHODOLOGY FOR CAUSATION AND LOSS ON THE PRIMARY CLAIMS

Causation Counterfactuals

72. ENRC starts from the various breaches of duty which I found against the DDs and the SFO in the Phase 1 Judgment (set out at paragraphs 22 - 25 above). In Section C of that part of the ENRC SOC which addresses Issue 66, it lists the relevant breaches as follows:

    (1) Unauthorised disclosures: these consisted of:

        (a) the IDCs committed both by the DDs and the SFO, and

        (b) the leaks to the press committed only by the DDs;

    (2) Failing to disclose matters to the client, ENRC;

    (3) Wrong advice as to criminal wrongdoing;

    (4) Wrong advice as to admissions;

    (5) Wrong advice as to the risk of a raid;

    (6) Failure to establish scope of SFO's concerns;

    (7) Failure to protect ENRC's privilege; and

    (8) Unnecessary expansion of investigation scope.

73. The breaches in sub-paragraphs (2) – (8) were those of the DDs alone.

74. ENRC then makes the general counterfactual points that absent the breaches, (a) ENRC would have acted differently and in particular would have greatly reduced the amount of work given to Dechert and others, (b) reasonably competent solicitors would have advised ENRC differently and in particular as to their engagement with the SFO which would have been much more limited, and as to the amount of work to be done which, equally, would have been much more limited, and (c) the SFO itself would have acted very differently and would have been prepared to accept a much more limited investigation. See paragraphs 16-19 of the ENRC SOC.

75. The upshot of this counterfactual is that much of Dechert's work and the costs of third parties paid by ENRC would have been unnecessary and not incurred at all. Nor would there have been the WMT claimed for.

76. Detailed counterfactuals in relation to each particular breach of duty are then set out at paragraphs 26 - 47 of the ENRC SOC. However, those counterfactuals are in effect repeated or expanded at paragraphs 53-110 of the ENRC SOC dealing with Issue 67.

Quantum: Unnecessary Work

Period up to 17 May 2012 ("the Earlier Period")

77. The counterfactuals alleged are then "translated" into 7 reasons for excluding fees rendered for particular work done by Dechert, i.e. reasons why they were Unnecessary. Those reasons are set out at paragraph 2 of Schedule 1 to the Unnecessary Work Further Information ("Schedule 1"). They are as follows:

    (1) Kazakhstan investigation;

    (2) Document review, IT issues and other unnecessary work;

    (3) Internal;

    (4) Unclear;

    (5) Sanctions after 5 March 2012;

    (6) Chambishi; and

    (7) Disproportionate requests.

    ("the 7 Reasons")

78. The 7 Reasons were said to be drawn from some or all of paragraphs 53 - 110 of the ENRC SOC, dealing with Issue 67.

79. The 7 Reasons were then used to analyse every line item of every invoice paid over the period up to 17 May 2012. Any applicable Reason was stated in the final column of the line item. There were over 20,000 line items for the total of the Dechert invoices. If one or more Reasons applied to a line item, then its cost was excluded as Unnecessary. If no Reasons were applied, then the cost was deemed Necessary. Any Necessary fees were highlighted in green. Unnecessary fees were left in white. As explained by footnote 4 to Schedule 1 ("Footnote 4") where a narrative entry included elements of Unnecessary and Necessary Work but did not identify how much time was spent on each, the entire entry has been coded Unnecessary. I refer to the invoices referable to the Earlier Period as "the Earlier Invoices".

80. At this point, I need to say something more about Reason 1 as deployed by ENRC in relation both to Unnecessary Work and Unnecessary Costs (see paragraph 89 below for the latter).

ENRC's general point is that no work on Kazakhstan should or would have been done after 31 October 2011 absent the breaches of duty. For this reason, it will be seen that originally, Reason 1 was only deployed in relation to Dechert invoices claiming fees for work done after that date, beginning with invoice K1/55 (subject to the point made in paragraph 85(1) below).

81. Although there was some discussion in the course of argument as to whether ENRC's cut-off point for Kazakhstan was 31 October 2011 in all cases, it is plain that this was how Reason 1 was applied. This was despite the fact that in a number of cases, for example Farm and Procurement, ENRC's actual or primary case was that a particular workstream should have ceased some months before October 2011. Nonetheless, in order to keep things simple and although this would confer something of a windfall on the DDs if ENRC was correct as a matter of substance, ENRC has not claimed that any period of work prior to 31 October 2011 was Unnecessary simply on the basis that all of the Kazakhstan work should have ceased at an earlier date.

82. It was at one point suggested that ENRC might yet be relying on an earlier cessation date, at least for the purpose of the Reasons applied in respect of its claim for Unnecessary Costs. However, when one examines the Unnecessary Costs Further Information and Schedule 1, it can be seen that Reason 1 ("Kazakhstan") is applied on the same basis and assumes a cut-off point of 31 October 2011, save for a few small sums which might have related to work done slightly earlier.

83. There is one rider to the position of Reason 1 in relation to Unnecessary Work, however. This is that the final amendment to the Unnecessary Work Further Information made on 23 January 2023 introduced a new element to Reason 1, set out at paragraph 1(b). This also classes as Unnecessary in relation to Kazakhstan work, work done before 31 October and billed after 25 September 2011 which consisted of "large-scale collection, processing, hosting and analysis of data or interviews." This is why one now sees in relation to the Dechert invoices for the Earlier Period, the application of a further Reason on certain line items which is simply called "Kazakhstan" as distinct from "Kazakhstan post-October 2011". Indeed, the former Reason has been applied to certain line items in the very first Dechert invoice relied upon, being 3025199 at K1/38. The former Reason is only added to line items which were already classed as Unnecessary for some other Reason, which means that the overall amount claimed does not change - see footnote 5 to the Schedule to the Unnecessary Work Further Information. Of course, if for some reason, the other Reasons deployed could not apply, this new Reason would assume some significance. I refer to the "original"

"Kazakhstan post-October 2011" Reason as "Reason 1A" and the later "Kazakhstan" Reason as "Reason 1B".

Period after 17 May 2012 ("the Later Period")

84. ENRC took a slightly different approach for the invoices referable to the Later Period ("the Later Invoices"), beginning with invoice 3029977. This is because the invoices for the Earlier Period did not always specify the subject-matter of the work charged for. However, in the Later Period, Dechert had to provide details of the amounts claimed, and why, for the purpose of the Costs Proceedings. Dechert's narrative here divided invoice items into Jurisdiction (i.e. Kazakhstan, Africa or Both), Workstream (i.e. individual subjects within the jurisdiction, for example, Camrose) and Activity (i.e. the particular kind of work done, for example "Documents" or "FRA").

85. In paragraphs 3-8 of Schedule 1, ENRC explains how it says it has given effect to the 7 Reasons in its analysis of the Later Invoices. It does so by allowing as Necessary or disallowing as Unnecessary, work by reference to Jurisdiction, Workstream or Activity. Thus:

    (1) All work done under the heading Kazakhstan is Unnecessary, save for some work in relation to Ms Zaurbekova, for which ENRC gives a 10% credit, being £23,556.38;

    (2) As for Africa, and as set out in the table at paragraph 7 of Schedule 1:

        (a) the Workstreams Africa Whistleblower, Chambishi, IT issues, Multiple, Project Mallard, Red Flags and Sanctions are all disallowed as Unnecessary save for three activities in relation to Multiple;

        (b) the Workstreams Books and Records, CAMEC, Camrose, General Bribery, Remedial Actions, and Data Protection are all allowed as Necessary save for certain categories of Activity in relation to each of those Workstreams other than Remedial Actions;

    (3) As for Both, the single Workstream Remedial Actions is allowed as Necessary save for Sanctions and Internal Activities.

86. An example is the approach taken in respect of invoice 3032939 at K1/155. Depending on the particular Jurisdiction and/or Workstream and/or Activity, the line item is then either allowed or accepted. There is no separate column for a statement of reasons here.

87. Schedule 1 contains a list of all relevant Dechert invoices identifying the Necessary Work on each and leaving "Balance of Invoice" as constituting Unnecessary Work.

88. I should add here that ENRC says in footnote 10 to Schedule 1 ("Footnote 10") that the work covered in these entries was often insufficiently particularised and where the narrative entry included elements of Unnecessary and Necessary Work without identifying how much time was spent on each, the entire entry was coded as Unnecessary. In other words, this is the same approach as was taken generally in relation to work done in the Earlier Period - see Footnote 4, referred to at paragraph 79 above.

Quantum: Unnecessary Costs

89. Again, a set of reasons is employed to distinguish between Necessary and Unnecessary Costs said to be drawn from the underlying breaches of duty on the part of the Dechert Defendants and the SFO. Those reasons are set out in 7 numbered paragraphs at pages 3-5 of the Unnecessary Costs Further Information. The sixth Reason has now been deleted but the other Reasons maintain their original numbers. The Schedule to the Unnecessary Costs Further Information then sets out each invoice rendered by each relevant third-party service provider, where all or some of the charges made are said to constitute Unnecessary Costs. As with Unnecessary Fees for the Earlier Period, the final column contains references to the numbered Reason or Reasons deployed in respect of each Unnecessary item.

90. The total amount in dispute on Unnecessary Costs is now £6,450,151.85. The relevant providers are AG, B2, FRA, HSF, KPMG, PwC and TRAG. ENRC no longer pursues the amounts in dispute in respect of Arent Fox, Grayston and JD. This is because the amounts are (relatively speaking) very small.

Quantum: WMT

91. This is also dealt with in the Unnecessary Costs Further Information, at Schedule 2 ("Schedule 2"). Here, broadly, ENRC has designated as WMT activities on the part of each relevant member of management, as:

    (1) time spent on meetings/calls which correlate to Unnecessary Work on the part of Dechert; and

    (2) all time spent on emails discounted by 12% on the basis that 12% is the percentage of Necessary as opposed to Unnecessary Work on the part of Dechert.

DECHERT'S METHODOLOGY FOR CAUSATION AND LOSS ON THE PRIMARY CLAIMS

Introduction

92. It will be seen from the above that there are, for Dechert, two possible areas of disagreement with ENRC's methodology. First, while the breaches of duty as found by me cannot be controversial, their particular consequences are, at least to some extent. For example, Dechert contends that in the counterfactual based on the absence of its breaches of duty, the amount of work that would have been done was more, indeed significantly more, than ENRC would allow. By way of a simple example, Dechert does not accept that in the counterfactual there would be no work on Kazakhstan at all after 31 October 2011.

93. Secondly, even where there is agreement that in the counterfactual, particular work would not have been done, there may be disagreement as to how much of any particular invoice should be reduced so as to remove that work.

94. It is a combination of such points which explains why Dechert still contests a significant part of ENRC's claims in respect of Unnecessary Work and Unnecessary Costs. As to the claims for WMT, they contest all of this, as explained below.

95. I refer in the context simply to the contentions made by Dechert although, of course, they are all adopted by Mr Gerrard.

Causation Points

96. Dechert's response to ENRC's general counterfactual points (made at paragraphs 16-19 of the ENRC SOC) are at paragraphs 41-44 of the Dechert SOC. Put very broadly, Dechert gives reasons why it says that the ENRC investigation would not have been as limited as ENRC suggests, absent the breaches of duty. There then follows, at paragraphs 45-65 of the Dechert SOC, a response to ENRC's account of the consequences of each breach of duty as set out in paragraphs 20-47 of the ENRC SOC. Dechert then addresses, at paragraphs 70-104 of the Dechert SOC, the detailed counterfactuals pleaded by ENRC at paragraphs 53-110 of the ENRC SOC, from which the 7 Reasons were drawn.

97. It therefore follows that there are substantial differences between ENRC and Dechert on the consequences of the breaches of duty and hence the applicable counterfactual, which means that Dechert disagrees with the 7 Reasons, at least to some extent. There are then further objections to the 7 Reasons based on what might be described as practical or technical deficiencies, as set out in paragraphs 51-88 of Dechert's written submissions.

98. The result of all of this is that Dechert has used its own set of reasons to be applied when ascertaining Necessary or Unnecessary Work or Costs although, as will be seen, there is some engagement with the 7 Reasons as well.

Quantum: Unnecessary Work

99. There are 5 parts to Appendix 1 to the Dechert SOC which all deal with Unnecessary Work. As with ENRC, Dechert divides the analysis into the Earlier Period and the Later Period.

Earlier Period

100. The first part of Appendix 1 is a reworked spreadsheet version of the ENRC breakdown of all of the relevant invoices, with green and white line items, applicable reasons etc, in relation to the Earlier Period, as described above ("the Earlier Period Appendix 1"). Dechert has put all of the invoices in the Earlier Period in one spreadsheet. ENRC's colour coding on the line items is maintained. Dechert has adopted any line item shown in green by ENRC in other words accepted by it as Necessary. Dechert has not conducted its own analysis of such line items.

101. However, when it comes to the white line items (i.e. those said by ENRC to be Unnecessary with its Reasons shown in Column K), Dechert has set out its own position by indicating a percentage reduction applied to the cost of that line item in Column L. If it agreed entirely with ENRC's appellation as Unnecessary, it applied a 100% reduction to that line item. However, for the most part, the reductions applied by Dechert are significantly less than 100%.

102. What one can see from columns K, L and M at the right hand side of the spreadsheet is the collection of ENRC and Dechert reasons more or less side-by-side with the Dechert-supplied percentage in the middle. Here, Dechert effectively "matches" ENRC's Reasons 1, 2, 5 and 6 being Kazakhstan, Document Review and IT Issues, Sanctions and Chambishi.

103. Thus, to take Kazakhstan as an example, wherever ENRC has disallowed a line item on the basis of Reason 1B in respect of the period up to 28 September 2011, Dechert states that only 30% of the cost of that line item should be disallowed as Unnecessary. For line items after 28 September 2011, Dechert will always apply a 50% reduction. This contrasts with ENRC's position which is that, with one exception, there should be a 100% reduction for any Kazakhstan work after 31 October 2011 and a 100% reduction for a number of line items before that date where Reason 1B has been applied.

104. An explanation for the use of 30% and 50% figures by Dechert in respect of Kazakhstan is set out in the first tab of its spreadsheet, called "Kazakhstan Response". Each element of Kazakhstan work is given a percentage which it bears to the total amount of Kazakhstan work done. So, for example, Farm work represented 15% of the total. Dechert then states whether any part of that particular workstream should be reduced as Unnecessary. It contends that all of the Farm work was Necessary and therefore it should "count" for its full 15% of the total. On the other hand, in respect of Iran, representing 10% of the whole, Dechert accepted that this should be reduced by 60%, which means that it accounted for only 4% of the whole, i.e. 10% reduced by 60%. The total for all workstreams ends up as 70% Necessary which therefore implies a reduction to be applied of 30%. Different figures apply to the post-October 2011 work such that there is the larger reduction of 50%. This is also explained in this tab of the spreadsheet. The ultimate applied percentages of 30% and 50% are therefore the result of weighted averages, as it were.

105. One might have thought that in relation to pre-28 September 2011 work which in principle ENRC accepted as Necessary, Dechert would have applied its 30% discount, thereby reducing the amount allowed. However this did not happen in cases where no other Reasons were applied by ENRC - i.e. the green line items. In such cases Dechert simply accepted ENRC's characterisation as Necessary although that was not strictly in accordance with Dechert's own methodology as set out in the Kazakhstan Response. However, Dechert did apply the 30% discount in other cases where ENRC had applied one or more Reasons to disallow a particular line item for example Reasons 2, 3 or 4. Here, the contest is between the 30% reduction allowed by Dechert and the 100% reduction sought by ENRC in relation to work done in the period up to 28 September 2011.

106. As to that approach, ENRC criticises the proportion of the total Kazakhstan work attributed to each workstream. For example, Dechert says that Data Protection constituted 5% of the work. In fact, according to ENRC, it was only 2% and so by using 5%, one "inflates" the Necessary element of the Kazakhstan work. On the other hand, for Document Review, said to constitute 20% of the work, ENRC says that it made up 44% of line items and 52% of the fees charged. So here, the Unnecessary Work is discounted, as it were.

107. Although the percentages now criticised by ENRC were in Appendix 1, produced with the Dechert SOC on 30 November 2022, so some months before trial, ENRC did not seek to respond to that document by stating its case as to the percentages of work done. Instead, ENRC contends that the whole exercise undertaken by Dechert is fatally flawed, because the

percentages chosen are arbitrary, and therefore it should be ignored. The Court should therefore apply ENRC's approach only. As to that, Mr Millett KC pointed out that the sorts of points now made by Mr Pillow KC could and should have been made in ENRC's Reply SOC and in any event in its Phase 1A written submissions, but they were not. I think there is force in this objection. It is not, in my view, a burden of proof point. It is a question of practical fairness. And if the response is that a detailed consideration of Dechert's percentage allocations of work was not undertaken until close to the trial, that is not really an answer.

108. In the event, as it happens, for the most part I am not sure that the issue over Dechert's percentages makes much difference. That is for reasons given below.

109. Further, the key point made on behalf of ENRC is that its method of determining the amount of Necessary and Unnecessary Work is a better and more principled approach, and Dechert could simply have engaged with that directly. But in fact, and leaving aside the question of percentage allocations, in essence Dechert does respond to ENRC's case on Unnecessary Work as will be seen below.

110. In the tab of this spreadsheet entitled "(1) Kazakhstan Response", Dechert does not merely set out its own applied percentages but refers to particular findings or comments which I made in the Phase 1 Judgment on which Dechert relies, together with its own statement of reasons, so as to support the percentage reductions applied.

111. The tab entitled "(2) Document Review and IT Issues" is Dechert's response to ENRC's Reason 2. Here, where a line item was disallowed by ENRC on the basis of Reason 2 and where Reason 1 was <u>not</u> also applied, then Dechert has applied a 30% reduction in the case of Kazakhstan work. This is the product of the weighted average referred to in paragraph 104 above. As for Africa, Dechert stated what percentage of each of 4 Africa workstreams was Necessary. Three of the workstreams were 50% Necessary and one, being imaging of African server data, was accepted as 0% Necessary. Where both Kazakhstan and Africa work was involved the reduction offered was 60%.

112. The tab entitled "(5) Sanctions" is Dechert's response to ENRC's Reason 3, Sanctions. The tab entitled "(6) Chambishi" is Dechert's response to ENRC's Reason 4, Chambishi. Dechert's responses to ENRC's other Reasons are to be found within its SOC.

113. Column M is Dechert's own description of what the relevant workstream for the line item concerned was. Much of this is self-explanatory, but it is important to note that in some cases, the description given by Dechert is to some extent different from with the description

inherent in the Reason applied by ENRC. Thus, in many cases where ENRC's Reasons Internal or Unclear are applied, they will have been attributed to a particular workstream in Column M. Equally, Dechert may have attributed a particular line item to Chambishi, even though ENRC has not applied the Chambishi Reason to that item.

114. It needs to be borne in mind here that there is only some £1.3m in dispute between ENRC and Dechert in respect of Unnecessary Work for the Earlier Period.

Later Period

115. As for the Later Period, there is a separate Dechert spreadsheet for this covering all the invoices. I shall refer to this as the "Appendix 1 Later Period Spreadsheet". The Summary shows that the amount in dispute is just under £4m. The "Combined" tab then sets out each line item for each invoice. For each line item the relevant Jurisdiction, Workstream and Activity is stated at Columns N, Q and R. Dechert applies its percentage reduction, if any, in Column P. Column Q contains what might be described as workstream codes. ENRC and Dechert have both used those workstream codes for the purpose of making their cases as to what is Unnecessary or Necessary.

116. Column O sets out ENRC's position which is binary: either a line item is Unnecessary or it is Necessary in its entirety. Which it is derives from the tables at paragraphs 7 and 8 of the Unnecessary Work Further Information. Column P sets out Dechert's position in relation to any given line item and in particular any percentage reduction which it proposes. The percentages applied for workstreams within particular jurisdictions are set out in the three further Appendix 1 documents which I shall refer to as "Appendix 1 Kazakhstan", Appendix 1 Africa", and "Appendix 1 Both". Each of these documents states ENRC's position as to which Workstream of which Jurisdiction is Necessary or Unnecessary. The next column, "Judgment Findings" gives references to particular passages from the Phase 1 Judgment. The final column headed "Reasons for reductions applied" then sets out the percentage reduction offered and why. Activities are not dealt with as a separate matter. This means that one can make a more or less direct comparison between ENRC's percentage reductions and those of Dechert. The only exception is where ENRC has itself made exceptions for particular Activities.

117. I should add that some limited use is made of those three documents in terms of the workstreams or descriptions given to some of the line items in the Earlier Period Spreadsheet.

118. I should also add that in relation to all the percentages proposed by Dechert, it was accepted by Mr Millett KC for Dechert (Day 4/63) that it would be open to me to select different percentages if I considered this was appropriate.

Quantum: Unnecessary Costs

119. Dechert's position here is set out in Appendix 2 to its SOC. There are 6 parts to Appendix 2, each referring to a service provider where ENRC has said there were Unnecessary Costs, Dechert has not produced a document in relation to the claims for Unnecessary Costs in respect of KPMG, PwC or TRAG. This is because Dechert disputes these claims in their entirety, on the basis that there is no breakdown of the costs claimed.

Quantum: WMT

120. Dechert resists this claim in its entirety. It does so first, because it says that the amounts claimed are no more than recurring costs of the business. Second, it says that the percentage allocations to WMT are speculative and based on no more than guesswork.

THE LAW

121. There are 6 general points of law that I deal with here:

(1) Assessment of factual causation;

(2) Inducement to breach of contract and causation;

(3) Remoteness: reasonable foreseeability;

(4) Remoteness: Novus Actus Interveniens;

(5) Failure to mitigate; and

(6) Determining Quantum and the Broad Brush.

Assessment of factual causation

122. It is common ground that this is the first step to be taken in the process of ascertaining the existence and extent of any loss caused by the breaches of duty complained of. As already noted, the background is that I have found that both the DDs and the SFO committed a series of breaches of duty over a period of just over 18 months i.e. from August 2011 to March 2013. The DDs' breaches of duty were more extensive than those on the part of the SFO because they included numerous breaches of duty other than those encompassed by the IDCs. The breaches of duty committed by the SFO were the IDCs, for which the DDs are also liable.

123. In relation to all such breaches of duty, it has to be shown by ENRC that they caused the loss claimed. For present purposes, the loss claimed is made up of the amounts which ENRC says it has lost as a result of Unnecessary Work, Unnecessary Costs and the WMT. This is a single loss in the sense that ENRC does not seek to apportion any particular part of it to any particular breach of duty or type of breach of duty, or to the DDs, as opposed to the SFO. The amount claimed against each is essentially the same, the small difference between them being due to the fact that ENRC is not making a claim against the SFO for losses arising in Period 1 - see paragraph 58 above.

124. I did not understand the basic principles of law governing factual causation to be in dispute. In particular, for any specific wrong, what must be shown is that it was a cause of the loss claimed. It does not have to be the cause or the dominant cause. See *Heskell v Continental Express* [1950] 1 All ER 1033, in which Devlin J (as he then was) observed at p.1047 that:

> "Where the wrong is a tort, it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate competing causes and ascertain which of them is dominant".

125. See also *Ministry of Pensions v Chennell* [1946] 2 All ER 719, where Denning J (as he then was) stated at p. 721:

> "…Sometimes there may be a single cause. More often there is a combination of causes. If the discharge of a missile or other event may be properly said to be a cause of the injury, that is sufficient to entitle the claimant to an award of a pension, notwithstanding that there may be other causes co-operating to produce it, whether they be antecedent, concurrent or intervening. It is not necessary that the discharge of the missile or other event should be " the " cause of the injury in the sense either of the sole cause or of the effective and predominant cause. In many cases where there is a combination of causes, it is impossible to single out one cause as distinct from others, and any attempt to achieve that impossible task would lead to difficulties as the insurance cases amply show.. All that is necessary is that the discharge of the missile should be properly speaking "a" cause of the injury,.."

126. These were both cases involving the commission of torts, but it was not suggested that the position was otherwise for breach of contract or breach of fiduciary duty, insofar as that is relevant.

127. Next, while the question of whether the wrongful act caused the loss is often framed in terms of whether it was a "but for" cause, that is not the only way to show that it was a cause. Sometimes, the "but for" test simply does not work. This is particularly so where there may be concurrent and/or consecutive acts of wrongdoing and/or ones committed by more than one wrongdoer. In this case, of course, all three such features are present. Sometimes, one has to apply a common-sense approach. Thus, in the Supreme Court case *Meadows v Khan* [2022] AC 852, Lord Sales and Lord Hodge said at paragraph 46 that:

> "But the "but for" test is not of universal utility. It has been criticised as a test of factual causation because it excludes a common sense approach which the common law favours and because it implies that value judgment should have no role in factual causation: *March v E & M H Stramare Pty Ltd*

> (1991) 171 CLR 506, 515, per Mason CJ, cited with approval by Glidewell LJ in *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, 1374. In fact, value judgments do play a role and the "but for" test is inadequate in cases in which there is more than one wrongdoer and more than one sufficient cause for the harm."

128. An example of where the "but for" test, or something like it, would plainly not work was cited by Laws LJ in the decision of the Court of Appeal in *Rahman v Arearose* [2001] QB 351. At paragraph 17 of his judgment, he referred to the examples given in the textbook *Prosser & Keeton on Torts, 5th ed*. One was where two different wrongdoers shoot a person and each of the shots caused a fatal wound. Another was where two wrongdoers polluted a river with oil. Or two wrongdoers who each shoot a person, and it was a combination of their shots which killed that person. If, in any of those cases, the claimant had to prove that each tortfeasor singly caused the damage, or caused any particular part of it, he could not do so. The result would be that neither tortfeasor would be liable. The correct outcome was that both wrongdoers would be liable for the entire loss, and then they would have a contribution claim against each other.

129. The further observations which Laws LJ then makes are important for this case, in my view:

> "18 The reason for the rule that each concurrent tortfeasor is liable to compensate for the whole of the damage is not hard to find. In any such case, the claimant cannot prove that either tortfeasor singly caused the damage, or caused any particular part or portion of the damage. Accordingly his claim would fall to be dismissed, for want of proof of causation. But that would be the plainest injustice; hence the rule. However, the rule was a potential source of another injustice. A defendant against whom judgment had been given, under the rule, for the whole of the claimant's damages had at common law no cause of action against his fellow concurrent tortfeasor to recover any part of what he had to pay under the judgment; so that the second tortfeasor, if for whatever reason he was not sued by the claimant, might escape scot-free. Hence the 1978 Act…It provides a right of contribution between concurrent tortfeasors. The expression "same damage" in section 1(1) therefore means (and means only) the kind of single indivisible injury as arises at common law in a case of concurrent torts.
>
> 19 The justice which lies behind the rule as to concurrent tortfeasors, that is the rule that each is liable for the whole of the damage constituted by the single indivisible injury suffered by the claimant, casts much light on what is meant by "single indivisible injury" and thus "same damage". Professor Glanville Williams, at p 17, referred to "the *logical* impossibility of apportioning the damage among the different tortfeasors" (my emphasis). This, I think, sits somewhat uneasily with a passage from the judgment of Devlin LJ as he was then in *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162, 189…"If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law." This approach seems to me to differ somewhat from one based on a logical impossibility of apportioning damage between tortfeasors. But that distinction may be too fine. The reality, I think with respect, is that both Professor Williams and Devlin LJ are referring to a class of case where there is simply no rational basis for an objective apportionment of causative responsibility for the injury between the tortfeasors; and the expression "single indivisible injury" is a shorthand description for that class of case. Now, the clearest instance of concurrent torts is one where the injury in question would not have occurred but for both torts: where, if only one had been committed, the injury would not have occurred at all. An example is afforded by a variant of the case given by Devlin LJ Suppose that two assailants, not acting in concert, shoot a man, who dies in consequence; but the expert evidence is that either shot on its own, while causing grave injuries, would

not have been fatal. The death is entirely and only the result of both shots. This case is like that given by the American author Prosser, in which the oil put in the stream by both defendants is ignited, and burns the plaintiff's barn. It is also like the wholly artificial case which I put to counsel in the course of argument, where two surgeons are simultaneously but independently operating on the claimant, each on one eye. Both are negligent, so that the sight in each eye is lost when it should not have been. But of course the combined effect is that the claimant is entirely blind: that is the single indivisible damage for which he is entitled to be compensated in full by either defendant.

20 But this is not the only kind of instance of concurrent torts. It is the first of the two types identified by Professor Glanville Williams in the passage from his work which I have cited. The second, it will be remembered, was "where either cause would be sufficient of itself to produce the consequence, as where two persons independently shoot at another at the same time, both shots being fatal". Is there a third kind of instance? I have in mind a case where it is shown that (a) each tortfeasor caused some part of the damage, but (b) neither caused the whole, and (c) some part (but not all) of the damage would therefore have been occasioned to the claimant if only one tort—either of them—had been committed, but (c) on the evidence it is impossible to identify with any precision what part or element of the damage had been caused by which defendant."

130. Finally, I refer to the Supreme Court case of *FCA v Arch Insurance* [2021] AC 649. Here, Lord Hamblen and Lord Leggatt stated as follows:

"182 It has, however, long been recognised that in law as indeed in other areas of life the "but for" test is inadequate, not only because it is over-inclusive, but also because it excludes some cases where one event could or would be regarded as a cause of another event. An example given by Hart and Honoré in their seminal treatise on Causation in the Law, 2nd (1985), p 206 is a case of two fires, started independently of each other, which combine to burn down a property:.. It is natural to regard each fire as a cause of the loss even if either fire would by itself have destroyed the property so that it cannot be said of either fire that, but for that peril, the loss would not have occurred. Another example,… is a case where two hunters simultaneously shoot a hiker who is behind some bushes and medical evidence shows that either bullet would have killed the hiker instantly even if the other bullet had not been fired. Applying the "but for" test would produce the result that neither hunter's shot caused the hiker's death, a result which is manifestly not consistent with common-sense principles.

183 In these examples each putative cause, although not necessary, was on the assumed facts sufficient to bring about the relevant harm. Such cases are thus often described as cases in which the result is causally "over-determined" or "over-subscribed". There is, however, a further class of cases in which a series of events combine to produce a particular result but where none of the individual events was either necessary or sufficient to bring about the result by itself…

184 A hypothetical case adapted from an example given by Professor Stapleton, which was discussed in oral argument on these appeals, postulates 20 individuals who all combine to push a bus over a cliff. Assume it is shown that only, say, 13 or 14 people would have been needed to bring about that result. It could not then be said that the participation of any given individual was either necessary or sufficient to cause the destruction of the bus. Yet it seems appropriate to describe each person's involvement as a cause of the loss. Treating the "but for" test as a minimum threshold which must always be crossed if X is to be regarded as a cause of Y would again lead to the absurd conclusion that no one's actions caused the bus to be destroyed.

185 Other examples of a similar nature given by Professor Stapleton include a case where the directors of a company unanimously vote to put on the market a dangerous product which causes injuries, although the decision only required the approval of a majority. Again, it cannot be said that any individual director's vote was either necessary or sufficient to cause the product to be marketed and yet it is reasonable to regard each vote as causative rather than to say that none of the votes caused the decision to be made. Another example is where multiple polluters discharge hazardous waste into a river. In all these cases each individual contribution is reasonably capable of being regarded as a cause of the harm that occurs, even though it was neither necessary nor sufficient to cause the harm by itself…

191 For these reasons there is nothing in principle or in the concept of causation which precludes an insured peril that in combination with many other similar uninsured events brings about a loss with a sufficient degree of inevitability from being regarded as a cause - indeed as a proximate cause - of the

> loss, even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself…"

131. In my judgment, for the most part, the application of a "but for" test does not work in relation to the breaches of duty here. That is because, in the context of concurrent and cumulative wrongs, it is obviously not possible to pick out one breach by, for example, the SFO and show that, but for that breach, one particular part of the losses claimed would not have arisen. Rather, there is an analogy here with the example of more than one polluter of a river engaged in many discharges of pollutants into it. To pursue that analogy, as articulated by Mr Pillow KC in argument, if the result of those acts of wrongdoing is a large number of dead fish it is not going to be possible to identify one particular act leading to the death of one particular fish. But this does not mean that all of the acts of the polluters did not cause the totality of the dead fish.

132. The SFO (and Mr Gerrard) challenge this analysis. It says that the losses claimed here are financial, not physical. There is therefore no "single indivisible injury". Rather, the correct position is that with sufficient work, either it is possible to connect one or more of the SFO's breaches with particular parts of the losses claimed - in which case the court should reach a figure using a broad-brush and common-sense approach - or it is not. But the SFO says that this is not the exercise which has been undertaken. As ENRC has not done such an exercise, there is either a fundamental obstacle to its claim for damages, against the SFO, or at the very least, it has to be shown that each SFO breach relied upon was the "but for" cause of some part of the loss.

133. I reject this challenge. First, as Laws LJ noted at paragraph 19 of his judgment, "single indivisible injury" is in effect just shorthand for a particular class of case. He was not purporting to make the approach of the court dependent on the particular type of damage suffered. Thus, the fact that the alleged losses directly caused by Dechert and the SFO's breaches of duty consist of money is beside the point. This really is a case of breaches by number of tortfeasors over a particular time where one set of wrongs interacts with the others to produce an overall outcome which here is a vastly increased investigation. It falls within the type of case identified by Laws LJ at paragraph 20 of his judgment and as identified by paragraph 191 of the judgment of Lord Hamblen and Lord Leggatt in *Arch Insurance.*

134. Even accepting that the court can use a broad-brush approach, it would not realistically be possible to allocate to each separate breach of duty an identifiable part of the losses claimed so that in fact, contribution claims between the respective Defendants would not arise since each is responsible already for a specific part of the losses in money terms.

135. It seems obvious to me, and is consistent with the authorities cited above, that the correct approach is to consider the overall effect of the Defendants' numerous, consecutive and concurrent wrongdoings over time to see in the end what the resulting loss is in financial terms. Once that has been done, the Court can then apportion the respective responsibilities between the Defendants pursuant to their contribution claims.

136. On that basis, it is not necessary - or appropriate - to use a "but for" test when considering causation and loss in relation to the SFO's breaches. The question is rather whether all or any of the breaches had causative effect in terms of the expansion of the investigation.

137. So far as Dechert is concerned, I did not understand it to be challenging the way in which ENRC presents its case on causation in general terms. Indeed, if it did, it could hardly have made the payments referred to in paragraph 60 above.

138. Accordingly, I proceed on the basis that I need to determine whether, in the case of the breaches of duty which I have found were committed by the DDs and the SFO respectively, they can be described as having caused the losses claimed in the sense described above. Since the SFO takes the point that none of the breaches of duty committed by it would have made any difference at all to the outcome in terms of the losses claimed, it will be necessary for me to consider each breach of duty separately, but of course in the context of the breaches of duty as a whole.

139. This gives rise to a further point. When considering the effect of each of the SFO's breaches of duty, that consideration must be done on the assumption that all the previous acts or omissions on the part of the Dechert, and indeed Mr Gerrard, still occurred. What one does not do when considering the effect of DC15, for example, is to analyse it in a vacuum and as if none of the prior IDCs were committed. The overall context in this case, and in particular the complex and cumulative interactions between Mr Gerrard, the SFO and ENRC is critical.

Inducement to breach of contract and causation

140. The second point of law arises out of one of the SFO's general contentions which is that, even if the SFO had not induced Dechert's breach of contract in relation to the IDCs, Dechert would have committed those breaches anyway. Part of that argument rests on the proposition that, in finding that the SFO had committed the IDCs, this said nothing about whether the SFO's inducement had any causative effect in relation to the breach. This, in turn, presupposes that in law, it is possible for a party to be found to have induced a breach of

contract (for the purpose of establishing that accessory liability in tort) even though the inducement itself had no effect.

141. I disagree. I think that the SFO's position confuses two different things: (a) was there an inducement of the relevant breach and (b) did the breach cause any loss?

142. In my judgment, in order to establish an inducement to a breach of contract, the claimant must establish some causative connection between the particular inducement alleged, for example persuasion, encouragement, assistance etc, and the commission of the breach. Otherwise, the inducement would be entirely hollow. If X shouts encouragement to Y to break his contract but Y does not hear him, although he happens later to break his contract, X has not induced the breach of contract at all.

143. Thus, when I said at J/900 that the ingredients of the tort of inducement were made out (save for causation and loss) I was not there referring to any causal connection between the inducement and the breach, but rather whether the breach so induced then itself caused any loss.

144. Thus, *Clerk & Lindsell 24th edition* states in the section headed "Damage" at paragraph 23-58 (which was 23-53 in the previous edition) that "the claimant must prove not only the procuring but also that he has been damaged by the breach of contract" (emphasis added).

145. Mr Colton KC also pointed to paragraph 36 of the judgment of Lord Hoffmann in *OBG Ltd & ors v Allen & ors* [2008] 1 AC 1 where he said that:

> "…did the defendant's acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability?..."

146. I do not see how this helps the SFO. What Lord Hoffmann was saying was that in the absence of that causal connection to the breach, there would be no procurement at all. This is made very clear when Lord Nicholls deals with the question of intention at paragraph 191:

> "…The defendant is made responsible for the third party's breach because of his intentional causative participation in that breach. Causative participation is not enough…"

147. Mr Colton KC also refers me to paragraph 114 of the judgment of Arden LJ (as she then was) in *Meretz Investments NV v ACP Ltd* [2008] Ch 244 where she says this:

> "For inducing breach of contract the essential elements were knowledge of the contract, intention to induce a breach of the contract and actual breach of contract. Accordingly, to be liable, a person must know that his action will result in a breach of contract:… As to breach, it is not enough that the defendant obstructed a person in the performance of the contract. The defendant's conduct must actually have caused a breach of that contract: per Lord Hoffmann at para 44."

148. But this only makes it clear that, along with causing the breach, the party said to have induced it must also know that this is what will happen. This passage hardly assumes that a

causal impact is not necessary - it assumes that it is. Moreover, that causative element is part and parcel of the inducement, if it is to be found. None of this has anything to do with causation and loss flowing from the breach.

149. In this context, the SFO has placed particular reliance on the case of *Jones v Stevens* [1955] 1 QB 275. Here, an employee of the plaintiff had left his employment in breach of his contract of employment. He was later employed by the defendant. The defendant had not enticed the employee away from the plaintiff in breach of his contract, so there was no procuring of a breach in that sense. However, the defendant had continued the employee's employment once it had become aware of the employee's previous contract with the plaintiff. At the time, this employment of the employee after notice had been received was considered in law to be "harbouring" the employee on the part of the defendant and rendered it liable to the plaintiff. However, the evidence was that the employee would not have returned to the plaintiff, even if he had not been employed by the defendant. Accordingly, for the defendant to continue to employ him caused the plaintiff no loss. The defendant was therefore held not liable to the plaintiff.

150. The breach in that case was the employee's not continuing to work for the original employer, the plaintiff, to whom he was still bound in law. It seems to me that in truth, the Court of Appeal was saying that there was no "harbouring" because the act of employing the employee made no difference, as he would have acted in breach by failing to return to the plaintiff anyway. This was in circumstances where it was common ground that the defendant had not enticed the employee away in the first place. So I do not think that this case actually assists the SFO in regard to the point of law it seeks to make. But in any event, the leading authority now, in my view, is the much later decision of the House of Lords in *OBG*.

151. If the suggestion is that, in finding the various inducements on the part of the SFO, I did not find, or think it necessary to find, a relevant causal connection with Dechert's breaches, that is simply wrong. It would have been incorrect in law for me to hold that there was an inducement of a breach without finding any causal connection between the two.

152. The only actual example given by Mr Colton KC is in relation to the inducement I found in relation to DC19A, and the text from Mr Gould. I deal with that point below when I come later to discuss that particular IDC, but it does not assist the SFO here.

153. Indeed, the whole of the section of the judgment on Inducement at J/878-896 shows that I had to and did consider how the inducement actually caused the breach, on the facts. See J/879 and 883 in particular.

154. Accordingly, I reject the SFO's submissions on the law here. The question for present purposes is what flowed from Dechert's breaches, including those induced by the SFO. Once that question is answered, there will then be the separate issue of contribution. In any event, I also address below the suggestion that Mr Gerrard would have acted as he did in relation to the IDCs, without any encouragement on the part of the SFO.

Remoteness: reasonable foreseeability

The requirement of reasonable foreseeability

155. It is common ground that the usual position in relation to torts is that the losses claimed must be reasonably foreseeable. It is also common ground (but it is in any event the case) that what must be reasonably foreseeable is the kind of damage which occurred although not its extent - see *Clerk & Lindsell* 24th edition at 2-157 and 162. Reasonable foreseeability is a less demanding requirement than reasonable contemplation of loss in contract, or the knowledge of probable loss as required in the tort of misfeasance. As Floyd LJ put it in *Wellesley v Withers* [2016] Ch 529 at paragraph 74:

> "…What then are the relevant differences in the rules governing the damage recoverable for breach of duty as between contract and tort? It appears to be accepted that the "reasonable contemplation" test in contract is more restrictive than the "reasonable foreseeability" test in tort: see the discussion of this in The Achilleas [2009] AC 61, paras 31-32 in the judgment of Lord Hope. Damage may be of a kind which is reasonably foreseeable (and therefore recoverable in tort) yet highly unusual or unlikely (and therefore irrecoverable in contract)…"

156. At least on the statements of case, it was common ground between ENRC and the SFO that the relevant test here was indeed reasonable foreseeability. See paragraph 44 of the SFO SOC and paragraph 56.1 of ENRC's SFO Reply.

157. However, in its submissions, ENRC postulated that in the case of inducement, reasonable foresight was not required at all. The position here was said to be analogous to the tort of deceit. The latter claim was the one at issue in *Smith New Court v Citibank* [1997] AC 254 in which the House of Lords held that reasonable foresight was not required for claims in deceit. I do not accept that *Smith New Court* is any authority for the proposition that the same position obtains in the case of inducement. It is true that Lord Steyn at p279F referred to the justification for a stricter approach in favour of a claimant in the case of an "intentional wrongdoer". However, first, I think the overall context of his observations shows that they were directed to the wrongdoer in the case of deceit i.e. the fraudster (see, for example,

p279C and p280B-C). Second, it is true that inducement, as a cause of action, does require an intention on the part of the inducing party to procure the breach of contract, of which he must have knowledge or to whose existence he was recklessly indifferent (see J/168-175). However, this tort does not involve (or at least does not require) deception or an intention to injure.

158. For those reasons, I reject the argument that the reasonable foresight requirement does not apply in the case of inducement. It does.

Reasonable foreseeability and knowledge of probable loss

159. As already noted, the SFO argues, among other things, that the nature and extent of the losses claimed by ENRC were too remote because they were not reasonably foreseeable. I deal with that argument, so far as the facts are concerned, below. However, one aspect of this argument is the suggestion that my judgment has already decided this issue in favour of the SFO, or substantially decided it, because of what I found in relation to the misfeasance claim.

160. Here, I held that while the relevant breaches of duty on the part of Mr Gould and Mr Thompson, while engaged in public functions, were made out, ENRC had not satisfied the separate requirement of knowledge of probable injury to ENRC. I explained this requirement in detail, and how ENRC put its case here, at J/186-194. Knowledge of the likelihood of the loss alleged is required, not mere foreseeability of it or knowledge of the probability of <u>some</u> loss to ENRC, whatever it happened to be.

161. I found that this "knowledge of probable loss" was not made out in relation to the SFO; see J/859-876. In so doing, I actually said specifically at J/870 that it was foreseeable that legal and other costs would increase if ENRC had to look for and disclose more information than previously. But that was insufficient to fulfil the "knowledge of probable loss" requirement of the misfeasance claim.

162. The short point is that what is required to be shown for reasonable foreseeability, which is an objective question, is different from and less than what is needed to establish knowledge of probable loss. I was concerned in the Phase 1 Judgment with the latter, not the former.

163. So it is not as if I have already found that there was no reasonable foreseeability so far as the SFO is concerned.

Remoteness: Novus Actus Interveniens

164. This is where the intervening act of another, often the claimant, is such as to no longer render the relevant defendant responsible as a matter of causation. In *Borealis v Geogas Trading Sa* [2010] EWHC 2789 (Comm) Gross LJ expressed it thus:

> "Secondly, in order to comprise a novus actus interveniens, so breaking the chain of causation, the conduct of the claimant "must constitute an event of such impact that it 'obliterates' the wrongdoing . . . " of the defendant: Clerk and Lindsell on Torts, 19th Edition, at para 2-78. The same test applies in contract. For there to be a break in the chain of causation, the true cause of the loss must be the conduct of the claimant rather than the breach of contract on the part of the defendant; if the breach of contract by the defendant and the claimant's subsequent conduct are concurrent causes, it must be unlikely that the chain of causation will be broken. In circumstances where the defendant's breach of contract remains an effective cause of the loss, at least ordinarily, the chain of causation will not be broken:…"

Failure to mitigate

165. A claimant must take reasonable steps to mitigate its loss. The burden of showing that there has been a failure so to mitigate rests upon the defendant.

Determining Quantum and the Broad Brush

166. It was common ground between the parties (and in any event is the case) that the Court is entitled to use a "broad-brush" applied with common sense when assessing quantum and where the assessment of damages cannot be made with precision. This was well summed-up by Popplewell J (as he then was) in Asda Stores Limited & Ors v Mastercard Incorporated & Ors [2017] 4 CMLR 32

> "306. When it comes to the burden on the Claimants to prove their loss, however, they are entitled to invoke the long established principles that the court takes a pragmatic approach. In particular: (1) Only as much certainty and particularity is insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts by which the damage is done:… (2) The fact that it is not possible for a claimant to prove the exact sum of its loss is not a bar to recovery. Where, as in this case, the assessment of damages inevitably involves an element of estimation and assumption, restoration by way of compensatory damages is often accomplished by "sound imagination" and a "broad axe":… The "broad axe" metaphor appears to originate in Scotland in the 19th century. The more creative painting metaphor of a "broad brush" is sometimes used. In either event the sense is clear. The Court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of his rights.

167. I have taken these principles into account when assessing quantum here..

168. Popplewell L went on to say this:

> 307. However, where the court is compelled to use a broad brush in the absence of precision in the evidence of the harm suffered by a claimant, it should err on the side of under-compensation so as (a) to reflect the uncertainty as to the loss actually suffered and (b) to give the defendant the benefit of any doubts in the calculation:…"

169. At the beginning of his submissions, Mr Millett KC relied upon both of those passages. However, his attention was then drawn (as was mine) by ENRC to the decision of the Court of Appeal in *BritNed Development v ABB* [2019] EWCA Civ 1840. In that case, 1 of the

grounds of appeal in a competition case was that the judge had under-compensated the claimant. In that regard, Henderson and Asplin LJJ (with whom Patten LJ agreed) said this:

> "Furthermore, it is in our view unfortunate that the judge in the present case should have found assistance in what Popplewell J said in *Asda* [2017] 4 CMLR 32, para 307, when the anti-competitive conduct in that case was not remotely comparable to the concerted and dishonest worldwide cartel in which ABB participated. Any suggestion, in a case of the present type, that the court should "err on the side of under-compensation" is liable to give entirely the wrong impression, quite apart from the obvious point that the aim of the court should always be to give the right amount of compensation, without erring in either direction. All that said, however, we remain of the view that, when para 12(9) of the judgment is read as a whole, it does not betray any fundamental error of approach which vitiated the judge's performance of his task. The most that can be said, in our view, is that in considering the judge's approach to, and assessment of, the evidence before him, we should be alert to the possibility that he may have been unduly prone to give ABB the benefit of the doubt, or to err on the side of under compensation, when (of necessity) wielding the broad axe or broad brush."

170. In the light of those observations, Mr Millett KC, accepted that it would be giving a wrong impression to say that the principle enunciated by Popplewell J at paragraph 307 of his judgment in *Asda* was the law. However, while under-compensation could not be a general principle there may be cases where it was appropriate and this was one such case because there were some uncertainties. By way of example, he pointed to the operation of Footnote 4, described at paragraph 79 above (see also Footnote 10 described at paragraph 88 above). In fact, as part of my approach on quantum, I have recognised the specific difficulties which those two footnotes could cause and made appropriate allowances - see paragraphs 670 - 671 and 696 above. I agree that there are some uncertainties so far as quantum is concerned and I have generally sought to take a cautious or conservative approach (i.e. which might or would favour Dechert) when considering appropriate percentages and the like, where the position is not clear.

Other points of law

171. So far as other points of law are concerned, I will deal with them in context, below.

FACTUAL CAUSATION AS AGAINST THE SFO GENERALLY

Introduction

172. I deal with factual causation as against the SFO generally, before dealing with the same issue as against Dechert. This is because the dispute between ENRC and the SFO over causation is much more fundamental.

173. There are two key causation questions involving the SFO:

(1) Were the SFO's breaches of duty causally irrelevant to ENRC's primary claim for losses, in the sense that even in their absence, ENRC's investigation would have

proceeded in much the same way and much the same cost? I refer to this as "the SFO Causation Issue";

(2) The second question concerns whether, but for its own wrongdoing, the SFO would have opened the CI at all; I refer to this as the CI Issue.

174. I am concerned in this part of the judgment with the SFO Causation Issue. However, there is some overlap between this and the CI Issue. The SFO contends that in the counterfactual, it would still have opened the CI because, in effect, it would have had the same information and concerns about ENRC. In other words, the case for a CI was essentially the same, irrespective of the SFO's breaches of duty. On the SFO Causation Issue, part of the reason why the SFO says that the investigation would have proceeded in the same way and at the same cost is because for its part, the SFO would have pursued ENRC and required it to engage in the way that it did in any event; again, because, broadly speaking, the materials before it would have conveyed the same information that it received from the IDCs (and other DCs) and therefore raised the same concerns.

175. On the SFO Causation Issue, the SFO's position is as follows:

(1) Its primary case is that, even if the acts of inducement had not occurred, Mr Gerrard would still have made all of the disclosures to the SFO that he did; accordingly, the SFO's breaches of duty made no difference. Mr Gerrard would have been in breach of duty anyway, such that the inducements had no causative impact at all; or, to put it another way, Mr Gerrard's breaches of duty constituted a *novus actus interveniens* vis-à-vis the SFO's breaches of duty on the one hand, and ENRC's claimed losses on the other;

(2) The SFO's secondary, and alternative position is that even if its primary case is rejected, there are various overarching points which means that even in the absence of the IDCs, the position as against ENRC would have been the same.

176. I consider the SFO's two cases in turn.

The SFO's Primary Case

177. I have already dealt in paragraphs 140 - 154 above with a legal point concerning inducement and causation which the SFO makes in this context. Further, in my Judgment, I have already found that in the case of each IDC, the SFO's inducement did have a causal effect on the breach committed by Mr Gerrard.

178. However, on the facts, the SFO's primary position is untenable anyway. It rests on the proposition that in the counterfactual, the SFO would not have ceased to deal with Mr Gerrard or at least it would not have confined its dealings with him only to properly constituted OMs. Rather, it would have continued to deal with him much as before because, on first suspecting that he did not have authority to say what he did in a DC, it would then have asked him directly if he was authorised. And in the counterfactual, he would obviously have lied and said that he was, and this would have sufficiently reassured the SFO.

179. However, first, the proper counterfactual is that the SFO would indeed not have countenanced any DCs once it knew or suspected that Mr Gerrard had no authority. The SFO officers are hardly likely to have simply accepted Mr Gerrard's say-so that he was authorised. That would be naïve in the extreme and Mr Thompson and Mr Gould were not naïve. In the counterfactual they would surely have acted on the basis that they were dealing with a solicitor who was behaving, or appeared to be behaving, in gross breach of duty to his own client, and unprofessionally.

180. Second, it is not necessarily the case that, albeit that Mr Gerrard can be taken to have lied if it suited him if confronted with questions about his authority, he would on every putative occasion have said clearly that he was authorised. After all, on at least one occasion, he referred to what he knew "unofficially" and second, it is absurd to think that he could have told the SFO that he was expressly authorised to tell it that he was having to consider his own position as solicitor for ENRC due to problems over disclosure etc. If he had sought to say that he was nonetheless authorised in those instances, it would not have been remotely credible. The fact that, in answer to questions from Mr Colton KC, Mr Gerrard agreed that if he had been asked by the SFO if he was authorised to say what he was saying, he would have said that he was, is nothing to the point. He was bound to have agreed with that proposition, but it does not mean that it was true.

181. The SFO also relies upon the notion that even if Mr Gould and/or Mr Thompson had decided not to deal with Mr Gerrard, someone else at the SFO would have done so in their place, as it were, so as to allow and enable Mr Gerrard to continue disclosing matters as before, but with someone else. I regard this suggestion as far-fetched. It presupposes that the SFO would continue to deal with Mr Gerrard after two of its senior officers refused to do so for good reason.

182. If, on the counterfactual, the SFO had not been willing to deal further with Mr Gerrard save (at best) through conventional and full OMs in the presence of personnel from ENRC, he

could not have committed the DCs for which he was found liable, including the IDCs. That is because he needed a "willing audience" in the form of the SFO. He needed SFO officers who were prepared to countenance conversations or meetings with him when they knew he was likely to volunteer information which he should not have. Or, as Mr Millett KC put it in argument, Mr Gerrard could not have played to an "empty house". See all the findings I made at J/878-891, especially 879, 882 and 883.

183. The whole point is that Mr Gerrard's breaches on the relevant DCs all involved (save DC19A dealt with below) the unauthorised and wrongful disclosure of information to the SFO. Without the SFO as an audience and a receptacle for this information, there could not have been any breach at all. Accordingly, the SFO's primary case must be rejected. It is not the case that absent the SFO's breaches, Mr Gerrard would have acted so as to make the same disclosures in any event. There was no *novus actus* on the part of the DDs.

The SFO's Secondary Case

Presence of the DCs in the Counterfactual

184. Here I deal first with ENRC's contention that, but for the SFO's breaches of duty on the IDCs, no DC would have taken place, regardless of whether it was one for which Dechert and the SFO have been found liable or in respect of which ENRC claims loss.

185. The SFO contends that this is unrealistic and that at least some DCs would still have occurred. The first substantive point made by the SFO is that Mr Gerrard would have still tried to have private conversations with it. But again, if the counterfactual is that the SFO would have refused to deal with him privately, he could not make the disclosures in fact made in the DCs, even if he wanted to. The fact that this is how he operated, and how he marketed his personal connections with the SFO to ENRC, is irrelevant. On the basis of the serious and (on my findings) obvious breaches of duty committed towards his client, no responsible SFO officer (which is what the counterfactual assumes) would have wanted to take any risks with Mr Gerrard. He may have sought to give an innocent explanation for what he said on one occasion but (as with the question of authority) once his breach of duty had been perceived, any officer was likely to take what he said with a pinch of salt. And if not on the first occasion, certainly on the second.

186. Equally, the fact that ENRC was in an SR (self-reporting) process, being one where solicitors would often speak to the SFO on their client's authority and without them present, does not matter because this solicitor was clearly acting without authority.

187. Further, and as already indicated, it is unreal to suppose that if some senior officers had decided not to deal with Mr Gerrard except in very confined circumstances, this would not have been reported back to Mr Alderman who would surely have seen to it that all officers took the same view. Or they would have reported it to their colleagues (including, later, Mr Rappo).

188. All of this is especially true when there was not just one IDC but 15, 9 of which occurred before the end of December 2011. The whole tenor of the SFO's dealings with Mr Gerrard and indeed ENRC would have been different. See here also, J/485 and 888.

189. Thus, for the purpose of ascertaining, for example, how the SFO would have viewed ENRC going forwards, it would be wrong to proceed on the basis that the only DCs that were affected by the counterfactual were the IDCs.

190. The SFO makes three further specific points in this context. They concern the Depel Interview, DC19A and DC25. I deal with those points in context below when I come to the chronology.

191. There are then a number of overarching issues between ENRC and the SFO on the SFO's Secondary Case. Before dealing with them, it is necessary to explain and give my conclusions on the issue relating to what became known as the Feedback Loop. It has relevance to several of the general points made by the SFO.

The Feedback Loop

192. It is a key submission of ENRC that the breaches committed by the DDs only ("the Dechert Breaches") and the IDCs committed by both Dechert and the SFO ("Joint Breaches") are all inter-related and all had a causative impact on each other, so that they all, cumulatively, led to the losses claimed.

193. The basic thesis is this:

(1) Mr Gerrard piqued the SFO's interest in ENRC through his unauthorised disclosures to it; more than that, over time, such disclosures caused the SFO to take an increasingly jaundiced view of ENRC, its operations, and its ability properly to conduct an investigation and self-report;

(2) The SFO responded positively to Mr Gerrard's secret overtures, thereby encouraging and indeed inducing him to make further unauthorised disclosures; this, in turn, led him to believe that it would keep such disclosures private, in the sense of not

revealing them to his client at OMs or otherwise; this was in the context where the SFO knew that he was acting in breach of duty or was reckless as to that fact;

(3) The "backing" of the SFO in this sense "emboldened" Mr Gerrard to advise an ever expanding scope of the investigation by telling ENRC that this was what the SFO would expect;

(4) For the most part, Mr Gerrard, in ENRC's eyes, appeared to be correct, judging by what the SFO said at the OMs in terms of what it expected from ENRC.

194. Indeed, various parts of my Judgment essentially reflected the Feedback Loop although, of course, I was not dealing generally with causation at that stage. Thus:

(1) I referred to Mr Gerrard's tainting the SFO's view of ENRC at J/580, 1092 and 1322, enabling Mr Gerrard to "get away with" expanding the investigation;

(2) at J/882 and 883, I refer to the SFO being willing to countenance and encourage conversations or meetings with Mr Gerrard, when it knew that he would be making disclosures which he should not; and Mr Gerrard knew that the SFO would not reveal this to his client. This is reinforced by Mr Gerrard adopting a role which appeared to be more like that of an intermediary - see J/550, 739;

(3) what was said at the DCs then influenced later events, in particular what was said by the SFO to ENRC at the OMs and in letters; see J/571, 573, 737, 743, 745, 747, 894 and 1282;

(4) the SFO eventually took the view, because of the IDCs, that ENRC could only be trusted for so long as Mr Gerrard was its solicitor and that what ENRC provided to the SFO was not likely to be acceptable unless Dechert was significantly involved in that exercise; see J/590, 1207 and 1222. apart from anything else, this obviously affected how the SFO would - and did - react to Dechert's dismissal;

(5) the DCs themselves contributed to the expansion of the investigation; see J/1244 and 1323.

195. The term "Feedback Loop" itself was first used in ENRC's SFO Reply. It arose in this way. Paragraph 7 of the SFO's Defence said that its wrongdoing did not have any direct impact on ENRC because ENRC was not aware of that wrongdoing, since it was ignorant of the unauthorised disclosures. Paragraph 8 then said that the SFO's wrongdoing could not have

affected the scope of the investigation in some other way. All this was in the context of the SFO's case as to why none of its breaches had any causative effect.

196. ENRC's response to this at paragraph 15 of its Reply was to say that the fact that ENRC was (obviously) unaware of the SFO's breaches at the time did not mean that the latter had no causative impact. That was because Mr Gerrard was emboldened by the secret dealings he had with the SFO in terms of what he then advised ENRC should do on the basis of what the SFO expected. Paragraph 15 set out a detailed exposition of the Feedback Loop over 6 sub-paragraphs with references to evidence and documents from the Phase 1 Trial.

197. In its written and oral submissions for the Phase 1A Trial, the SFO made a number of objections to the reliance by ENRC on the Feedback Loop.

198. First, it said that the reference to the Feedback Loop only came in ENRC's SFO Reply. That is correct, but I have explained how it came about. In any event, it was, in my view, essentially presaged in the Judgment. Moreover, the point is not really a pleading one, but rather, whether the Feedback Loop stands up to scrutiny as a matter of substance.

199. Second, the SFO said that the Feedback Loop was at too high a level of abstraction and without concrete examples. I do not accept that point. Paragraph 15 of the Reply did refer to specific pieces of evidence, and some of the paragraphs of my Judgment, quoted in paragraph 194 above, are in the context of particular DCs, OMs etc. Furthermore, if justified by the evidence and documents, I fail to see why the Feedback Loop cannot be deployed as a general analytical tool to show how inter-connected the various breaches of duty were and (on ENRC's case) to refute the SFO's contention that its breaches of duty had no causative effect at all.

200. It is then said that the Feedback Loop as such was not put to any witness at the Phase 1 Trial and in particular Mr Gerrard, Mr Thompson or Mr Gould. That is true but it does not matter. I can assume for these purposes that if it had been put to Mr Gerrard, he would have denied it and so probably would Mr Gould and Mr Thompson. But I am entitled to take into account what I consider to be the obvious inferences from the evidence given at the Phase 1 Trial and the documents, and my own observations set out in the Judgment.

201. Next, and as a matter of substance, the SFO says that Mr Gerrard had been giving strident, aggressive and inaccurate advice to ENRC long before it was involved. References to this effect are given at paragraph 28 (2) of the SFO's written submissions. I agree that those references show this. But it is not ENRC's case that Mr Gerrard did not start to give his

wrong and expansionist advice until after the SFO was involved. Indeed, there are a number of references to the Judgment where I deal with pre-August 2011 events. However, none of this means that Mr Gerrard was not emboldened by his relationship with the SFO to make ever-increasing demands on ENRC by reference to what he knew the SFO would actually tell ENRC itself at OMs, for example.

202. A further point of substance made by the SFO was that ENRC already trusted Mr Gerrard, prior to the SFO's involvement; therefore, nothing later done by the SFO could have caused ENRC to trust him, or trust him more. References are here given to a WS from Mr Spendlove, the solicitor acting for ENRC in the Privilege Proceedings. He did not give evidence at the Phase 1 Trial. I do not see that the passages referred to assist on this question beyond stating, as was obviously the case, that ENRC would have put its trust in Mr Gerrard generally and especially at the outset, because he was its solicitor and a specialist solicitor at that. Equally, the references to paragraphs 52 and 53 of Mr Ehrensberger's first WS do not really assist. They are about Mr Gerrard saying that he had a very good relationship with the SFO which caused Mr Ehrensberger to think that the SFO would trust him and so he was uniquely placed to advise ENRC as to how to navigate interactions with the SFO. In a sense, this actually supports the Feedback Loop, in my view, because on that basis, when the SFO did give a message to ENRC (which itself arose from earlier IDCs) ENRC would take it especially seriously if Mr Gerrard agreed with it. It is true that there is here a passing reference to Mr Gerrard telling Mr Ehrensberger of his good relationship with the SFO even before the SFO was involved. I see that, but I do not accept that this (or the other evidence referred to) means that ENRC was not disposed to trust Mr Gerrard's advice more than just because he was their specialist solicitor, as a result of what he said was his relationship with the SFO. Or, to put it a different way, that as time went on, and some at ENRC were resisting Mr Gerrard's call for further work to be done, they were in the end persuaded (or overruled by others), on the basis that Mr Gerrard said that it was what the SFO would expect. This was in the context of references by the SFO to, for example, "last chance saloon" in the OMs.

203. A final point was that in any event, it was not reasonably foreseeable to the SFO that its wrongdoing in the IDCs would lead to Mr Gerrard giving recklessly wrong advice or unnecessarily expanding the investigation. This forms part of the SFO's general reasonable foreseeability argument which I deal with separately below at paragraphs 514-533. References also made to J/871 which deals with knowledge of loss in the context of the

Misfeasance Claim (where I found that there was not the required knowledge of loss). Again, I deal with this below.

204. Accordingly, so far as it relates to factual causation, I consider that the Feedback Loop point has considerable force.

Prior breaches of duty on the part of Dechert

205. The SFO points out, correctly, that I found that Dechert had committed a number of breaches of duty before the SFO became involved, although the extent of the expansion of work was not in the same league as that which occurred later. The precise extent of my findings, pre-SFO involvement, as it were, is set out at J/928-1043. However, these earlier breaches do not mean that the SFO's breaches of duty could not also be causative of the losses which are claimed and which were contributed to by earlier (or indeed concurrent) breaches of duty on the part of Dechert. This is in a context where I have found (see below) that the Kazakhstan investigation should have stopped altogether after 31 October 2011, and where most of the work on Africa commenced once the SFO became involved. And as already found, I do not accept that ENRC was "pretending" that there had been no earlier breaches by Dechert (see above). Part of this point focuses on reasonable foreseeability which I deal with separately at paragraphs 514 - 533 below.

206. It is also in a context where there was the Feedback Loop, already considered at paragraphs 192 - 204 above.

207. I therefore reject the submission that wrongdoing on the part of Dechert broke the chain of causation, so far as the SFO was concerned, whether as constituting a *novus actus* or otherwise.

208. The SFO then points to the fact that ENRC now only claims losses resulting from the IDCs as against Dechert even though there were other DCs where Dechert had acted in breach of duty. But the fact that ENRC has chosen to rely only on the IDCs does not mean that they could not, as breaches of duty, be causative of the losses claimed. And all the more so, because of the effect of the Feedback Loop. It is really just a forensic point to argue that because ENRC claims no losses as a result of the non-IDCs, the IDCs cannot be causative.

A Proportionate Approach by the SFO

209. Next, the SFO relies on the fact that at OM2, it said that it wanted a proportionate investigation and it was willing to discuss questions of scope and cost with ENRC. That is true, although on the same occasion, Mr Alderman also said that ENRC should adopt an

enquiring approach and the SFO would not be surprised at what ENRC dug up. He wanted to see how deeply ENRC would dig on particular areas. But this does not mean that the SFO's breaches of duty could not have caused the losses claimed. In the event, we know that ENRC's investigation was extended disproportionately and unnecessarily. And in fact, despite what the SFO said, a huge Kazakhstan report was produced. In reality, the SFO was willing to go along with Mr Gerrard's "running commentary" approach, at least up to when Dechert was dismissed by ENRC. So notwithstanding the SFO stating its desire for a proportionate investigation at one point, this does not mean that it could not have caused an investigation that was the opposite.

Information and Materials available to the SFO in the counterfactual

210. A further point made by the SFO is that even in the absence of the IDCs, or indeed all the DCs, it would still have obtained substantially the same information and material from other sources including newspapers, SARs, together with other communications from Mr Gerrard and representatives of ENRC. I deal with these points below. By way of a preliminary point, it is correct that I held that it was not the case that but for the SFO's wrongdoing, the SFO Letter would not have been written, or ENRC would not have entered the SR process. However, the SFO Letter was limited in its content and scope; while prompted by the August Article (as to timing), along with other materials, at that stage nothing had Mr Gerrard's *imprimatur*; neither the fact that there was the SFO Letter nor ENRC's decision to enter the SR process meant that the SFO effectively would have had the same material as they would have had, absent the IDCs and DCs.

Information obtained at OMs

211. Reliance is placed on the OMs as the source of information given to the SFO which was said to be in essence, the same as information given in the IDCs, or indeed more useful or serious. However, first, it is likely that the content and shape and even the frequency of the OMs would have been different absent the IDCs, even without the absence of the DCs. This is, again, in part a function of the Feedback Loop. But also, the shape of the investigation would have been different as well. This would have had an effect on what was communicated to the SFO in the first place. The fact that in part, this was caused by Dechert's own breaches of duty unconnected with the DCs, makes no difference if (as I find) the IDCs causally contributed as well. The upshot is that it does not follow that the information given to the SFO at the OMs would have been the same.

212. Furthermore, in truth, the content of the disclosure made at the IDCs did go beyond the OMs because of the damaging nature of what was said. The SFO certainly saw point in continuing the DCs; see J/894-895. The SFO contends that ENRC has not provided any examples of something imparted at a DC which was not also communicated at an OM. However, in my judgment, and generally, the information provided (and, importantly, how it was provided) at the IDCs was more damaging to ENRC than that disclosed in the OMs, not least because it was ENRC's solicitor who was privately confiding in the SFO, as it were. See the actual content of the disclosures made at the IDCs quoted at J/520-521, 546, 567, 577, 588, 605, 618, 643, 725-726, 806 and 828. See also my observations as to how the information conveyed at the DCs had greater significance and potency because of the context and critically Mr Gerrard's role. Here, the following passages are worth quoting in full:

> "573. As for reference to red flags, it is said that this was innocuous, since Mr Richards had already referred to them (without objection from Mr Ehrensberger) in OM1. That is true, but context is everything. To say that there were lots of red flags and also "lots to tell" implies that Mr Gerrard had found matters of serious concern which might not be the same as or limited to the matters mentioned at OM1, otherwise why say this? It is rather like a conspiratorial (in a non-legal sense) whisper. It was not in ENRC's best interests to say this sort of thing and Mr Gerrard knew it…
>
> 592. What Mr Gerrard said was clearly against ENRC's interests because he said he felt he was being professionally compromised. He could not possibly have had authority to say this. The fact that Mr Ehrensberger had said (at OM1) that effectively, he could not work at ENRC unless it was open and transparent does not affect the significance of what Mr Gerrard said here or his authority to say it. It is one thing for a Board member or executive officer to say something like what Mr Ehrensberger did as an assurance; it is quite another when a solicitor is saying that he was or could be professionally embarrassed…
>
> 611. For his part, Mr Thompson did not accept that, at the time, he thought there was anything said which was plainly against ENRC's interests although he accepted with hindsight that it could be said that Mr Gerrard was seeking to disparage Mr Ehrensberger. As for the disparaging of JD, Mr Thompson said that the SFO had already concluded that they were conflicted, and in that sense, what Mr Gerrard said was not new. But in my judgment, it is not simply about whether the information or communication was new. It is also about who was saying it. See paragraph 528 above, in the context of knowledge drawn from the press. Nor is it an answer to say that the references to falsification and destruction of documents were not plainly unauthorised, in the eyes of Mr Thompson, simply because of the December Article. Again, it all depends who is saying it. The same goes for the references to the "odd" AC, the "weird situation" and the client putting on more pressure about scoping. It is also very hard to see how Mr Gerrard could, in the eyes of Mr Thompson, have been authorised by his client to say that it was split on the question of co-operation…"

213. In addition, there were the significant discrepancies between what was said in the IDCs and in relevant OMs which were obviously damaging to ENRC in the eyes of the SFO. See J/557, 559-563, 565, 603, 614 and 647. The point here is that this obviously would have indicated to the SFO that Mr Gerrard was indeed prepared to tell it things in private that would not be repeated in public (see J/565) and that increases the significance of what the IDCs effectively told the SFO which it did not get from the OMs.

214. Insofar as is necessary I will also refer to particular OMs in context below, when dealing with the Factual Causation Chronology.

Press Articles

215. The SFO relies in particular at paragraph 8 (3) (b) of its SOC on 27 press articles about ENRC. Only 4 were in the SFO's disclosure and only one other is said specifically to have been read. If there is no evidence that the SFO read the vast majority of the articles, there is no real evidence that they had any causative impact on the SFO's thinking going forwards (as opposed to the IDCs).

216. The SFO's general response is that the fact that articles were not in its disclosure does not mean that they were not read by relevant officers. There were, after all, references to recent press coverage in some documents; in fact, of the 6 documents cited by the SFO here, they all concern the press reports leading to the SFO Letter (itself being one of the quoted documents). The 4th document is a letter from Mr Thompson dated 17 December 2011 to the FCO about the SFO's dealings with ENRC up to that point, which then refers to a range of press coverage and comments on the activities of ENRC. The document J6/88 is a further copy of the letter to the FCO, so that adds nothing. The document J6/87 is also an email about the letter to be sent to the FCO plus a reference to Mr Gerrard referring to forthcoming articles in the Independent and the Daily Telegraph.

217. Looked at overall, the collection of documents cited here is hardly persuasive evidence that (a) individual SFO officers read all the articles cited, and (b) as a result they took a particular view of ENRC going forwards which meant that the SFO would have taken the same approach in the absence of the IDCs. The SFO's Rejoinder also refers to the work of its press office; the first document cited relates to articles from early May 2012 about a suggested desire at ENRC to divide up its operations so that its African arm is split off; the second and third documents are dated 14 March 2013 and refer to some press coverage of parts of the Kazakhstan report which had been leaked; this was hardly likely to be new information for the SFO which of course had the report; so these further documents do not add anything.

218. Further, on this topic, as for the 5 articles that had been read by the SFO, none was of any particular significance (see paragraph 16.2 (b) of ENRC's SFO Reply).

219. Finally, whatever information was conveyed in the press articles would not have had the same resonance as when it was conveyed by ENRC's own solicitor. See J/528 and 551.

SARS

220. The SFO also relies on various SARs filed by ENRC. However,

(1) the SARs relating to the Russian Trading Scheme (RTS) were disclosed in ENRC's listing information, and the SFO in 2011 did not consider they warranted opening a criminal investigation;

(2) the CAMEC SAR filed by HSF on 15 September 2009 was for the purpose of obtaining a SOCA consent for ENRC's acquisition of CAMEC which was given on a "fast track" basis; the SAR recited various allegations in relation to Mr Gertler and Mr Rautenbach which HSF in fact said were largely based on press speculation and related to jurisdictions where it was very difficult to test the veracity of the allegations;

(3) the Camrose SARs were also to obtain SOCA consents; some were for the Camrose acquisition, which was given, and at the time, Mr Collins said they showed little or no evidence of bribery; there was also the SAR submitted by JD on 30 November 2012 in respect of the Gertler buyout ("the JD SAR") which was supplemented by a further short SAR of 24 December 2012 because part of the payment mechanism had changed; the JD SAR made reference to the unexplained cash payments of $35m from Metalkol; but it provoked no adverse comment by the SFO at the time; indeed, Mr Gould helped to facilitate this, on the basis that once Mr Gertler was out of the picture, it would be easier for ENRC to access relevant documents;

(4) the final SAR made on 16 March 2013 concerned allegations made by Mr Gerrard to PwC alleging corrupt payments by ENRC involving Mr Hanna ("the PwC SAR"); this included allegations that Mr Hanna had paid a $500,000 cash bribe to two Presidents of African countries (unidentified) and later that there were at least 3 payments to 3 different Presidents of the same country, namely Zambia and a payment of $600,000 by Metalkol to a Judge; ENRC points out that these allegations are in fact inconsistent and insofar as there were payments made to Presidents in Zambia that was not a country of interest in this context; here, the SFO takes issue with ENRC's description of the allegations made by Mr Gerrard as being "wild" and whether they were treated as such by ENRC's legal team by reference to points made in the Phase 1 Trial. However, the fact remains that in its internal document of 19 March 2013, Dechert considered that it had seen no documentary evidence that Mr Hanna was involved in such payments although there was one document which appeared to support the fact of a payment to one African President; more importantly, there is no evidence that the SFO acted on this SAR at the time or even saw it;

(5) although ENRC suggests that access to SARs was limited in any event, the SFO points out that its officers did see some SARs. As to that, Mr Collins referred in April 2011 to the SARs made by HSF in a document which concluded there was no criminality on the part of ENRC. As for Mr McCarthy's involvement, this goes back to some enquiries made which involved Mr Collins at the outset, in April 2011. As for Mr Thompson, a note said that he discussed a SAR in December 2011. The task here was to review all SARs. An earlier email from Ms von Dadelszen said that the SFO should investigate the SARs going forwards. Also, Mr Gould saw at least one SAR in August 2012 and as already mentioned, he was involved in the SAR to obtain SOCA consent for the Gertler buyout.

221. SOCA consents obtained pursuant to SARs constitute a defence to money-laundering offences. They would not provide defences to any other criminal offences and I accept, as the SFO contends, that the mere fact that most of these SARs were to obtain consents does not mean that their content was not of potential relevance to the SFO in relation to the activities of ENRC. Nonetheless, what was said (or not said) by the SFO about them, as recited above is significant. Further, there is otherwise no real evidence that the SFO took these SARs into account, going forwards. And as late as 27 March 2013, the SFO stated that there had not been any full assessment of the SARs; see paragraphs 499 - 501 below.

The RAID ("Rights and Accessibility in Development) Report

222. The RAID report of May 2011 is also relied upon by the SFO. It dealt with the CAMEC acquisition. Here, Mr McCarthy said, after considering it, that he did not see any issues for the SFO to pursue as a criminal investigation; Mr Collins said it did not provide any evidence to show that ENRC had bribed public officials.

Mr Joyce

223. The SFO also relies on comments which Mr Joyce made in Parliament which were therefore subject to Parliamentary privilege. It says that it relies on the fact that he made such statements, as opposed to their truth. That rather lessens their impact in terms of the SFO's thinking. It is true that Mr Joyce did contact the SFO directly to inform it of his concerns about ENRC and in particular its dealings with Mr Gertler. See his email of 7 April 2011 to Mr Alderman which also refers to ENRC as having acquired Camrose at less than market value. Mr Collins thought that it was worth meeting Mr Joyce, in particular because he seemed to have a wealth of knowledge about the DRC, and as that country had so many natural resources, it may be worth gaining some insights into it. He also noted that Mr

Joyce's reference to bribery was wrong because this was part of the new Bribery Act which was not yet in force.

224. Having had a meeting, the SFO did not think that what Mr Joyce had said constituted evidence of serious and complex fraud or corruption; a letter to him dated 17 May 2011 said that the SFO's initial enquiries had not found any evidence of corruption in relation to ENRC activities in the DRC and its relationship with Mr Gertler, and therefore, they would not be pursuing this matter further.

225. It is correct that the SFO met with Mr Joyce on 20 July 2011. Mr Joyce's general impression was that Mr Alderman was in "send" rather than "receive" mode at the meeting. He did not recall being asked whether he had information to provide to the SFO. On 29 November 2011, Mr Collins sent Mr Joyce an email which referred to press reports that Mr Joyce had delivered a "dossier" to the SFO. The email pointed out that neither Mr Collins nor Mr Alderman had received any such documents. Mr Joyce said that he could not remember if he responded to this email. But his "dossier" had been published on his website in any event. It is correct, as the SFO says, that it accessed Mr Joyce's website at least in June 2012. This can be seen from the email which Mr Collins wrote to Mr Gould and Mr Thompson on 27 June 2012 where he asked whether he could divulge the SFO's interest in ENRC to someone (the identity of which has been redacted). He simply pointed out that it was difficult to hold a "neither confirm or deny line" because Mr Joyce's website said that Mr Joyce had referred the matter to the SFO. I do not think this takes the matter much further in terms of the SFO's reliance on what Mr Joyce substantively was saying.

226. Further, the SFO seeks to draw an inference that the Global Witness ("GW") publications to which the SFO had access themselves referred to the use of DRC shell companies and that this reference must have come from Mr Joyce's dossier because his own parliamentary staffer Ms Pickles had left to join GW in July 2011, and Global Witness had referred to Mr Joyce's work when meeting Dechert in April 2012. I see all of that but, first, when the SFO did meet GW, it did not think that anything evidential emerged from it. See, in the context of the CI Decision (defined at paragraph 374 below), paragraphs 482 - 484 below. Second, there is still no specific evidence that the SFO actually relied upon anything that Mr Joyce had told them or his dossier.

227. Finally, Mr Thompson's notes of an internal meeting with Mr Collins on 7 December 2011 show that Mr Collins mentioned his contact with Mr Joyce which included a meeting to discuss ENRC. Mr Collins noted that Mr Joyce had hosted an event for First Quantum at

Parliament. He also said that although an article in the Telegraph suggested that Mr Joyce had provided material to the SFO, no response had been received, Mr Collins was not aware of any such material in the SFO's possession. And of course, there was the letter back to Mr Joyce in May 2011.

228. Importantly, the SFO also says that once ENRC had agreed to meet the SFO following the SFO Letter, the OMs rapidly eclipsed press reports and other materials as its key sources of information in relation to ENRC's potential criminality. That rather diminishes the claimed importance of the press reports, SARs and other materials. However, for reasons already given, it is not the case that the OMs gave the SFO the same information as the IDCs (with or without other DCs) nor is it the case that the OMs would have taken the same form and content absent the IDCs.

229. In all of those circumstances, I do not think that the contacts with Mr Joyce took matters further.

Further Matters

230. There was some reference by the SFO to communications from SPJ and also some early intelligence in 2011. But I do not think that overall, they really added to the sum of the other material which the SFO says it had had, and they were not the main focus of the SFO's points here.

Conclusion

231. For all of those reasons, I do not consider that it can be said overall that in the counterfactual, the SFO would have ended up with much the same material as it obtained through the IDCs and the DCs such that its own attitude towards ENRC and what was required of it would have been any different. In reaching that conclusion, I have considered not only the individual impact (or otherwise) of the different materials but also their cumulative effect.

General Conclusion on the SFO's Secondary Case

232. For all the reasons given above I reject the SFO's Secondary Case on causation.

233. However, there is a further causation/quantum point made by the SFO which is that ENRC cannot show that the SFO's wrongdoing gave rise to the particular Unnecessary Work and Costs itemised by ENRC in its detailed quantum exercise. I will deal with this point at paragraphs 550 - 554 below in the context of Quantum.

234. In addition, I still need to consider the further points made by the SFO in relation to the chronology of events. I will do this once I have dealt with factual causation as against Dechert generally, to which I now turn.

FACTUAL CAUSATION AS AGAINST DECHERT GENERALLY

235. First, I should set out ENRC's general counterfactual case from paragraphs 16-19 of its SOC (referred to in paragraph 74 above) in a little more detail:

(1) ENRC would have followed sensible legal advice given by a reasonably competent solicitor and it would have limited the investigation and its engagement with the SFO as much as that legal adviser would have allowed;

(2) The putative sensible legal advice would have been:

(a) not to self-report to the SFO unless ENRC was reasonably sure that there was relevant criminal wrongdoing to be reported;

(b) to conduct a limited investigation into the Kazakhstan allegations, where much of the investigation work could have been done by IA;

(c) there should only be a limited investigation into Africa to include steps taken to improve ENRC's own procedures and standards;

(d) ENRC could seek to limit its commitment to the SFO in terms of scope to a proportionate one, designed to see if there was potentially relevant wrongdoing;

(e) any self-report to the SFO would be confined to any relevant wrongdoing established, following ENRC's investigation; and

(f) in those circumstances a raid was unlikely;

(3) As for the SFO's approach:

(a) it was in principle open to limiting the scope of an investigation;

(b) absent the IDCs and the DCs it would have no basis to propose or endorse a wide-ranging investigation or to open a CI or to raid ENRC or otherwise to exercise its statutory powers against it.

236. Here, it needs to be emphasised that this counterfactual does not pre-suppose no engagement with the SFO at all. That is obviously against the backdrop where I found that it was not the

case that but for the SFO's wrongdoing (a) there would have been no SFO Letter or (b) ENRC would not have agreed to engage with the SFO as it did on 9 November 2011.

237. At the most basic level, there is no dispute in principle between ENRC and Dechert on factual causation. This is because Dechert accepts, as it must, that the investigation undertaken by ENRC, which involved the very substantial fees charged by Dechert and the services of numerous third party providers, was much greater than it should have been. Hence Dechert's payment to ENRC of the sums which it says reflect the true Unnecessary Work and Unnecessary Costs, noted at paragraph 60 above.

238. Dechert also accepts that it is not necessary for ENRC to show what the particular consequences of each separate breach were (see paragraph 9 of its submissions), so long as each breach relied upon had some causative effect. Mr Millett KC does make the obviously correct point that a breach committed at a given point of time could not have caused expansion of work which occurred earlier. But ENRC does not contend otherwise. As already stated, its case is based on the cumulative effect of concurrent and consecutive breaches of duty on the part of both the DDs and the SFO.

239. The essential dispute between ENRC and Dechert is over the extent of the Work and Costs which were truly Unnecessary. I determine that dispute in detail when I deal with Quantum at paragraphs 542 - 838 below, because that is where, in practice, the difference between ENRC and Dechert really emerges.

240. Nonetheless, some overarching points can be dealt with here.

241. First, Dechert objects to the notion that ENRC could simply have used IA as a substitute for external solicitors. It says that this is plainly unrealistic and cites the examples of ENRC's previous use of solicitors. I see that, but then ENRC does not say that IA could have performed the investigative role of external solicitors across the board. Had that been its position, it would not have allowed any of Dechert's fees at all. Rather ENRC says that much of the work in relation to Kazakhstan could have been done by IA rather than solicitors. Indeed the counterfactual still posits the retainer of the "reasonably competent solicitor". It is rather a question as to what particular work on the investigation needed to be done by solicitors rather than IA. And on the facts, the position is much more nuanced, as the detail of the debate on Quantum will show. Thus, subject to one or two qualifications, ENRC has in fact allowed for Dechert's fees in relation to the Kazakhstan investigation up to 31 October

2011. It was at the beginning of 2011 when external lawyers were brought in following the original WB1.

242. A second point concerns the role of Mr Dalman and how he would have required from Dechert (and others) much more extensive work than ENRC would allow. However, the position of Mr Dalman is all bound up in the context of the advice he received from Mr Gerrard which would not have been there in any counterfactual. I discuss this aspect of Mr Dalman in particular at paragraphs 299, 303, 308, 309, 312, 344, 471, 536, 537, 664 and 665 below.

243. Equally, one cannot assume that what was said or offered by ENRC (or indeed said by the SFO) at the OMs would also pertain in the counterfactuals, because in the absence of the IDCs and the "running commentary" approach, the OMs would not have taken the same form or content or indeed frequency.

244. A third point concerns what the reasonably competent solicitor and the SFO would have done in the counterfactual, as described at paragraph 74 above. Obviously, a reasonably competent solicitor will have to base its advice as to the extent of any work to be done, at least in part, upon its perception of how the SFO would act and react.

245. Here, I consider that a very important consideration for the SFO was the disclosure to it of any relevant criminality by a party such as ENRC. As the SR Process envisages (which I explained at J/139-148), if a party reports relevant criminality, then that could be used as the basis for a civil settlement. It is not possible to have a civil settlement without some relevant criminality being disclosed. In addition, of course, if the relevant criminality disclosed was serious enough, it might be that a civil settlement becomes inappropriate and the SFO might instead commence a CI. But if no relevant criminality is shown, then there would usually be little or nothing for the SFO to go on, on the assumption that it was acting properly and in accordance with its officers' duties. That, of course, is subject to information from sources other than the party concerned which might have driven the SFO to commence a CI in any event. As it happens, I have rejected that proposition, which I explain when dealing with the CI Decision below.

246. It is important to reiterate that the counterfactual would not assume the "running commentary" approach which was adopted by Mr Gerrard and which, in the event, the SFO was prepared to go along with.

247. It is correct that the counterfactual assumes that there would still have been the SFO Letter. However, on its face, it was relatively confined in its requirements. It said this:

> "**Subject: Corporate Governance and media allegations of corrupt practice**
> My Director, Richard Alderman, has discussed with me recent intelligence & media reports concerning allegations of corruption and wrongdoing by Eurasian Natural Resources Corporation (ENRC).
> Guidance on self disclosure of corruption is set out within the Serious Fraud Office's (SFO) website…and I would take this opportunity of referring you to that document and urge you to consider it carefully whilst ENRC undertake any internal investigations.
> In the meantime both Richard Alderman and I would like to discuss with you, at this office, ENRC's governance and compliance programme and its response to the allegations as reported. As Richard Alderman and I are on leave next week would you please coordinate a convenient meeting date with Ms Andrea Johnson…
> I can confirm that at this stage the SFO is not conducting a formal criminal investigation into ENRC plc."

248. As noted above, the counterfactual also assumes that ENRC would still have engaged with the SFO in an SR process. However, that would not necessarily have resulted in a report if the position was that no criminality was disclosed, or a least not one of any great length. In the event, that was the position for Kazakhstan. As for Africa, it is hard to see why, in the counterfactual, the SFO would not have been prepared to deal with ENRC on a much more limited basis. Absent all of the IDCs and the other DCs which would not have occurred without them, the SFO would have countenanced a much more limited and focused investigation on Africa by ENRC for the purpose of any SR Process. This is in a context where I have rejected the SFO's Primary and Secondary general cases on causation, above.

249. A further point made by Dechert is that in any event, there was much work that needed to be done for the purposes of ENRC's own governance and procedures, which were the subject of the SFO Letter. That is true, but as Mr Pillow KC pointed out, there was much other work being done at the relevant time which does not form part of the losses now being claimed. This included other work being done by FRA, Deloitte, and Jones Day; see paragraphs 23 and 24 of Mr Ehrensberger's first WS. There was also all of the initial work done by Mr Gerrard through DLA and then Dechert before August 2011 which came to about £500,000 and resulted from their initial instructions.

250. I deal further with points made by Dechert on factual causation in the context of the chronology (to which I turn next), and later, Quantum.

251. But in general terms I agree with ENRC's counterfactual.

FACTUAL CAUSATION: THE CHRONOLOGY

Introduction

252. ENRC has divided its factual causation analysis as against both Dechert and the SFO into 5 separate periods and for each period, it has allocated its losses by reference to what fees and costs were incurred over that particular period. The WMT is not allocated by amount but ENRC does say whose management time was involved in each period.

253. The precise periods are as follows:

	Dates	**Gross Losses Claimed** [1]
Period 1	17 August - 31 December 2011	Fees: £623,165 Costs: £344,276 WMT: E, D, and V[2]
Period 2	1 January – 31 May 2012	Fees: £2,246,972 Costs: £1,858,821 WMT: E, D, and V
Period 3	1 June - 30 November 2012	Fees: £4,616,288 Costs: £3,864,551 WMT: E, D, V and Z[3]
Period 4	1 December 2012 - 13 March 2013	Fees: £3,326,445 Costs: £2,809,438 WMT: E, D, and V
Period 5	14 - 31 March 2013	Fees: £427,004 Costs: £511,912 WMT: E, D, and V

254. Annex A to ENRC's submissions then sets out the "wrong advice" breaches of duty on the part of Dechert, as found by me, which were committed in each of Periods 1 and 2 along with other breaches of duty that occurred throughout the retainer. These breaches encompassed wrong advice as to a raid, criminality, potential penalty, the effect of the BA, the risks of bringing documents into the UK, failure to advise of the risks of SR, consider an alternative course, protect ENRC's privilege, establish the scope of SFO's concerns, record advice in writing, advising, and the "running commentary" approach.

[1] IE without taking account of the sums paid by Dechert.
[2] Messrs Ehrensberger, Dalman and Vulis.
[3] Mr Zinger

255. Annex B to ENRC's submissions then sets out the detail of my findings in relation to Dechert's breach of duty in unnecessarily expanding the investigation, by reference to Kazakhstan and Africa and the individual work streams therein.

256. The content of Annex A cannot be controversial, as it simply sets out the content of findings which I made in different parts of the judgment. The same applies to Annex B save where ENRC then makes comments in parentheses after the citation of particular extracts from the judgment, usually to the effect of stating what was implicit in what I had said. Generally, there has been no challenge to Annex B. Where there has been a dispute as to what I actually meant in one of these paragraphs, I deal with it in context below.

257. It is ENRC's case that these breaches of duty had causative effect, not merely in relation to the particular period or periods in which they were committed, but they had causative effect going beyond those periods; see, for example, how the matter is put in paragraph 43 of ENRC's submissions.

258. In the case of Period 1 only, although I found wrongdoing on the part of both Dechert and the SFO, the losses for that period are claimed only against Dechert. Consistent with that, the relevant breaches of duty are those on the part of Dechert other than the IDCs. However, the IDCs are relied upon by ENRC as being causative of losses incurred in Period 2, and indeed beyond. As already noted, ENRC's case is cumulative both with regard to Dechert's and the SFO's breaches of duty.

259. Next, in a broad sense, Dechert has accepted that its breaches of duty were causative of loss. It is rather that the losses incurred were, according to Dechert, very much less than ENRC contends. That is because of Dechert's argument that in the counterfactual, much more work would have still been Necessary than ENRC gives credit for.

260. The SFO, on the other hand, does take issue more directly with what losses are said to have flowed in each period (other than Period 1) because this forms part of its overarching contentions that its breaches of duty caused no loss at all, and further, the CI would have commenced even without the IDCs.

261. For those reasons, when dealing with the chronology, I concentrate on points made by the SFO although where there are particular matters raised by Dechert, I address them, too. I have, of course, already dealt with a number of general points made by the SFO, in paragraphs 172-231 above. Where I do so, I do not repeat those conclusions below if the same point is made in the particular context of a particular Period.

Period 1 - 17 August - 31 December 2011

262. Here, there are two classes of breach of duty committed by Dechert. The first comprises the August and December Leaks. The second consists of Dechert's wrong advice and unnecessary expansion breaches. As to the latter, only breaches committed after 25 September 2011 are relied upon because of the impact of limitation in relation to earlier breaches.

263. ENRC's first point is that in fact, only the August Leak is actually relevant. That is because, having caused the leak, Mr Gerrard was then under an immediate duty, as ENRC's solicitor, to disclose his wrongdoing back to ENRC. But had he done so, he would have been sacked on the spot. The same would apply, if one got to it, with the December Leak. However, ENRC says that there is no need to consider the other breaches because if Dechert would have been sacked on the spot and a reasonable solicitor appointed in its place, then there would not have been the opportunities for the later breaches to be committed and with them, the incurring of all the losses. ENRC is not saying that in this counterfactual, it can claim for the entire costs of the investigation; its claim accepts that there was still Necessary Work and Necessary Costs. What I understood ENRC be saying is that if it is right on its analysis of the August Leak, it is simply unnecessary to consider the causative impact of any of the other and later breaches.

264. However, this assumes that ENRC has chosen the correct starting point with regard to the August Leak. In my view, it has not. The breach constituted by Mr Gerrard's omission to report his wrongdoing was preceded by the earlier positive breach of duty in causing the leak. Logically and chronologically, any counterfactual must focus on the earlier, and primary breach. The counterfactual must be that Mr Gerrard had not caused the August Leak in the first place. If so, there would have been no duty to report a breach because on this hypothesis, there would have been none. It is therefore necessary to consider the other breaches, which, of course, ENRC does in any event.

265. As Annex A makes clear, notwithstanding a start date of after 25 September 2011, there were many breaches of duty on the part of Dechert committed in Period 1. There is no reason to suppose that they did not have causative effect.

266. The real difference between ENRC and Dechert here is the extent of the Unnecessary Work and Costs incurred in Period 1 along with WMT. This is something that I address principally in the Quantum section below. It does not seem necessary to me to consider, as a matter of quantum, the notional 5 separate claims for losses across all of the Periods. In fact, all ENRC

has done here is to allocate the relevant claimed Unnecessary Work and Costs by reference to when the relevant work was done. If I were to find below on Quantum (as in fact I do) that at least some of the work and costs claimed to be Unnecessary by ENRC were in fact Necessary, then, depending on the financial impact of that, the individual loss figures attributable to each Period would change. But it is not necessary for me to set out the changes per Period, as it were. It is sufficient if I revise the figures, or the approach to the figures, for the fees and costs incurred as a whole. And that is a reflection of the fact that it is unnecessary for me to attempt to work out the particular effect on particular sums incurred by ENRC caused by any particular breach. On that basis, there is really nothing further to say on Period 1 so far as Dechert is concerned.

267. As for the SFO, it takes a preliminary point on Period 1. This is that, if the correct starting point for the counterfactual was Mr Gerrard's failure to disclose his wrongdoing so that he would in fact have been sacked, the position of the SFO and what it did or did not do would be irrelevant from the causation point of view. However, this was not the correct starting point as explained above, so this point disappears.

268. Otherwise, and without prejudice to that first point, the SFO then makes specific points about the IDCs committed in Period 1. As ENRC only claims losses in respect of them which occurred in Period 2 and beyond, I shall discuss those further points below, in the context of Period 2.

Period 2 - 1 January – 31 May 2012

269. So far as Dechert's breaches are concerned, ENRC again relies on the relevant parts of Annexes A and B. By their very nature, many of them would be likely to have continuing causative effect while the retainer continued, in particular most of the wrong advice breaches referred to in Annex A, and the unnecessary expansion breaches referred to in Annex B. I agree with that.

270. So far as the SFO is concerned, for the most part, it repeats in this context the general points made i.e. the fact that the SFO's wrongdoing was not the cause of the SFO Letter or the entry of ENRC into the SR process (in a but-for sense), it wished to be proportionate, the Feedback Loop is wrong, and that information from the OMs eclipsed what had been revealed in the relevant IDCs. I have dealt with all of those general matters above.

271. ENRC contends that the Period 1 IDCs, together with Dechert's own breaches in Period 2 (and Period 1 cumulatively) caused the losses incurred in Period 2 and (with other breaches),

beyond. For this purpose, it has sub-divided Period 1 into 3 periods. The first is the period leading up to and including OM1. Before OM1 there were 3 relevant IDCs, namely DC1, DC4 and DC5.

272. As to DC1, the point is that Mr Alderman learned that Mr Gerrard had been involved with the August Leak (see J/481). As I found in J/485, Mr Alderman should never have dealt with Mr Gerrard at all at that stage and in those circumstances. The fact that he did, and would return the favour (J/483) obviously encouraged Mr Gerrard to think that he would have his own channel of communication to the SFO, which in fact happened. The proof of this is the occurrence (among others) of DC4 and DC5. I held that the relevant statements made by Mr Gerrard at these DCs with his references to a "big problem" at ENRC and the conflicts within it (J/523, 527, 536 and 551) were designed to pique the interest of the SFO and "up the ante" – see J/533 and 830. Of course, Mr Alderman himself was at the DC4 meeting.

273. The SFO makes the point that Mr Alderman already had an interest in ENRC before these DCs. ENRC accepts that the SFO Letter could not have been written simply off the back of DC1 and the August Leak (J/1678-1679). But this hardly means that Mr Alderman's interests could not have been piqued very significantly by the fact of DC1 and what he learnt in (or from) DC4 and DC5.

274. I also accept that it was unusual for a Director of the SFO to have been directly involved at this stage (I said it was odd, in relation to DC11) but it would have been equally odd if not more so, right at the beginning.

275. Then Mr Alderman attended OM1. It is hard to see why, unless his interest had indeed been stimulated by DC1, DC4 and DC5. The tone of what he said was bound to have had a significant impact on ENRC and also encouraged Mr Gerrard to think that the SFO would deliver the kind of message he wanted. That is because Mr Alderman said that the SFO was concerned with ENRC at Corporate and Director levels and that it should take the matter seriously. He said twice that the SFO could not guarantee that it would not take enforcement action.

276. I accept that as a matter of obvious common sense, this would have made any client attending such a meeting feel very concerned. There was a qualitative difference between what was said at this meeting and the more limited statement made in the SFO Letter. As to that, the SFO says that there is no evidence that OM1 was perceived to be threatening by anyone attending on behalf of ENRC. However, in my judgment, it is completely unrealistic to

suppose that what was said at OM1 would not have concerned ENRC and also that it would not have made it easier for Mr Gerrard to say, in the light of it, that his advice should be followed in order to appease the SFO whose interest ENRC have now observed at first hand. All of this was the commencement of the Feedback Loop.

277. There is another, more fundamental, point here. This is that as a matter of causation and as I found, Mr Alderman should never have dealt with Mr Gerrard as he did in DC1. Right at the start, to the extent that the SFO wished to have dealt with Mr Gerrard it should have done so only in OMs or at least, when dealing with him alone, there was clear written evidence of his authority to speak, given what had happened at DC1. But on this basis, none of the DCs after DC1 would ever have occurred. The whole approach of Dechert, ENRC and the SFO would have been different. Again, of course, there would still have been the question of identifying what work and costs would still have been Necessary; but on this analysis, the impact of all the later IDCs become somewhat irrelevant. On this analysis, DC1 was itself causative sufficiently of the whole loss claimed by ENRC subject to the question of what was Necessary Work and Costs.

278. Nonetheless, as already stated, ENRC has of course dealt with all of the IDCs and the other breaches of duty by Dechert, as do I.

279. The next sub-period is that leading up to and including OM2. This encompasses DC6, DC7 and DC8. Of course, it also encompasses ENRC's decision to enter the SR process on 9 November 2011. As to that, I held that this was not something which, but for the SFO's wrongdoing up to that point, would not have occurred. Indeed ENRC's claim for its losses does not assume a counterfactual whereby there was no decision to enter the SR process. The real question, however, is how ENRC would have dealt with that process and yet again, the work and costs that were Necessary and how, of course, the SFO would have acted.

280. At DC6, DC7 and DC8, there were further damaging pieces of information conveyed by Mr Gerrard to Mr McCarthy and Mr Thompson (the contents of which were emailed to Mr Alderman in the case of DC6 and DC7) with the references to open "red flags", "lots to tell" and "truly shook the company" which was "very worried" and so on. See J/566-582 and 587-601. Also, Mr Gerrard told the SFO that its tactics (including what was said at OM1) had worked in getting ENRC to engage.

281. The obvious consequence of this for Mr Gerrard was that it did indeed embolden him further - the SFO continued to give him a private channel for his damaging remarks and it would

obviously have given him more confidence to push ENRC to accept his advice about the scope of the investigation.

282. I have already made reference to what the SFO said at OM2, in the context of the point made by the SFO that it had always wanted any investigation to be proportionate. See paragraph 209 above. The remarks about an enquiring approach and what ENRC might dig up must themselves have been influenced by DC6, DC7 and DC8. Again, one result would be that ENRC was likely to have been even more receptive to Mr Gerrard's assertions that the investigation should cover various things (especially on Africa) because this is what the SFO would want.

283. Here, the SFO makes the point that nonetheless, it had already amassed a considerable amount of information by December 2011 such that the IDCs really made little if any difference. I have already dealt with that general point at paragraph 210 above. I should also refer to paragraph 33 of Ms von Dadelszen's WS where she said that they had very little visibility as to what was going on within ENRC. Of course, Mr Gould, Mr Thompson and Mr Alderman had more information, but that was essentially coming from the DCs. Ms von Dadelszen did herself gain some further information but this was through DC9 on 13 December 2011 (see below).

284. The third sub-period is that leading up to OM3 on 21 December. DC9, DC10 and DC11 occurred during this period. I dealt with those DCs at J/605-630. The unauthorised statements there included ENRC putting pressure on Dechert as regards scope, suggesting it was trying to limit the scope of the investigation, and a split within ENRC; there was also an "attritional battle" with ENRC with its board changing its mind regularly and a problem with UN sanctions breaches. I said at J/1253 that

> "Among other things, DC10 went into detail on Africa with Mr Gerrard referring to CAMEC, Camrose, Mr Rautenbach and UN sanctions breaches. It will be recalled that Ms von Dadelszen's list of discussion topics for OM3, prepared after DC10, included those matters."

285. Ms von Dadelszen agreed in cross-examination that it was possible that Mr Gerrard was trying to ensure that the investigation was as wide and as broad as he wanted it to be and that the SFO would support him in that.

286. Although OM3 was to determine the scope of ENRC's investigation, not much was actually fixed in detail. The SFO did say that it did not expect ENRC to re-do due diligence but it expected an investigation into whether ENRC had turned a "blind eye" to unlawful conduct. There was no criminal offence as such (see J/942). I think, as ENRC contends, it is a fair inference that a remark like that had been prompted by what had been said by Mr Gerrard at

DC8 - DC10. In addition, I pointed out the lack of real detail on scope set out at OM3 - see J/1255, 1331 and 1335-1337.

287. In connection with OM3, the SFO has also pointed out what information was communicated to it at that meeting. This included investigations revealing a potential problem in Russia, a whistleblower revealing a fraud involving senior people in the company, unusual payments to intermediaries in Russia and/or Kazakhstan, and bizarre payments in relation to Camrose. Also that the Africa investigation would include large loans or payments. In other words serious or potentially serious matters were being openly disclosed. I see that, but first, the question remains whether OM3 (like other OMs) would have happened or happened in this way, without the previous IDCs (and with or without the Other DCs), which is very doubtful. Second, how much the disclosures at OM3 were considered as of real interest to the SFO in terms of where it wanted to get to in relation to the SR process (or indeed a criminal investigation) is also very doubtful. In this regard, see also my observations about OM4 at paragraphs 293 - 294 below.

288. In my judgment, and looking at Period 2 generally, all of the IDCs committed by the SFO here must have and did contribute causally to the expansion of the investigation going forwards. The SFO's own concerns and interests were clearly highlighted and in turn this led to messages of the kind given to ENRC at the OMs, which in turn allowed Mr Gerrard to expand the scope of the investigation. In particular, where he advised that the SFO would expect something, it would carry authority.

289. As already explained in paragraphs 192 - 204 above, this is why the fact that ENRC was ignorant of the IDCs at the time is irrelevant.

290. The SFO in this context again makes the point about the information it had anyway, which therefore diminished or removed the effect of what was said in the IDCs. I have dealt with this at paragraph 210 above, and in particular, in the context of the significance of what was said at the OMs, at paragraphs 211 - 213 above.

291. I accept for this Period (and indeed the others) ENRC's point that (a) the SFO's wrongdoings had a sufficiently causal connection with ENRC's losses, and (b) the fact that the SFO breaches causally contributed to the losses, along with Dechert wrongdoings in relation to the IDCs and otherwise, both concurrently and successively, does not mean that the SFO's breaches of duty were not also an effective cause of the loss.

Period 3 - 1 June - 30 November 2012

292. Here, ENRC contends that the losses incurred in this period would not have occurred but for DC13 and DC15, along with Dechert's own breaches in Period 3 and again, the ongoing effect of the breaches of both parties in prior periods. DC13 was committed in Period 2, but strictly, DC15 was committed at the beginning of Period 3 itself (i.e. 15 and 18 June) but it is still put forward by ENRC as causative of the Period 3 losses, no doubt on the basis that it was at the start of a long period of loss.

293. Before going to DC13, I should refer to the fact that the SFO made many references in its oral submissions to the information communicated by Dechert's presentation at OM4. This referred to, among other things, members of staff saying that documents had been falsified in relation to the Education Allegation, intermediaries and stripping, investigations due to whistleblower allegations, forensic accountants' investigations on Camrose and CAMEC acquisitions and promissory notes on the Camrose acquisition, and Africa red flags. Mr Colton KC pointed out in particular that in answer to a question from Mr Gould as to whether the promissory notes were bearer notes (i.e. payable to whoever was in possession of the bearer note at the time as opposed to a named payee) it was confirmed that they were. Mr Gould explained that he did not think anyone used bearer promissory notes any more and raised some concerns around that. Mr Colton KC made the point that the information that the promissory notes were bearer notes was new.

294. I see all of that, but from the point of view of the SFO, presentations such as this up to then had not appeared very useful. See first, Mr Thompson's view of this and other presentations which I quoted at J/633; the upshot being that while they hinted at wrongdoing they lacked specificity as the basis for a civil settlement. It had to be shown that money had flowed into ENRC derived from crime. See also Mr Thompson's note of OM5 when he said that nothing of substance had been reported yet.

295. It was during the DC13 call on 9 May that Mr Gerrard told Mr Gould that ENRC was doubting the extent or thoroughness needed for the investigation and there was a real reluctance to allow Dechert to look at the London and Africa servers. Even by itself, this was suggesting that ENRC was not going to be as forthcoming as the presentation at OM4 had suggested. As Mr Gould accepted in evidence, Mr Gerrard was trying to get the SFO to emphasise certain points in its future messages to ENRC.

296. OM5 followed a day later. I noted at J/647 that what was expressed by Mr Dalman in terms of ENRC giving its full support to an investigation was itself inconsistent with what Mr

Gould had been told by Mr Gerrard the day before. As I observed in J/894, the SFO's receipt of information from Mr Gerrard at the DCs affected how they presented matters at OM5 and OM6. In that context, DC13 must have affected the messages given to Mr Dalman at OM5.

297. OM6 had been fixed for 18 June. Shortly before that meeting, the 18 June Letter was sent by Mr Thompson to Mr Gerrard. I cite this at J/726. It reminded ENRC of:

> "• The need for a frank and thorough formal report of any wrong-doing that has been discovered.
>
> • The requirement that the SFO is satisfied that the scope of the investigation has not been restricted.
>
> • The Board of Directors have demonstrably committed to the process."

298. I held that the 18 June Letter had been sent as a result of a pre-agreement between Mr Gerrard and Mr Thompson at DC15 which took place over two calls on 15 June and one call on 18 June 2012. I also held that it was, from the point of view of Mr Thompson, disingenuous. At OM6 itself, the SFO said that CAMEC was of interest to it and that it was of importance to the SFO if ENRC had been wilfully blind. Mr Thompson said twice that ENRC was in the last chance saloon, and Mr Gould said that there would be a raid on ENRC's premises if data was not secured, and that if the investigation was restricted in scope, then the inevitable outcome would be a recommendation for a criminal investigation. I found that these messages had been intended by both Mr Gerrard, who initiated them, and the SFO, who facilitated them, to "up the ante" and "put the wind up" ENRC and thereafter to help Mr Gerrard to exert pressure on his clients to "play ball". See J/735-739, 743, 745-747 and 1282-3.

299. Those messages had the desired effect because of Mr Gerrard telling the SIC afterwards that Camrose, CAMEC and Chambishi were all in scope and the SFO wanted to track all the transactions. It is inconceivable that Mr Gerrard did not report back on OM6 and in the terms in which the SFO (at his behest) had expressed its views. At this meeting, Mr Dalman said that this was not about pleasing Mr Gerrard, it was all about pleasing the SFO, and ENRC would be raided if it did not start to cooperate. He, of course, had already been primed by the emails which Mr Gerrard sent to him on 12 June after the latter had received Mr Thompson's email, and Mr Gerrard's emails to Mr Dalman were themselves disingenuous - see J/733. The messages then delivered at OM6 and indeed the 18 June Letter would have appeared to Mr Dalman to confirm the misgivings which Mr Gerrard had expressed earlier.

300. The extent of the disingenuous nature of the dealings between Mr Thompson and Mr Gerrard, for the benefit of his clients, was of course demonstrated at the open call on 25 June when Mr Gerrard said to Mr Thompson that "no one had understood where the SFO was

coming from" in relation to the 18 June Letter, and that Mr Gerrard had been unable to explain to his client why the SFO's attitude appeared to have hardened. See J/750.

301. Equally, when Mr Zinger later challenged the scope of the required investigation, Mr Gerrard sent an email on 4 July 2012 saying that Dechert had reviewed Mr Zinger's amendment to the workplan and were concerned that he appeared to be "at odds with our understanding as to what the SFO is expecting as to scope of the review". He went on to say that "such a significant narrowing of the scope runs the very real risk that the SFO will lose confidence in the company's ability and willingness to provide a full and frank report. The consequences of this will be the withdrawal of the civil process and the commencement of a criminal action." He later reminded Mr Zinger that, as his own note of OM6 confirmed, the SFO made clear that ENRC was in the "last chance saloon".

302. Mr Gerrard then sent a copy of his email to Mr Zinger (which itself refers to what was said at OM6), along with Dechert's note of OM6, to Mr Dalman, saying this:

> "I have been becoming increasingly concerned with the way in which the investigation is progressing. I set out below my principal concerns:
>
> 1. We understand that Victor and Beat are influencing or directing the investigation. We advise that immediate changes are made to the Special Investigation Committee. This will ensure that the investigation is carried out with the level of independence that the SFO expects.
>
> 2. The scope of the investigation is being narrowed to a level which will not be acceptable to the SFO. We believe that the SFO will be concerned that the company is not willing to fully investigate matters it raised.
>
> 3. We are not making the appropriate progress to access your commercial lawyers and/or their documentation: (a) Jones Day - no access and no Chambishi documentation provided; (b) Herbert Smith - written report promised by them and additional documentation requested on 9 February 2012 and 16 March 2012 not provided.
>
> 4. We have not yet received key documents from Beat and Victor. I have grave concerns that the company runs the real risk that the SFO will lose confidence in the company's ability and willingness to provide a full and frank report. The consequences of this will be the withdrawal of the civil process and the commencement of a criminal investigation."

303. There was then the subsequent SIC meeting on 9 July. At this meeting, Mr Dalman effectively rejected the view taken by Mr Zinger as to narrowing the scope of the investigation, which is hardly surprising in the light of what he understood to be the hardening attitude of the SFO, and Mr Gerrard's warnings about that.

304. Pausing there, the SFO contends in paragraphs 13 and 14 of its SOC that absent DC13 and DC15, it would have made similar comments anyway (apart from the reference to the raid), because of the concerns which it had by that time. I do not accept this. It is obvious from my findings and in any event it is a matter of common sense, that DC13 and then DC15 clearly brought about the 18 June letter and then the particular comments made at OM6. It is correct

that Mr Thompson had emailed Mr Gerrard on 12 June asking how things were progressing and to fix a meeting for the latest findings. But the tone of that restrained email is in contrast to the 18 June Letter and what was said at OM6. Indeed, as to the latter, Mr Thompson accepted that Mr Gould's comments were overblown and complete nonsense. Mr Gould himself accepted that he did not think the SFO would have been able to secure a search warrant at that point. The fact that it is correct that there were delays in producing the report (which had been promised for June 2012) is an insufficient basis to say that the SFO would have made the same comments in any event.

305. The entire chronology of DC13, DC15 and OM6 reveals the extent to which the SFO was actively facilitating the messages which Mr Gerrard wanted to be communicated to ENRC, as he requested. Their result was indeed a perceived "hardening" of the SFO's stance. It is in my view hopeless to suggest that absent DC13 and DC15, the SFO would have conveyed messages to the same effect. What also follows from all of this is that it cannot be said that, as a matter of factual causation, the consequent willingness of ENRC to expand the investigation as Mr Gerrard wished was caused simply by Mr Gerrard. He needed the co-operation of the SFO, and the SFO provided it.

306. There are points raised by the SFO here also as to reasonable foreseeability. I will deal with those in context when I deal with that subject at paragraphs 514 - 533 below.

307. At this juncture, it is also worth recording what the SIC agreed at the meeting on 9 July. CAMEC would be included in the investigation along with Camrose and Chambishi. So far as CAMEC was concerned, I noted at J/1272 that Mr Dalman had said at OM5 that there would be the focus on CAMEC as well as Camrose and what was in fact Chambishi, even though it appeared that CAMEC had been ruled out by the SIC the previous day. And as far as Dechert was concerned, the approach by 7 June, according to Mr Ehrensberger, was that CAMEC was to be reviewed "just in case". See J/1278. On 15 June, Ms Black had informed Mr Zinger that Dechert had informed the SFO that they would look at Camrose and Chambishi because of related party transactions, but there was also a report in relation to CAMEC. Just two days before OM6, Mr Ehrensberger was still questioning why CAMEC was included. Indeed, at OM6 Mr Gerrard enquired whether the SFO was interested in CAMEC as he thought it had been dropped out of the scope. Given DC15, this was a question which could probably have only elicited one answer, namely in the affirmative. In fact, ENRC accepts that there was Necessary Work in relation to CAMEC, namely a review of the due diligence process for its acquisition. But the SIC agreed on 9 July to approve a

broad scope of the investigation, with reference to what the SFO would expect, and which would include how each acquisition came about, due diligence and valuations in relation to each and any independent valuations and the source and destination of the acquisition monies and loans made by ENRC. This was in addition to the collection of substantial quantities of data and further images of data held in London and security as well as imaging the Africa data, collecting material from HSF and reviewing the documents within the datasets.

308. Dechert broadly agrees with this except that it says that the transfer of data from B2 to FRA was partly because B2 was unsuitable. As to that, I have dealt with it in the context of the costs of B2 and FRA at paragraphs 735 - 736 below. Dechert also says that this particular meeting did not approve the review of all data imaged, which ENRC accepts is correct at that point, but there were subsequent authorisations such that by the end of the Retainer, Dechert had reviewed over half a million documents. Finally, Dechert said that the relevant decisions were also caused by independent decisions taken by Mr Dalman. But Mr Dalman's own decision-making process was itself clearly influenced by what Dechert was saying, what the SFO had said at OM6, and Mr Gerrard's references to what the SFO would expect; see above and J/1095 and 1097.

309. For its part, and as already presaged above, the SFO point out that Mr Dalman had not given any evidence that he had been influenced by SFO wrongdoing at the time. But that, of course, is because he was unaware of the wrongdoing, as opposed to the messages from the SFO given to him openly, or as conveyed to him by Mr Gerrard whose advice he would accept. This is all part of the Feedback Loop. The SFO was aware that Mr Dalman would be responding to what the SFO had said, because his reaction to the 18 June Letter had been reported back to the SFO at the meeting on 25 June.

310. In the light of all of the above, I accept ENRC's contention that in the counterfactual, the SIC would not have approved on 9 July, the broad scope of the investigation in relation to each of the three acquisitions or the substantial expansion of the collection and review of electronic data or the expansion of the investigation to include or confirm the inclusion of CAMEC (although, as already noted, ENRC accepts that limited work in relation to CAMEC can be considered Necessary). There would also have been a more limited investigation into Chambishi which would simply give the SFO comfort about the price paid where there had already been two independent valuations, rather then re-doing the due diligence and doing the other matters. This is the basis on which ENRC contends that in reality (because that work was so limited) there would not have been any investigation as such into Chambishi.

311. A further point made by the SFO is that in relation to the unnecessary expansion breaches on the part of Dechert, ENRC relied upon the fact that the SFO stated at OM2 that it had wanted a proportionate exercise. That does not assist in the present context because on my findings, the SFO went along with Mr Gerrard's desire to have a message sent to ENRC to the effect that the investigation should be broad. See also paragraph 209 above.

312. OM7 took place on 20 July. At this meeting, Mr Dalman said that he had now "set the tone from the top", Mr Ehrensberger and Mr Hanna had been removed, he was committed to transparency and so on. He later thanked Mr Gerrard for his assistance in all of this; see J/754 and 757. But again, I do not see this as some independent supervening act on the part of Mr Dalman. He had been the recipient of the various messages from the SFO not long before (and which themselves affected the conduct of the 9 July SIC meeting) as a result of DC13 and DC15, which were then built upon by Mr Gerrard. I noted at J/1294 the fact of Mr Dalman's heavy reliance on Mr Gerrard's advice at this stage.

313. However, the SFO says that this being the position enunciated by Mr Dalman, when he resigned (on 23 April 2013), that itself would have been very significant for the SFO. I do not see that as a matter of chronology, because that resignation came after the SFO had taken the decision in principle to launch a CI; but in any event I have dealt with this matter in the context of the CI at paragraphs 471 and 503 below.

314. A different point made by the SFO is that, as with OM5 for example, there was at OM7 an extensive presentation on both Africa and Kazakhstan which included reference to the $35m Metalkol payment (summarised at J/755-756). And this was therefore the sort of information which (a) would have driven the SFO to require a more extensive investigation in any event than ENRC's counterfactual supposes and (b) would have been a factor leading to the later decision to launch the CI.

315. As to that, first, the decision to launch the CI was obviously very much later. Second, the SFO's own position at the end of 2012 was that without the "Dechert material" i.e. the report which had not yet been produced, there was little to go on, other than supposition and little chance of getting much in the way of evidence. See Mr Thompson's email of 18 December 2012 to that effect referred to at J/1361. It is worth noting that this email was in the context of both Kazakhstan and Africa – see Mr Gould's note on providing the s72 undertakings dated 18 November 2012, and the terms of the draft undertaking itself which was in entirely general terms and not confined to Kazakhstan material.

316. I now deal with the Depel Interview. This is relevant for two reasons. First, there is an issue between ENRC and Dechert as to its consequences in the context of Mr Gerrard's breach of duty in relation to the Depel Interview. Second, the SFO relies on it in the context of its general case on causation (see paragraph 13 (6) of its SOC), and then again in the context of its decision to open the CI (see paragraph 30 (8) of its SOC). It is convenient for me to deal with all aspects of it here.

317. Mr Depel had been suspended from ENRC on 11 April and on the same day, he submitted a grievance. He was interviewed by the SFO on 16 May 2012 pursuant to s2A of the Criminal Justice Act 1987 ("the CJA"). He resigned from ENRC on 15 June 2012 shortly before a disciplinary hearing.

318. I found (and Dechert admitted) that Mr Gerrard knew in April 2012 that Mr Depel was going to be interviewed, that the SFO was intending to serve him with a s2A notice, and later that Mr Depel had in fact been interviewed, and that Mr Gerrard recklessly failed to disclose any of this to his client. At J/240, I said that it was hard to see why this breach was not in fact deliberate as opposed to reckless and at J/242, I said that if Mr Gerrard had not instigated the interview he had certainly facilitated it.

319. Dechert also accepts that had these matters been disclosed to ENRC, Dechert would have immediately been sacked. But it does not accept that, had ENRC been told of the impending interview, it would have tried to dissuade Mr Depel from doing it or sought to prevent Mr Depel disclosing any privileged information to the SFO if he did. I found that although there was no breach of duty by the SFO here, there was significant privileged information disclosed by Mr Depel in the course of the interview (see generally J/657-720).

320. As to this, Dechert says that these matters are not significant because Dechert had already advised ENRC of the risk of Mr Depel being interviewed, but ENRC had ignored it. As to this, ENRC points out that Dechert had actually done a detailed interview with Mr Depel on 14 February 2012, but it was never disclosed to ENRC. So that information was available, or it should have been. Second, Mr Ehrensberger had agreed on 16 March to a debrief with Mr Depel, once it was known when he would actually leave. That did not happen, but AG interviewed him on 31 May 2012. Unbeknown to it or ENRC, of course, Mr Depel had already been interviewed by the SFO.

321. So if the suggestion is that, had ENRC known that Mr Depel was going to be interviewed by the SFO, they would not in fact have taken preventative steps or debriefed him, I reject that.

A reasonable solicitor in Mr Gerrard's position, aware of an impending SFO interview, would obviously do that.

322. Dechert's breach here did have causal impact because, had Mr Gerrard disclosed the fact of the interview as he should have done, and his prior knowledge of it, Dechert would have been sacked as already noted. Perhaps more directly, however, knowledge on the part of ENRC that the SFO was interviewing people like Mr Depel would have cast doubt on the usefulness of the "running commentary" approach because it would be seen that the SFO was already "fishing" for further information in the light of what it knew.

323. On any view, I accept that Dechert's breach here contributed, along with all the other breaches, to the Period 3 losses (and beyond).

324. The next question relates to the contribution of the Depel interview to the SFO's sum of knowledge, quite apart from the IDCs. Here, one turns to Mr Thompson's is contemporaneous take on the Depel interview. To repeat J/669:

> "At pp7-8 Mr Thompson set out the areas where the information provided by Mr Depel was consistent with other information held by the SFO including in relation to difficulties expressed by Mr Gerrard. Mr Thompson then set out at p8 points that might detract from Mr Depel's credibility. He concluded thus:
>
> > "I have been involved in the meetings with ENRC since November 2011, and have reviewed all the intelligence and open source material we have. The interview of Mr Depel is a major development. Overall I regard the information he has provided as credible, as it is generally consistent with the other information available to the SFO.
> >
> > The choice for the SFO is now whether to continue with the self reporting process. If Mr Depel is even partly correct, in my view it is inconceivable that a civil settlement would be an appropriate outcome. It seems to me that the overarching question is whether ENRC should be allowed to continue to access the UK capital markets when in reality those controlling the company appear to regard the UK's listing and corporate governance rules with contempt. It will not be an easy case to investigate and prosecute, but I recommend that the Director now considers adopting the case as a criminal investigation."

325. As to that, Mr Thompson's evidence for the Phase 1 Trial was rather different. In his second WS, he said this:

> "52. Had Mr Depel proved to be a critical witness for the purposes of deciding how to engage with the self-report process, or deciding whether to open a criminal investigation, then we would have interviewed him again and then drafted a witness statement so that he could give evidence on the record. In the event, we never took a witness statement from Mr Depel throughout the time I was involved in the ENRC matter, which ended with the opening of the criminal investigation. We came to see that the account he had given us was full of broad brush assertions about people, some of which amounted to little more than company gossip. What he told us was not very useful because it was not specific enough, beyond him telling us of his dislike of ENRC employees and management. We were also very aware that, as a whistleblower, his answers could be influenced by his feelings towards ENRC. .In hindsight I can say that he did not really add much value to the case as a whole. The information he provided did not in fact lead to a criminal case being opened, contrary to the suggestion in my memorandum of 22 May 2012. As I have said above, Mr Gould was keen to continue the self-report process, and he apparently took the view, with which I have subsequently come to agree, that Mr Depel's information did not materially change the case for a criminal investigation. The criminal investigation was not opened until April of the following year, and Mr Depel's disclosures did not have any bearing on the decision to open a criminal investigation almost a year later…

> 54. Having reviewed these documents [identified in paragraph 53] , I am fortified in my recollection that Mr Depel's interview did not have any bearing on the decision to open a criminal investigation.
>
> 55. The email which I sent to Mr John dated 23 April 2013 was intended to set out for him the key reasons for acceptance so that he could prepare a record of the decision. Those reasons are reflected in the Case Acceptance Notification. The six key reasons for acceptance to which I refer in my email do not appear to have anything to do with Mr Depel's interview. Further information had become available to the SFO over the course of the 11 months since Mr Depel's interview and matters had moved on. The suggestion that Mr Depel's answers in that interview influenced a case acceptance decision taken nearly a year later makes no sense to me."

326. All of that said, I did not entirely accept this change of position. At J/680 I said:

> "Mr Thompson was also asked about the significance of the interview; as just noted, he recommended that a criminal investigation be started, saying that the interview was a major development. Mr Thompson said that with hindsight, and as matters turned out this was not really the case. I think that here, there is an element of Mr Thompson now seeking to downplay the significance of the interview especially in the context of conceding that at least in some respects he had been seeking or receiving privileged information. That said, it obviously was not viewed as sufficient to start an investigation because there was no investigation at that stage."

327. It is of course the case that the Depel Interview did not feature at all in the Case Acceptance Notification for the CI almost a year later, as Mr Thompson noted in his paragraph 55.

328. So on any view, I do not see how the SFO can really rely upon the Depel Interview as a reason for opening the CI (i.e. as distinct from DC23 and 24). I deal more generally with the CI below.

329. So far as the SFO's general attitude towards ENRC and the investigation in May 2012, the question is whether the Depel Interview would have made it resistant to changes in ENRC's approach to the SR process absent the IDCs, because of the Depel Interview (with or without its other sources of information relied upon). It is a fair comment to say that on the specifics of Africa, Mr Depel had made some points which were in fact favourable to ENRC, for example that he had not seen much of interest on CAMEC, Mr Rautenbach and Mr Gertler. See page 36 of the interview notes where he concluded that it is just "penny ante".

330. The impression I have is that whatever Mr Thompson may have thought at the time about the Depel Interview, it did not really feature much thereafter in the SFO's thinking. And it did not, in my view, have the power of the damaging disclosures made by Mr Gerrard in the IDCs.

331. In terms of causation, and this is not in essence denied by Dechert save on questions of quantum, all of Dechert's own breaches were continuing over this period and contributed to the losses. See the breaches set out at Annex A and Annex B.

Period 4 - 1 December 2012 - 13 March 2013

332. Apart from all the breaches dealt with so far, including Dechert's own breaches in Period 3, ENRC says that DC19A contributed to its losses here.

333. DC19A occurred on 20 November, so right at the end of Period 3. What happened was that Mr Gerrard called Mr Gould, who was on a train, at 5:10pm and they spoke for about two minutes. It is clear that they were then unable to continue the conversation on the phone and Mr Gould then sent the text which read:

> "Sorry bad signal on the train. DGCBQC has shown he ignores or passes such requests for meetings etc back to the case team. We should have Alun Milford with us when we meet next week. That move is my suggestion to the 9th floor to get them on board as to how I believe this could be resolved—2 parts, one non pros and one pros (although the 2nd part may be more than one defendant). I believe AM will take a reasonable stance when the material is viewed; it is, in my opinion, after all not material we are ever going to get in an evidential format. Happy to chat later if you/client need more comfort—should be available from about 6.45 or so (or tomorrow afternoon in the office). DG (the non CBQC one!)."

334. I held that Mr Gerrard was in breach of duty in not reporting this text (which emerged as part of the additional disclosure on Day 24 of the Phase 1 Trial) to his client. This was because of Mr Gould's frank references to the SFO's thought processes about material which, in his opinion, they were never going to get in evidential format, and the attitude of Mr Milford. See J/782.

335. As for Mr Gould, quite apart from the breach of his own duty to the SFO and his Independence Duty towards ENRC (see J/785), I also said that Mr Gerrard's had been induced by the SFO's breach of duty here.

336. By this stage, of course, the pattern of private unofficial conversations between Mr Gould and others from the SFO and Mr Gerrard was well established. See J/879 and 883. Indeed, had there not been a bad signal on the train, Mr Gould would no doubt have said the same thing to Mr Gerrard as part of their conversation on the phone.

337. Of course, the breach on the part of Mr Gerrard here was different from those involved in the other IDCs. That is because, on this occasion, the breach was not Mr Gerrard imparting damaging information to the SFO, it was his omission to inform his clients of the information imparted to him by Mr Gould. Nonetheless, the inducement was, equally, Mr Gould's facilitation of the conversation, by being willing to have it, in the course of which or as a result of which Mr Gerrard would act in breach of his duty to ENRC by not disclosing what Mr Gould told him.

338. ENRC says that, had Mr Gerrard communicated the text to his client, then ENRC would have discovered Mr Gerrard's improper relationship with at least Mr Gould, and Mr Gould would

have been removed from the case and perhaps Mr Gerrard also. But more importantly from the point of view of causation and loss, ENRC would not later have provided the Kazakhstan report in unredacted form and it would have not disclosed what it did at OM8. It would also have stopped or reduced its participation in the SR process thereafter. All of this would have significantly reduced or avoided the work and costs incurred later i.e. in Periods 4 and 5.

339. However, the SFO and Dechert argue that in the case of this IDC, the counterfactual is different. It is that the text would never have been sent at all. That is because the text would not have been sent had Mr Gould supposed that Mr Gerrard would have passed it to his client. As a matter of fact, that must be right - see J/785. But if the text would never have been revealed to ENRC (because it would never have been sent) then the causal consequences attributed to it would not have occurred either.

340. I can see the attraction of this argument, but analytically, I do not think it is correct. Inducement of breach of contract is an accessory liability to the breach of duty committed by the underlying contract-breaker. The key event is the underlying breach of contract. That is why, in my judgment, the contract-breaker and the "procurer" would be liable in respect of the "same damage" for the purpose of the 1978 Act. But if that is so, then what is important for the counterfactual is the absence of the underlying breach. That is so, whether the breach is one of commission by Dechert i.e. communicating unauthorised information to the SFO, or one of omission i.e. not communicating important information about the SFO back to the client. Either way, Mr Gerrard was being disloyal. It is hard to see why the SFO should be liable, causally, in respect of the first kind of breach but not in relation to the second. So I agree with the counterfactual posed by ENRC, which is that Mr Gerrard would have received the text but would have passed it on to his client.

341. On that basis, the next question concerns the causative effect of DC19A. I have already referred to what ENRC contends here, above. Overall, the submission is that ENRC would have been much more circumspect about its dealings with the SFO, and this would have reduced or avoided the Unnecessary Work and Costs of Period 4 (and 5). However, of course, ENRC is not here relying solely on DC19A as the cause of the Period 4 losses. There are also the other multiple effective causes constituted by the other breaches of duty already referred to.

342. So far as DC19A is concerned, I can see that the information in the text would have caused ENRC to be more wary and limited in its dealings with the SFO. I do not accept, as the SFO suggests, that the intelligence about Mr Gould's view that the material would never be

obtained in evidential form was of no consequence. After all, Mr Gould also gave his opinion that Mr Milford would take a reasonable stance, presumably for the same reason (a lack of evidence) that Mr Gould had stated. Further, Mr Thompson himself had previously expressed a similar view; see his email of 18 December quoted at J/1361, as referred to in paragraph 315 above. I do not think that ENRC would have dismissed Mr Gould's view on the basis that it was not representative of others. It is true that Mr Thompson was now Mr Gould's superior, but ENRC would not have known that.

343. A further point made by the SFO is that ENRC's own lawyers would have been alive to the fact that in any event, the SFO could have used s2(3) of the CJA, even if it might have appeared that Mr Gould was ignorant of that. I follow that but it does not mean that the SFO's own perceptions, as shown by the text, should simply be ignored, in terms of further dealings with it.

344. I do not actually think that ENRC would have ceased at that stage to be part of the SR process. What is more likely is that the amount of work that was thought necessary in terms of an investigation and report on Africa would be less and I accept that the SIC and Mr Dalman would have welcomed advice from their solicitor that the scope of work could be less if so advised. While Mr Dalman had stressed that he wanted to be transparent, as already noted, that was conditioned by what Mr Gerrard had advised him and in the context of what Mr Gerrard said the SFO would expect.

345. Equally, by this stage, it is not clear to me that any report would or could necessarily be delivered in a restricted form so far as the use that the SFO could put it to is concerned. However, that is not really relevant for present purposes because this would not go to the incurring of the losses in Period 4 and I think the same is substantially true of the point that the information given at OM8 would have been in more high-level terms.

346. However, I do accept that DC19A did causally contribute to the Period 4 losses because it would have encouraged ENRC to take a more restricted view of the investigation work it really needed to do. It could and surely would have taken a stronger line with the SFO knowing that the evidential difficulties meant that it would be amenable to a reasonable settlement and it would have been more difficult for Mr Gerrard to continue to insist on an ever-broadening investigation.

347. That said, in any event (i.e. without DC19A), I also take the view that all of the breaches of duty thus far committed by (a) Dechert and (b) the SFO contributed causally to the Period 4

losses. It would be unrealistic to suppose otherwise. Concentrating on the SFO for the moment, its prior breaches, namely all the previous IDCs, were all part of a continuum so far as causation of the losses were concerned and their effect did not somehow stop at the end of 2012. Indeed, by this stage, Mr Gerrard had been able to get his client generally to do what he wished, even to the extent of requiring further work to be done on, for example, Kazakhstan which only served to delay the report which itself was already severely delayed. This continuum had been in place for over a year by the time of DC19A.

348. A final matter to consider here is OM8. As with other OMs, the SFO rely upon it in the context of the argument that even absent the IDCs, it would still have substantially the same information about ENRC which would have conditioned its attitude towards, for example, a more limited investigation proffered by ENRC. It also relies upon it in connection with the separate issue about the commencement of the CI which I deal with separately below.

349. OM8 took place on 28 November 2012. Dechert gave a PowerPoint presentation with 49 slides on Africa and two on Kazakhstan. There is also a detailed attendance note of the meeting from Dechert.

350. The SFO PowerPoint emphasised the change to the Board and management at ENRC and that Mr Dalman was truly committed now to the investigation and transparency, whereas he had not been in a position to do so before. The substance of the PowerPoint contained much detail on Africa and in particular on the CAMEC acquisition. As to that, there were slides concerning the Metalkol payment showing that the money going into the Metalkol account was documented but not the cash payments going out amounting to the $35m. This was new or expanded material on Metalkol that had not been available openly, as it were. In fact, this information was repeated in the SAR sent by Jones Day on 30 November 2012 to validate the Gertler buyout. In this document, it was said that there were two inconsistent explanations being offered as to the purpose of the withdrawal of the $35m which were the subject of an investigation by Dechert. It also said, however, that ENRC did not in fact have control or oversight of the Metalkol account and no employer or manager of ENRC acted as a director of Metalkol or a signatory to that account.

351. I would accept that the SFO now had some further information which did not have before but otherwise, the position was much as it was in relation to OM7. More generally, I think that the points already made about the OMs at 211 - 213 above apply here.

352. Overall, my conclusion on the Period 4 losses, as with each of the earlier Periods, is that I agree that the breaches of duty committed both by the SFO and Dechert relied upon by ENRC contributed concurrently and cumulatively to the losses incurred in this period.

Period 5 - 14 - 31 March 2013

353. This is for a short period of just over 2 weeks, from 14 March to 31 March 2013. The Unnecessary Work and Unnecessary Costs claimed amount to just under £1m together with some WMT.

354. As with previous Periods, ENRC contends that the breaches of duty in earlier Periods committed by Dechert and the SFO jointly i.e. the IDCs, and Dechert's own breaches of duty caused the losses incurred in Period 5, along with Dechert's breaches of duty in that Period.

355. In addition, however, ENRC relies on the publication of an article in the FT on 14 March 2013 ("the March Article"). This made reference to a "draft presentation to the SFO" on behalf of ENRC and, as I found, it was based on two documents which had been leaked by Mr Gerrard. I also found that the information in the March Article was damaging to ENRC. I held that Mr Gerrard was in breach of his duties to ENRC; see J/1463. This would also have been a case where he was in further breach of duty by not disclosing his own wrongdoing to his client; see J/1482.

356. The reason why ENRC relies on this particular breach is because of its argument that had Mr Gerrard disclosed his breach of duty in relation to being the source of the leaked material leading to the March Article, he would have been sacked on the spot. As a matter of fact, that is obviously true and indeed is common ground. However, from the point of view of causation of loss, the correct starting point is the prior and primary breach, namely leaking the material in the first place. The relevant counterfactual here would be the absence of the leak, in which case, there would be no breach of duty to report. This is the approach I have already taken in relation to the August Leak - see paragraphs 263 - 264 above. On that basis, it is hard to see what the March Article breach of duty really adds.

357. In this context, however, I have to deal with the following further matter. As part of my findings about the March 2013 leaks I held that there was a "powerful inference" from the matters I described at J/1449-1455, that Ms Caroline Binham, a journalist at the FT, had spoken to Mr Gerrard at a lunch with him on 6 March and that she had agreed to assist him by getting the relevant documents, one way or another, to Mr Murphy, who was the author of the March Article. Ms Binham was not called as a witness by Dechert.

358. Following the handing-down and publication, on 16 May 2022, of my Judgment following the Phase 1 Trial and on 31 May 2022, I received a letter from the editor of the FT, Ms Khalaf. It stated that Ms Binham was not a conduit for the leaked documents in question and neither Mr Gerrard nor Ms Binham was Mr Murphy's source. The letter did not state who the source was.

359. As a result of that letter, which I provided to the parties, Mr Gerrard, now separately represented, made an application ahead of the Phase 1A Trial that I should receive this letter in evidence and reconsider the whole question as to whether Mr Gerrard did indeed leak the materials that were quoted in the March Article. Dechert did not join in making that application with Mr Gerrard.

360. On 27 January 2023, Mr Gerrard's solicitors, Charles Fussell & Co. LLP, wrote to Ms Khalaf to ask whether Ms Binham and Mr Murphy would be prepared to sign short witness statements confirming the facts that had been set out in the earlier letter from the FT. There was no response from the FT, and so the solicitors sent a chaser on 27 February. On 3 March, Ms Khalaf sent an email to Mr Winter of Charles Fussell. In it she said that neither Ms Binham nor Mr Murphy proposed to provide witness statements or be "drawn into this matter further." However they did not resile from the information provided in the original letter. There was therefore no prospect that they would voluntarily give evidence and there was no suggestion from Charles Fussell that in the event that the matter was re-opened, they would be the subject of witness summonses.

361. That is the background to the application made by Mr Gerrard which I must now consider.

362. The first question is jurisdiction. While the Court has jurisdiction to alter a judgment before the relevant order is sealed, it has no jurisdiction after the order has been sealed. Here, I made two sets of orders. The first, made in both the 2017 and 2019 action and dated 16 May 2022 was to adjourn the handing-down hearing to a consequentials hearing to be fixed. The adjournment of the handing-down was expressly for the purposes of CPR 52.3 (2) (a) and paragraph 4.1 (a) of PD52A. I explain the relevance of those provisions below.

363. The second set of orders, again made in both the 2017 and 2019 actions, made reference to the Phase 1 Judgment handed down on 16 May 2022. I then made certain costs orders flowing from that judgment, together with detailed directions for the purpose of and leading to the Phase 1A Trial. I also adjourned again the hand-down of the Phase 1 Judgment to a date to be fixed following this judgment.

364. On the face of it, certainly the second set of orders of 4 August 2022 were made consequent upon the handing-down of the judgment. If this is correct, then I have no jurisdiction to entertain Mr Gerrard's application.

365. However, Mr Hain argues that there is no relevant order because no order granting "substantive relief" on the Phase 1 Judgment has yet been made. He also points to the fact that the handing-down of that judgment was adjourned.

366. As to the question of substantive relief, it is true that there could perhaps have been declarations put into an order dealing with the issues that I decided in the Phase 1 Trial, although the conclusory part of my judgment there was clear enough as to the findings I had made. What has happened in fact, is that the Phase 1 Trial has now led directly into the Phase 1A trial on the basis of the directions I made on 4 August 2022.

367. Mr Hain's position is that, as an order for substantive relief was not made, there remains a judgment in theory still capable of being altered. I do not accept this analysis. As it happens, here there was a costs order made on 4 August 2022. This could only have been made consequent upon the findings I made in the Phase 1 Judgment.

368. Mr Hain suggests that if there is no need for an order for substantive relief being made before the Court loses the power to alter its judgment, the losing party would find itself in a "no man's land" because it could not ask the Court to alter the judgment, but neither could it seek permission to appeal. However, that is not correct. Indeed, the application for permission to appeal must be made at the time when the "decision is made". See CPR52.3 (2) (a). That is when the judgment is delivered, not when any consequential order is made. If permission is not sought on that occasion, then the lower Court has no jurisdiction to entertain an application for permission at all. That is why the practice suggested by paragraph 4.1 (a) of PD52A is to formally adjourn the handing-down hearing to a later date so as to preserve the ability of the relevant party to seek permission later. Equally, the time for service of the Notice of Appeal, which is 21 days if not extended, runs from the date of "the decision" i.e., again, when the judgment is handed down; see CPR52.12 (2) (b). So the ability to seek permission is there from the outset. Thus there is no "no-man's land".

369. Mr Hain then says that even if a substantive order is not required, in fact, no judgment was handed down here, or at least its handing-down was not "perfected". This is because of the very order to adjourn the handing-down hearing. But the purpose of that is to facilitate an extension of time in which to seek permission to appeal, not in any way to delay the handing-

down of the judgment itself. If it were otherwise, it could not be said that the Phase 1 Judgment was handed down on 16 May 2022 - and thereby made public - at all. That cannot be correct. The handing-down of the judgment itself has been perfected.

370. For all those reasons, I consider that I have no jurisdiction to alter my judgment and therefore no jurisdiction to re-open the question of the March 2013 Leak. That is therefore an end to Mr Gerrard's application.

371. However, if I was wrong about jurisdiction, this is clearly not a case where the Court's power to re-open a judgment - itself very sparingly exercised - should be exercised. As the Supreme Court in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] 1 WLR 3223, put it:

> "The question is whether the factors favouring re-opening the order are, in combination, sufficient to overcome the deadweight of the finality principle on the other side of the scales, together with any other factors pointing towards leaving the original order in place."

372. In my judgment, there are no factors here which could begin to overcome that "deadweight":

(1) This was one very small part of a very long trial with numerous issues and it comes at the very end of the chronology of the parties' breaches of duty;

(2) At best, it could have been a contributing factor to an amount of loss in the region of £1m in a context where over £22m was claimed in the Phase 1 Trial for Unnecessary Work and Costs along with WMT, and with some further damages claims;

(3) Whether one concludes that in this context, the full rigour of the principles in *Ladd v Marshall* [1954] 1 WLR 1489 apply or not, the fact is that at no stage prior to the Phase 1 Trial, did Dechert seek to obtain evidence from Ms Binham or Mr Murphy. It is not sufficient now to say that this would have been pointless because they would not have agreed to be witnesses. Dechert could have decided to obtain a witness summons;

(4) What one would be left with, therefore, would be the re-opening of a trial now with three other parties (none of whom, in particular Dechert, supports this application), simply in order to admit a letter on the basis that it could constitute at least some hearsay evidence where the relevant parties would not be cross-examined on it. I agree with Mr Hain that the fact that the evidence is no more than hearsay does not mean it is necessarily worthless. He points to the important text from Mr Depel to Mr Gerrard dated 21 May 2012 which read "only u and 2 know about S2". Mr Hain submits that the Court found this to be credible evidence. However this was a rather different situation. The text was a contemporaneous document and one whose

contents Mr Gerrard accepted were accurate. Its importance lay in the fact that it emerged during the trial in a way which demonstrated that Mr Gerrard's earlier evidence was false;

(5) It is far from clear that the FT Letter would have had an important influence on the existing evidence; there were a number of factors which made the inference "irresistible" that Mr Gerrard was the source of the leak. It hardly follows that a letter of the kind sent by the FT, without any form of evidential backup, would or even might alter that inference;

(6) In addition, and as I have explained in paragraph 356 above, it is actually unclear what the March 2013 Article adds from a causation point of view;

(7) Given those matters, the potential significance for Mr Gerrard in having an opportunity to persuade the Court that it was wrong about the March 2013 Leak so that his opposition on this could be vindicated, carries very little weight;

(8) Accordingly, to re-open the Phase 1 Trial on the basis sought would be wholly disproportionate and unfair to the other parties and would disrupt the finality of what has been very substantial and complex litigation.

373. Accordingly, I refuse Mr Gerrard's application in this respect.

374. However, on the basis that the March 2013 Leak breach of duty does not really add anything, the question is whether all the other breaches of duty by Dechert and the SFO did. In my view, they all contributed causally, as before, to the losses claimed. In particular, given that Period 5 is effectively just a 2-week extension to Period 4, there is no reason to suppose that the causes at work for that Period would not also be at work for this final, short period, and for the same reasons as those given in my analysis of Period 4 above.

THE CRIMINAL INVESTIGATION

Introduction

375. As already noted, the issue here is formally stated as:

> "But for the SFO's allegedly wrongful conduct:..Would the SFO have announced a criminal investigation into ENRC in April 2013 or pursued an investigation thereafter?"

376. The SFO wrongdoing consists of DCs 23 and 24 but along with, and in the context of prior IDCs, including in particular DCs 8, 9, 10, 13 and 15.

377. As a matter of law, ENRC must show that this wrongdoing was an effective cause of the SFO's decision to commence the CI which it took in principle on 17 April and confirmed on

19 April 2013 ("the CI Decision"). The wrongdoing did not have to be the only cause or even the dominant cause (see paragraphs 127 - 138 above). As it happens, ENRC's primary case is that the SFO's wrongdoing was the "but-for" cause of the CI Decision by itself. But it does not have to go that far.

378. The SFO denies that its wrongdoing was the or an effective cause. It says that, without the relevant IDCs, the CI Decision would still have been made when it was, or possibly a little later.

379. It might have been thought that this issue would be relatively easy to resolve. After all, the actual decision-maker, Sir David Green, gave evidence at the Phase 1 Trial as did Mr Gould, Mr Thompson and Mr Milford, who were also involved in the decision, and all of whom attended the meeting on 17 April. However, their WSs suggested that in large part, they had no independent recollection of the making of the decision. I recite here the relevant parts of their WSs:

(1) Sir David Green begins at paragraph 33 of his WS to say that he cannot remember making the decision to open the CI but he is then referred to a number of documents. These included a document prepared by Mr Gould entitled "Case Evaluation Board: Recommendation to the Director" ("the CEB"), his own notes of the meeting and an email from Mr Nigel John which enclosed the "Case Acceptance Notification" ("the CAN") and then says this:

> "34. Our system for deciding whether to open a criminal investigation was that there would be a Case Evaluation Board, comprising Mr Milford, Geoffrey Rivlin and the case team. They would make a recommendation to me and I would decide whether or not to accept it. The test to be applied is whether the Director has reasonable grounds to suspect serious or complex fraud. In this case it appears that I actually attended the Case Evaluation Board myself, which was unusual. I cannot remember why this was but I assume, from my reading of Mr Thompson's email to Mr Milford of 12 April 2013, that I attended because it was felt that the matter was urgent and needed to be progressed.
>
> 35. Prior to attending the 17 April 2013 meeting, I would have spent a while reading the recommendation and trying to understand it in order to make a decision. Looking at my notes of 17 April 2013, I think I would have made these before the meeting and perhaps added to them during the meeting. At point 3 I have noted "?Decherts must have found something." The question mark before "Decherts" suggests to me that this is an inference I had drawn from my reading of the Case Evaluation Board Recommendation or something I was told in the meeting.
>
> 36. I decided that a criminal investigation into ENRC should be opened. Factors which were particularly relevant to my decision were that ENRC was a major listed UK company, that there were suspicions of major corruption within the organisation, and the payment of US$35 million from ENRC's UK based treasury to an account in Africa held by Metalkol which had subsequently been emptied in a series of cash withdrawals."

(2) Mr Gould, at paragraph 192 of his first WS, refers to the various documents he was shown which included the CEB and the CAN and then says:

> "193. I remember the meeting on 17 April 2013 to consider whether to open the criminal investigation. It quite informal and "roundtable" in style: the attendees were discussing the Recommendation, asking questions, and considering the practicalities of the investigation.
>
> 194. The short note I circulated after the meeting recorded that: "*The meeting focussed on clear lines of enquiry arising from the work undertaken by Dechert LLP (be it provided to the SFO by means of update meetings or a formal report"*. The "update meetings" referred to there were the formal meetings with ENRC present.
>
> 195. Other than that, I have little to add to the documents."

(3) As for Mr Thompson, he said at paragraph 202 of his WS that he had no memory of his involvement in the opening of the CI. Before being shown the relevant documents, he thought he had not taken part in that decision. He then refers to documents and says as follows:

> "204. It is clear from these documents that I was at the meeting on 17 April 2013 when the Director decided, subject to its scope being refined, to open a criminal investigation into ENRC. The documents have not prompted any memories.
>
> 205. The first key reason for acceptance I provided to Mr John was "*Information coming to light suggesting that the company was not being frank with the SFO in terms of the findings of its internal investigation."* The SFO's legal representatives have asked me what information that was. I cannot be certain, at this distance in time, what I meant but I note that in my second witness statement in the Privilege Proceedings I said: *"We concluded from ENRC's decision to terminate the retainer of Dechert, very shortly before Dechert was due to disclose to us the findings of its African investigation, that ENRC had decided not to make full and frank disclosure of the results of its investigation."*

(4) As for Mr Milford, he said as follows in his WS:

> "43. Under the system we had put in place the question of whether to open a criminal investigation would be reviewed by a Case Evaluation Board. As noted above, I used to chair these boards. Also as noted above, the statutory test for opening a criminal investigation was (and is), to paraphrase, reasonable suspicion of serious or complex fraud. We would go through the inferences that arose from the material we had. Once clear about that, we would go through whether it met the statutory test. If it did, we went on to consider whether it met the Director's published take-on criteria.
>
> 44. For the purposes of preparing this witness statement the SFO's legal representatives have shown me a number of documents relating to the decision to open a criminal investigation into ENRC, including:….
>
> 45. I cannot remember the detail of the meeting on 17 April 2013 although I can remember it taking place in the Director's office. I see from reading the documents that it was decided at this meeting that a criminal investigation into ENRC should be opened and it is apparent from the documents that the decision-making process was expedited. I think this would have been because we were concerned about evidence being lost, as I have explained above and as Mr Thompson noted in his email of 12 April. Unusually the Director sat in the meeting, and he chaired it.
>
> 46. I note the email exchange between Geoffrey Rivlin and Matthew Wagstaff regarding Dick Gould's understanding of the remit of the investigation. I suspect what Geoffrey had in mind was that Dick Gould had wanted a full-blown cross-agency team looking at this case. That obviously wasn't accepted. I evidently felt that I needed to make clear for the record that the decision should be sharply focused as far as UK-based entities were concerned, as I sent an email setting that out the following morning. I think, looking at the documents, that my email was supposed to be corrective to the note Mr Gould circulated after the meeting. Perhaps I

> should have rewritten Mr Gould's note completely, but I probably did not have the time and so I sent an email setting out the key points instead. Eventually, Mr Thompson sent an email which confirmed the position for the notification document."

380. Accordingly, the contemporaneous documents, and what can (and cannot) properly be inferred from them, as well as the matters preceding the 17 April meeting, are especially important.

381. The SFO is itself a prosecuting authority. By s1(3) of the CJA, the Director may investigate "any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud". There was some debate between ENRC and the SFO as to how high a hurdle this was. However, this does not really matter because it is not ENRC's case that, absent the SFO wrongdoing (and depending on what Sir David Green actually had in mind) the SFO could not lawfully have taken the CI Decision. Rather, the question is whether it would in fact have done so absent the wrongdoing.

382. The stated grounds for opening a CI are distinct from what Mr Milford called the SFO's published "take-on" criteria which would need to be satisfied once the "reasonable suspicion" had been established ("the Acceptance Criteria"). These are as follows:

> "SFO Case acceptance criteria
>
> The Key Criterion for the SFO to take on a case is that the suspected fraud was such that the direction of the investigation should be in the hands of those who will be responsible for the prosecution.
>
> The factors that would need to be taken into account include:
>
> 1. Whether the sum at risk is estimated to be at least £1 million. (This is simply an objective and recognisable signpost of seriousness and likely public concern rather than the main indicator of suitability.)
> 2. The case is likely to give rise to national publicity and widespread public concern; such cases include those involving Government departments, public bodies and the Governments of other countries, as well as commercial cases of interest.
> 3. The investigation requires a highly specialist knowledge of, for example, financial markets and their practices.
> 4. The case has a significant international dimensional.
> 5. There is a need for legal, accountancy and investigative skills to be brought together as a combined operation.
> 6. The suspected fraud appears to be complex and one in which the use of section 2 powers (Criminal Justice Act 1987) might be appropriate."

383. As part of its argument on causation here, the SFO has made references to a number of what might be called "untainted" sources of information which, either individually or collectively, would have justified the opening of a CI in any event. I have dealt with some of these already at paragraphs 210 - 231 above, and I deal with others in this context, too, below. However, such information does not seem to be relevant unless the SFO (a) was actually aware of them at the time and (b) relied upon them as matter supporting the opening of a CI. Put another

way, the question here is not what the SFO might or could have done absent its wrongdoing; it is what it would have done.

The Chronology

384. I now set out a chronology of the relevant documents and events starting from the end of 2012 and in which the SFO was involved. Events before that time have already been set out and dealt with in earlier sections of this judgment.

385. The first document is the JD SAR submitted to the SOCA for the purposes of the latter giving its consent to the Gertler buyout. This involved ENRC acquiring Mr Gertler's 49.5% shareholding (through various companies) in Camrose. Although this was addressed to SOCA, the SFO, through Mr Gould was well aware of it. Indeed, it was regarded by the SFO as a positive step, since it was thought that the removal of Mr Gertler would make it easier for ENRC to access material in relation to the aspects of Camrose which were, by then, to be investigated. I have already noted the references in the JD SAR to the $35m payment out from Metalkol. Accompanying the JD SAR was a draft disclosure document along similar lines. The SOCA consent was duly given, and the buyout proceeded to completion.

386. The next matter concerns the letter sent by Mr Gerrard to Mr Gould on 12 December 2012. I referred to that letter at J/788. For present purposes I need only refer to the request in that letter that any report provided by Dechert to the SFO would be under a limited waiver of privilege for the purposes of corporate-self reporting only. The letter also required the SFO's confirmation that if a settlement was not reached, the report would not be used by the SFO as evidence of any wrongdoing or in any criminal proceedings against ENRC, its subsidiaries or employees or directors.

387. That letter led to Mr Gould suggesting that the SFO offer a section 72 restricted use undertaking to ENRC. I dealt with this in relation to DC20 at J/791-795. It was in this context that Mr Thompson made the observation which he did in his email of 18 December 2012, referred to at paragraph 315 above. Indeed, it had been preceded by an email from Mr Rappo in which he said that he thought that ENRC appeared to be engaging in the SR process in a "genuinely proactive manner". See J/1360.

388. The next event is the SFO meeting of 21 January, which was to decide the response to ENRC's letter of 12 December. By that stage, the SFO had been informed that Dechert had completed the Kazakhstan report although it had not yet been delivered. Mr Thompson wrote

a note for that meeting dated 18 January. He said that the considerations arising from the assurances sought by ENRC included:

> "1) ENRC's request for assurance about the use of the investigation report in evidence.
> 2) Possible use of a section 72 SOCPA agreement with ENRC to limit the use of the report by the SFO.
> 3) Whether the SFO should give ENRC any assurance about the use of the report, LPP and future prosecution.
> 4) Commencement of a formal criminal investigation."

389. He then set out a lengthy background. It included the fact that although there had been a number of delays and problems at ENRC, there was now a new approach following the appointment of Mr Dalman, and that Dechert "finally appeared to be obtaining access to documents and staff to progress the investigation properly (although access to material on the ground in DR Congo remained problematic for security reasons and as a result of Gertler's remaining influence)."

390. He went on to say that a civil settlement on Kazakhstan in the region of £1-10m might be possible, depending on the report. The position was difficult to assess in relation to Africa, but there was potential for a very significant sum to be obtained. The buyout of Mr Gertler should enable ENRC to obtain the necessary accounting records. Reference was also made to the $35m.

391. Mr Thompson's note then ended thus:

> "6 Risks and sensitivities
> ENRC has been, and continues to be, the subject of significant press interest.
> There has been interest in ENRC's activities in the DR Congo from MPs, including Eric Joyce and the recent contact from Sir Edward Garnier.
> Anti-corruption NGOs have taken great interest in this matter. Global Witness in particular have done a lot of work on the DR Congo, and have contacted the SFO specifically on ENRC and made representations."

392. At the meeting were Sir David Green, Mr Milford, His Honour Geoffrey Rivlin, Mr Rappo, Mr Gould, Mr Thompson and Mr Peck. The latter produced a note of the meeting. Among other things, it said this:

> "1. DSFO explained that he was concerned that the investigation appeared stalled. He said that he did not have a firm view on the way forward (i.e. prosecution, civil settlement) and was open to a discussion of the options.
> 2. MT reported on the earlier discussions that had taken place between the SFO and ENRC… there was no confirmation that they would receive a civil settlement.
> 3. General discussion on the Kazakhstan report (over 18 files of evidence) that Decherts says is now ready. ENRC are seeking reassurances as to how this file will be used by the SFO.
> 4. DG said that there had been a significant change in attitude at ENRC since the appointment of Mehmet Dalman to the Board. The problems with the share price has also added pressure to get 'their affairs cleaned up' and to move on.
> 5. DSFO asked when James Coussey will finish his review of all the material the SFO holds to assess the position on next steps. MT explained the JC is looking at the intelligence reports to see if the SFO can establish a criminal case.
> 6. DSFO asked about the Africa report. PR said that the expectation was that it would be sent to the SFO by the end of January.

> 7. DG said that collating quality evidence from the Congo was a real issue due to the earlier inhibiting actions of Dan Gertler and the practical risks of dealing with a country where large-scale violence breaks out frequently. He said without full cooperation of the suspects in Africa you wont get anything useful.
> 8. DG spoke about the US$35 loan that would most likely form the basis of any investigation — from Camrose into another subsidiary and then withdrawn in cash over a period of time. Financially this looks suspect. AM said that ENRC is listed in London and runs its accountancy through London — that gives an appropriate link for further investigation on this point. DG said that Decherts now have access to banking transactions.
> 9. DSFO said that he had read through MT's and DG's report of 18 January and it seems as though the possible fraudulent activity in Kazakhstan was largely on the company itself. DG said that this could extend to adverse impacts on ENRC's shareholders more widely and misrepresentation on the stock exchange.
> 10. DG also said there is evidence of suspect transactions in connection to the 'stripping' contracts, possibly including the involvement of the CFO of ENRC, Zaure Zaurbekova. She is based in London. DG said that the Decherts report did not cover the activity of the CFO.
> 11. DG continued to say that there was still an element of uncertainty as to the legal position of the Decherts report and on what basis they would send that over to the SFO.
> 12. GR asked if the team currently has enough evidence to bring any charge.
> 13. DG said no. At this point, only evidence to form a reasonable suspicion to commence a criminal investigation. DSFO said that we needed the 3 Decherts reports to assess our position on whether to open criminal proceedings or to consider the civil recovery route…"

393. Accordingly, there was no decision to commence a CI at that point. The options in relation to the reports were civil recovery or a CI. And plainly, there was the intimation of a CI if there was no Kazakhstan report, which was obviously designed to encourage ENRC to get on with it. However, there was no similar sanction proposed in relation to Africa.

394. All of this led to the sending of the Rappo Letter which is set out at J/801. I observed at J/802 that the SFO had clearly decided to take a tougher line.

395. On 30 January 2013, the first version of the Kazakhstan Report was delivered, consisting of 326 pages. There was to be a final version, which included the section on stripping, and this was delivered on 28 February, consisting of 438 pages.

396. The next events were DC23 and DC24 themselves. They took place on 27 and 28 February, respectively. Mr Thompson's note of DC23 reads as follows:

> "Note of my phone call to NG at 1650 today:
> I called NG on his mobile - he was in the USA. We discussed his client's position and where they are with reporting to us.
> Re Kazakhstan, they have largely completed the additional work on the stripping contracts and the more recent allegations about the CFO. The stripping contracts have been found to be consistently inflated/fraudulent by about 30%. The position with the CFO is that whilst they have found "unfortunate coincidences" the allegations have not been substantiated. His overall view is the there is insufficient evidence to amount to relevant criminality for our purposes (though some sort of civil action or referral to UKLA could be considered). However he said that his current report on these points is still in draft and is subject to: firstly a need for experts to agree; and secondly Board approval. He described the Board as nervous after Patrick's latest letter. In consequence he is seeking an extension of time to report properly to us towards the end of March.
> In respect of Africa he was vague but what he said was very interesting. He described the situation as complicated but more concerning for the Board. He said he thought that he had taken his work as far as he could without there being a risk to any investigation we might wish to carry out. I think this was in

respect of risks of loss of evidence or by alerting potential suspects, but he was not at all specific. He said he would ideally like to come and meet us about this and explain further.
I said I would relay all this to Patrick and we would get back to him. NG said he would be back in the UK 0730 on Thursday and would be keen to meet next week if at all possible (in addition to knowing our view on the delivery of the Kazakh addendum reports).
My inference from what he said is that there is some real substance to the issues found in Africa, presumably in respect of the Camrose transaction and the cash payments previously flagged as unaccounted for. I would suggest that we agree our position and Patrick relays this to him when he is back in."

397. I dealt with this at J/806-827.

398. Mr Thompson's note of DC24 is as follows:

> "I received another call from NG. He had called me as he had been unable to get hold of Patrick. He confirmed that his further report on Kazakhstan was not yet ready. I said that, having discussed it with Patrick, we were content for the report to be finalised in March.
>
> NG said that he had recently received further information from another whistleblower claiming that the management of SSGPO were behind the fraudulent stripping contracts. He also mentioned the involvement of the ENRC CFO's son in a company involved in a stripping contract. It was unclear exactly what the CFO knew but he repeated his comment to me of yesterday that there were a number of unfortunate coincidences. This will be addressed in the further report when it is finalised.
>
> NG then moved on to Africa. He said there were "massive problems on sanctions". It appears that the company has conspired to beach [sic] various sanctions and had even been dealing with sanctioned individuals until very recently. The previous engagement (i.e. information provided by Pierre Prosper in March 2012) with the SFO over the sanctions issues now looks as if it may have been misleading. He requested a discussion so that he could get a steer on whether to continue investigating this.
>
> NG then commented on the £35m cash payment linked to the Camrose take over and the promissory notes. He described the cash payment as a "corrupt" payment to Dan Gertler in which Victor Hanna (ENRC Africa) had connived. He described the arrangements around the promissory notes as "bemusing". He repeated his concern that he did not want to continue his work to the detriment of any future investigation by the SFO. NG also said that he now believes there are relevant e-mails and documents to which he has been denied access thus far.
>
> NG again repeated his offer of a meeting to explain the position in more detail I said that whilst this was potentially helpful, the SFO's position remained that we needed substantive reports to consider rather than verbal updates. I said I would relay the conversation to Patrick and his team."

399. I dealt with DC24 at J/828-838. At J/830, I said that the information given in relation to Africa was plainly not in ENRC's interests and unauthorised. What Mr Gerrard now said on sanctions suggested that this was not merely historic. Second, reference to payments as "corrupt" was bound to raise the stakes. The same was true about Mr Gerrard's reference to relevant emails and documents to which he had been denied access thus far. At J/834 I noted that Mr Thompson had accepted that, coming from ENRC's solicitor, there was nothing more likely to pique the SFO's interest than the use of the word "corrupt" and that the references to sanctions were about current not historic conduct.

400. On 1 March, Mr Thompson emailed Mr Rappo, copied to Mr Coussey and Mr Gould enclosing his note of DC23 in DC24, saying this:

> "All

> For the record, attached is a note of my recent calls with Neil Gerrard. The second conversation certainly suggests that the African issues are looking much more serious.
> In respect of the additional Decherts report received, rather unexpectedly, late yesterday, I have only read the Exec Summary. From this, it looks like there is a lot of murk in SSGPO in Kazakhstan but nothing that would really amount to anything of interest to us. Even the CFO's involvement may not be as interesting as first thought, but we await Neil's final conclusions on that."

401. The features of DC23 and 24 which were of obvious significance were that:

(1) Mr Gerrard took the view that his continued investigative work might prejudice any future investigation by the SFO i.e. that evidence might be removed;

(2) there was evidence to which he had been denied access;

(3) there were many problems on sanctions in Africa which was not how the issue of sanctions had been presented before;

(4) the $35m payment was corrupt; and

(5) he wanted to come in to see the SFO to discuss this further.

402. The points about his own position in relation to evidence would have had a particular resonance given what he had said at DC8, albeit a long time before (where he said he would resign if the difficulties continued), DC9 (falsification of documents), DC10 (being obstructed), DC13 (ENRC doubting the thoroughness of the investigation needed and being reluctant to allow access to the servers) and DC15 (Mr Gerrard's prompting the SFO to send the 18 June 2012 letter with its references to the scope of the investigation not being restricted and ENRC having to be full and frank).

403. At some point, Mr Gerrard had arranged a further meeting to discuss Africa and this had been set for 3 April.

404. On 13 March, there was a call between Mr Gerrard and Mr Rappo. This constituted DC25. Here, unlike DC23 and 24 I did not find Mr Rappo in breach of duty in the sense required, but I did find that Mr Gerrard was, once more, in breach of duty. Mr Rappo's note of DC25, whose contents were agreed by Mr Gerrard said as follows:

> "Separately NG raised the issue of Africa:
> 1. They had identified significant evidence of wrongdoing.
> 2. They will be recommending to the ENRC board this Friday that 1 or 2 people be suspended pending the investigation continuing
> 3. Criminality identified in summary as follows:
> - OFAC sanctions breaches
> - Euro sanctions breaches
> - Bribe payments—Hard evidence that 35 million was given to Gertler, and material to suggest that this has gone on as bribes
> Main suspect Victor Hanna, UK resident, US national, Africa CEO
> Decherts want to give the SFO an update briefing on this, in advance of any report, as there are complications with 'lawyers' being involved, who appear to be aiding and abetting, and also

misleading HMT and the SFO. Ideally they want to do this this month, particularly as they want to suspend 1/2 people, and do not want to jeopardise any subsequent SFO investigation."

405. Dechert was dismissed at 3pm on 27 March. In the late morning of that day, Mr Williams KC of Fulcrum spoke to Mr Gould requesting a meeting later in the day at 4.30pm. This took place. In attendance were Mr Gould, Mr Williams KC, Mr Dalman and Mr Wilkinson. According to Mr Gould's note of the meeting Mr Dalman said that the company had become frustrated with the progress of the issues surrounding ENRC so far and concluded that a "fresh pair of eyes" was needed to drive the matter to a conclusion, hence Dechert's replacement by Fulcrum. Mr Wilkinson wanted to assure the SFO that the company was committed to continuing a positive mutual relationship. Mr Gould said that the Kazakhstan report was being reviewed and a report was being finalised on that element. Mr Wilkinson said that the meeting scheduled for 3 April would still be beneficial, because the new representatives could begin building the relationship and it would enable them to understand the lie of the land. Mr Gould did not make any comment about the meeting being called to inform the SFO of new material relating to DRC and the subject of new material was not raised by those at the meeting. Mr Dalman said that the board was likely to be subject to a re-shuffle in the next few days. Mr Dalman said he was considering his own position upon which, Mr Wilkinson said that if Mr Dalman went for it, he would follow.

406. Immediately following this meeting, Mr Gould went to see Mr Rappo and they agreed on the service of a section 2A notice on Dechert. He set out the reasons for this in a note. The first sentence referred to DC23 and DC24 and the fact that Mr Gerrard had offered to update the SFO with regard to new material on Africa, and the setting up of the meeting for 3 April. Mr Gould then referred to the meeting on 27 March much as he had done in his note of that meeting. There was also a reference to the $35m payment and that this could have happened only with "senior authorisation". He then set out that, with the sacking of Dechert, there were concerns over what incriminating material had been identified and the "intentions" of ENRC. He referred to a number of points including again the new material on Africa and the suggestion of a meeting, and also when the Africa report was now likely to be produced, given the change of representation. The SFO had already made clear that delay would not be acceptable without very good reason. There was reference to Mr Gertler and the buyout which had removed his "blocking" tactics from the equation. He speculated whether a smaller legal team might mean that they could not access all the material or would only be supplied limited material in the first place once the papers had been transferred from Dechert. He concluded by saying that it was logical to suspect that ENRC would not voluntarily

provide the information which underlies the Kazakhstan report, which he said the SFO would need, or the material upon which Dechert was formulating the report on Africa. In order for a decision to be made on the issue of the SFO commencing a CI, all this information needed to be obtained. The appropriate way forward was a section 2A notice given that no CI was being conducted at the time.

407. An initial deadline for the provision of the information and documents by Dechert pursuant to the s2A notice was given as 8 April. However, this was extended in the first instance to 27 April by the issue of a new notice.

408. In his WS at paragraph 138, Mr Gould said that he formed the view that ENRC was no longer likely to self-report, or would only want to do so on specific elements of wrongdoing i.e. nothing on Africa.

409. In fact, the 3 April meeting with Fulcrum did take place and Fulcrum was obviously engaging with the SFO on the SR process. It was attended by Mr Williams KC and Mr Pearce of Fulcrum, Mr Coussey and Mr Gould. The SFO said that the purpose of the meeting had been to have an update on the DRC and to see the impact of the investigation on the report. The SFO wanted to consider in particular the $35m payment. Reference was also made to the Gertler buyout. Fulcrum asked the SFO to confirm, from its perspective, what it would like to see reported on.

410. Following the meeting, and on 5 April, Mr Gould wrote to Fulcrum setting out what the SFO expected on Africa:

> "The points of interest to the SFO were the transactions relating to the purchase of:
>
> CAMEC (believed to be in 2009);
> Camrose (believed to be in 2010; and
> Chambishi (also believed to be in 2010).
> These points of interest would need to include a review of, but were not limited to, the following subcategories:
> Due diligence and valuations;
> Loans and funding of the transactions;
> Management and Board knowledge;
> Market Disclosures (if and where applicable);
> Sanctions (be it country or person); and
> Books and records review.
> I also raised at the meeting on the 3rd April 2013 a particular issue which has already been alluded to at a number of meetings with Dechert LLP and members of the Board of ENRC Plc (including meetings at which Mr Dalman and Mr Wilkinson have been present) namely payments into and out of Metalkol.
> The information provided in update meetings indicates that the funds in question are linked to the purchase of Camrose. The payments the SFO has so far been informed of, albeit in a limited manner, into Metalkol span 2010 to 2012 whilst payments out of Metalkol may extend to more recent times.
> However there are payments out of Metalkol between 24th January 2011 and 10th February 2011 (inclusive) which are of particular concern to the SFO.

> I trust that this information will enable you to discuss the focus of any report with your clients. As was set out at the meeting on the 3rd April 2013 the SFO was expecting a report on Africa by the end of this month; given your client's wish to progress this matter I would like to understand their expectations, in terms of a time-line, as to any suggested delivery date of such a report."

411. As a side observation, this letter shows the breadth of the investigation on Africa that the SFO was expecting by that stage. It reflected the expansion that had occurred since the middle of 2012 for the reasons given above.

412. On 9 April, Fulcrum wrote to the SFO asking that it be given access to the Dechert material to be obtained pursuant to the s2A Notice. Without it, ENRC could not engage efficiently with the SFO and it was not appropriate for Fulcrum simply to access the material at the offices of the (now-dismissed) Dechert. Fulcrum also proposed a further meeting on 15 April.

413. That further meeting took place where the SFO said that the focus for Africa should be on Camrose, CAMEC and Chambishi, how it was that a $35m payment to Mr Gertler was lost, and whether it was a corrupt payment to the DRC government or simply money-laundering.

414. On 16 April, Fulcrum emailed Mr Gould, noting that Mr Dalman had now written to him to confirm its ongoing formal instruction and to address the concerns set out in the SFO's letter of 15 April. They wanted now to set a date to come and discuss the way forward with the SFO.

415. One then comes to the immediate prelude to the 17 April meeting. On 12 April, Mr Thompson wrote as follows to Mr Milford:

> "Alun
> As previously mentioned, the Director tasked us last week with producing an evaluation report by today. Dick has done an excellent job in pulling together the Byzantine threads of this saga over the course of the last week and the report is attached. It is necessarily quite detailed as the situation is complex and requires careful consideration by us all. My own view is that a criminal investigation is now required but the exact scope of that investigation needs to be determined in the light of the factors Dick has highlighted.
> There is some urgency as ENRC has an AGM coming up on the 16 April. It is possible that the current chairman may not be re-elected.
> If we are to commence a criminal case in earnest there are good reasons to take some urgent steps to secure certain material. I know there is plenty going on with […] etc, but would it be possible to convene a panel early next week (e.g. Tuesday)?
> I leave it to you decide on exactly who should attend, but it may be simplest for the Director to attend the panel in the circumstances. I would also suggest that James Coussey, Dick and I all be present to assist with the detail."

416. It seems to me that Mr Thompson's reference to taking "some urgent steps to secure certain material" must have originated with DC23 and 24.

417. The report referred to by Mr Thompson was the CEB prepared by Mr Gould. It had been requested by Sir David Green, no doubt following the sending of the s2A notice to Dechert. The reference to urgent steps to secure certain material (obviously, now not from Dechert but

ENRC itself) must be a reference to material which had not been accessed by Dechert; it will be recalled that in DC24, Mr Gerrard said that he had been denied access to certain material.

418. Mr Thompson then emailed some further thoughts on 14 April as follows:

> "As I explained briefly on Friday, the paper was drafted by Dick under some time pressure and I did not interfere with the content. I have some additional observations for you to consider, as set out below.
> • There are some points that may need clarifying with Dick as to precisely what he means (e.g. paras 9, 25 and the comments on International Co-operation on pages 14-15).
> • The suggestions under Press Strategy are interesting but I doubt that they are realistic. There has been frequent and sustained press interest in this for several years and I do not think that trying to warn the press about s342 offences is really going to work. Arguably, it is pressure from public exposure that has brought the company this far.
> • The overall recommendation for considering a JIT is reasonable in the circumstances. This is a massive and very well resourced company with a very wide range of activities and subsidiaries. I understand that Decherts have charged over £20m for their work to date - and they only looked at a limited number of issues. Dick is quite right to point out that if we are intending to launch a wide ranging investigation, the resource implications are significant. This would inevitably need blockbuster funding.
> • Dick's comments on risk, health & safety etc are also not overblown. The indications from the limited work we have done to date are that this is a nasty company which has grown out of an ex-Soviet regime and not shed some of the tactics that went with that background.
> As stated below, my own view is that this case should be adopted for criminal investigation. A civil settlement (of whatever magnitude) would be difficult to defend in any kind of principled way. If we step back and look at the reality of the position, the fundamental issue is that this company should never have been allowed to list on the FTSE in the first place. It is not a properly run PLC and it still only has 18% of shares tradeable. The only reason we have got this far is that the share price has tanked over the last few years and this has impacted on the controlling shareholders. I therefore think that this is a case that manifestly meets the revised criteria for a criminal investigation - particularly given its impact on UK Plc.
> That said, my major concern about Dick's recommendation for a broad investigation is a lack of focus. Undoubtedly, the more we looked the more we would find. However, how much of it is ultimately prosecutable is a different question. The Kazakh stuff is extremely murky but I would be concerned that we could spend a lot of time and effort chasing shadows. The African allegations look much more promising, involve some senior people and would, if successful, make a major impact. A combination of sanctions is also a serious possibility - e.g. a charge under s7 of the Bribery Act against the company, prosecutions of individuals for corruption in respect of the African allegations, prosecution of the UK side of the Kazakh stuff (Alex Stewart etc), some civil recovery action and referral to the UKLA of relevant matters."

419. His reference to Africa allegations looking much more promising was in comparison to Kazakhstan. But again, he must have had in mind what he was told at DC23 and DC24 and what he observed to Mr Rappo at the time.

420. I now turn to the CEB itself. The first 5 paragraphs set out the background up to the provision to the SFO of the Kazakhstan report. Paragraph 5 says that the report made it clear that the investigation had identified false reports/documents, instances of material being destroyed, misleading statements and disruptive tactics by employees of ENRC subsidiaries. Paragraph 6 says that it was reviewed by Mr Coussey, but his conclusions have been redacted on the copy of the CEB in the trial bundle. Paragraph 7 says that, given the clear view that the investigation into Kazakhstan was prejudiced by ENRC through subsidiaries or employees,

the allegations of bribery have continued, but now in disguised form. Reference is made to the Education Allegation. Paragraph 8 refers to procurement. Paragraph 10 then goes to Africa and paragraphs 11-14 recite what happened on 27 March and the section 2A Notice. Later paragraphs deal with Mr Gertler and the buyout, much as had been portrayed in Mr Gould's documents of 27 March. Reference was later made to some intelligence obtained by the SFO. Suspected offences included under the Bribery Act 2010 including "inadequate procedures" under section 7, Prevention of Corruption Act 1906, Theft Act 1968 (false accounting), Fraud Act 2006, Companies Act 2006 and FCA Regulations.

421. He then sets out 4 options, being:

> "a) Permit ENRC Plc to continue to conduct an internal enquiry and reach an amicable solution once both Kazakhstan and Africa reports have been considered; this may be by way of a civil recovery or an agreed basis of plea to criminal proceedings but without a formal criminal investigation being conducted.
> b) Conclude that the report provided by the company into Kazakhstan is sufficient to dispose of the areas it addresses by way of a civil recovery disposal and await the report into issues involving Africa thereby treating the matters as entirely separate.
> c) Open a formal criminal investigation tightly focused on ENRC Plc.
> d) Open a formal criminal investigation into ENRC Plc and the surrounding entities that gave rise or are involved in the suspected criminal conduct in ENRC Plc."

422. Having assessed those options, he said that (d) was the most appropriate course when the Director came to consider it. He said that this option:

> "encompasses the entire criminality of ENRC Plc including those parties which provide a complete picture of the wrong-doing e.g. the auditors and the intermediaries. It is likely to bring to the attention of the investigation team a wide range of lines of enquiry which have not yet been identified. Additionally it offers the potential for joint working with other law enforcement agencies or regulators to address the totality of corporate governance and compliance issues that impact on this case. This option offers the widest range of positive outcomes but is accompanied by the highest risk as described in the following sections."

423. I should add that Mr Gould said this about option (a):

> "a) This option utilises the least SFO resource. Undoubtedly a civil recovery resolution could be obtained; and one which could be of a significant magnitude. It is possible that some kind of plea agreement could be reached if the reports identify criminality that the SFO views must result in prosecution action. […]. Additionally there is concern that the reports into Africa will not be as open and frank as the SFO both expects and demands. It would also be difficult to present a compelling public reason for not pursuing any kind of formal investigation. As such I do not believe that this option is to be recommended."

424. I shall refer to some other parts of the CEB below, in context, where relevant.

425. A brief note of the meeting was taken by Mr Gould but does not add anything material for present purposes.

426. As noted by Sir David Green himself, he took some notes, one of which contained the phrase "?Decherts must have found something". It will be recalled that he thought this was derived from something he read in the CEB or was told at the meeting. I think the latter is much more

likely. I think it must have derived from DC23 and DC24 in the sense that it suggests that Dechert had actually found something of substance in relation to Africa. I do not think it could possibly be a reference to Kazakhstan.

427. Following the meeting, Mr Thompson was emailed on 23 April in these terms by Mr John:

> "Hello Mark,
> I have been tasked to draft the case acceptance notification for the corruption case mentioned above which will then be circulated to selected department within the SFO. A copy of the notification is attached for reference.
> I am contacting you to ask whether you would you be able to provide me with details of the "ground for acceptance" which has led the Director to sign off the case for investigation.
> Many thanks in advance,"

Mr Thompson's reply late that evening, and copied to Mr Milford, was as follows:

> "Nigel
> The key reasons for acceptance would be:
> 1 Information coming to light suggesting that the company was not being frank with the SFO in terms of the findings of its internal investigation.
> 2 Information and apparent evidence of major corruption in respect of the company's operations in Africa, including alleged involvement of senior individuals within the company.
> 3 Significant allegations of corruption and fraud involving UK elements of the company's operations in Kazakhstan, including the possibility of a corporate offence under 57 of the Bribery Act:
> 4 Significant adverse impact on reputation of the City and UK plc from the pervasive nature of the allegations about the company.
> 5 Complex transactions with significant international dimensions requiring the multi-disciplinary skills of the SFO for an effective investigation.
> 6 Need for SFO's compulsory powers to be deployed to secure existing evidence and obtain further material.
>
> Taken together, these factors constituted a very strong basis for the acceptance of the case by the SFO, and the Director agreed at a meeting held on 19 April.
> Regards
> Mark
> Alun - please feel free to comment on anything I have missed as I understand this will be a document of record for Intel purposes."

428. The CAN followed. It repeated the precise content of Mr Thompson's email although slightly re-ordered, as follows:

> "**Grounds for acceptance**
> Information has come to light which suggests that the company was not being frank with the SFO in terms of the findings of its internal investigation.
> There is apparent evidence of major corruption in respect of the company's operations in Africa, including alleged involvement of senior individuals within the company.
> There are significant allegations of corruption and fraud involving UK elements of the company's operations in Kazakhstan, including the possibility of a corporate offence under S7 of the Bribery Act.
> The matter involves complex transactions with significant international dimensions requiring the multi-disciplinary skills of the SFO for an effective investigation. There is also a need for the SFO's compulsory powers to be deployed to secure existing evidence and obtain further material.
> The matter may cause a significant adverse impact on reputation of the City and UK Plc from the pervasive nature of the allegations about the company."

The Status and Import of the CEB and CAN

Introduction

429. Quite apart from the dispute between the SFO and ENRC as to the causes for the CI Decision by reference to events other than DC23 and 24, there is a significant dispute as to the relative status and import of the CEB on the one hand, and the CAN on the other. Both might be said to be "formal" documents in the sense that the CEB was a document that would be supplied where various options, including a criminal investigation, were under consideration, and once the decision had actually been made, the reasons had to be articulated in a CAN.

The CAN and the Reasons Email

430. I will start with the CAN, not least because there is a preliminary point about what parts of it are actually referring to. I do so by reference to the original email from Mr Thompson which set out 6 discrete reasons, because that is how both sides have dealt with the matter. I shall refer to his email as "the Reasons Email". Its content was, of course, precisely repeated (though re-ordered) in the CAN.

431. It is important to note that according to the Reasons Email, the 6 reasons given constituted a very strong basis for accepting a CI, and that the Director agreed. There is no reason to think that this statement is untrue. Moreover, the Reasons Email was copied to Mr Milford, General Counsel, who was at the meeting and he was asked if he thought anything was missing. There is no evidence that he did. Mr Milford thought that the CI Decision had been expedited because there was a concern about evidence being lost. He also said that Mr Thompson's email confirmed the position for the notification documents. He contrasted this with the breadth of the CEB. So that is at least some evidence that Mr Milford regarded the Reasons Email as accurately representing the key points behind the CI Decision.

432. Mr Thompson himself (when explaining the ultimate significance or otherwise of the Depel Interview) had said at paragraph 55 of his second WS that the Reasons Email was intended to set out the key reasons for acceptance.

433. Mr Wagstaff also confirmed at paragraph 17(5) of his WS that the CAN, a formal document, had set out the grounds on which the Director had accepted the case for investigation.

434. The SFO makes the point that the CAN is an "ex post facto" document made after the meeting. But if its purpose was to record the reasons why the CI Decision was made, it could hardly have been made before the meeting. It had to record what in fact were the reasons for the CI Decision actually made. By way of contrast, it can fairly be said that a document or

report prepared for the meeting, even with recommendations attached, may not be comprehensive or accurate as to the actual reasons for the decision taken. Indeed, the SFO at paragraph 68 of its Phase 1 Trial written opening said that the CAN set out the grounds on which the case had been accepted for investigation, as provided by Mr Thompson in the Reasons Email.

435. On the face of it, the CAN is the only document which formally purports to set out the reasons for the CI Decision. And that was its function.

436. I now turn to its content. I begin with Reason 1. The expression "information coming to light" could only be a reference to something which has come to the attention of the SFO relatively recently not, for example many months previously, or in the previous year. On the face of it, the only new information which the SFO had become aware of is what was said in DC23 and DC24. If ENRC was likely to remove evidence if Mr Gerrard persisted with the investigation as he wished, then that would obviously mean that ENRC (as opposed to Dechert) was not being frank with the SFO as to its findings. Equally so if it had material to which Dechert was being denied access.

437. In cross-examination, Mr Thompson accepted that the reference to "information coming to light" could not be to anything occurring before DC23 and DC24. He agreed initially that the information coming to light was indeed a reference to those calls, without qualification. He then said that DC23 and 24 fed into Reasons 1 and 2 but he did not think that they were the only material, although he did not there identify what other material that might have been in relation to those Reasons. He was referred to paragraph 205 of his first WS where he said that Reason 1 was a reference to the termination of Dechert's retainer. He agreed that this was not a complete statement (in the light of what he had just said in cross-examination).

438. Mr Colton KC suggested that the information coming to light was the PwC SAR made on 3 April 2013. But there is no evidence that the SFO took it into account or had even read it, prior to the 17 April meeting. That is quite apart from the quality of its content, described at paragraph 220(4) above.

439. As for Reason 2, again, on the face of it, this would be a reference to DC23 and 24 because of Mr Gerrard's reference to "massive problems on sanctions" and the $35m being a corrupt payment in which Mr Hanna (a senior individual in the company) had connived, along with Mr Thompson's own conclusion that Mr Gerrard's conclusion was that there was "real substance" to the issues found in Africa in respect of Camrose and the cash payments. That is

then given emphasis when Mr Thompson told Mr Rappo that the Africa issues were looking "much more serious". There is some corroboration for the proposition that these matters came up at the 17 April meeting because of Mr Green's reference to Dechert having "found something" (see paragraph 426 above). I already made the point that of the two possibilities canvassed by Sir David Green as to what that was about, the most likely was it came out of something said at the meeting.

440. As to this, the SFO says that it is not likely that Sir David Green would have been told things that came from any of the IDCs (because they should not have happened) and neither Mr Gould nor Mr Thompson would have mentioned them. I do not agree. First, it depends on how the information is relayed. Second, Mr Thompson did forward his notes of DC23 and DC24 to Mr Rappo, his senior. And on my interpretation of the Reasons Email, they had come into the open within the SFO.

441. On Reason 2, Mr Colton KC said that its content was established anyway by reference to what was said at OM7 and OM8 and the other materials. I deal with the latter below but as for these OMs, there is a qualitative difference between what was said there (in June and July 2012 and which provoked no CI) and what was said at DC23 and 24. The point is that Africa looked much more serious and Mr Gerrard emphasised actual corruption. OM7 and OM8 did not refer to corruption.

442. All of the above then links into Reason 6. If there was material which might go missing or which Dechert was not given the opportunity to look at, and there was real substance to the possibility of corruption in Africa, then the SFO's compulsory powers (to secure existing evidence and obtain further material) were necessary. Hence the need for CI. That all fits in with Mr Gerrard's effective reference to the SFO investigation being at risk if he continued to pursue the investigation. Here, it was put to Mr Gould that Reason 6 was really saying that there was a risk of evidence being moved out of the UK, and ENRC was seeking to hide criminality from the SFO, and that the SFO only believed this because of what Mr Gerrard had been telling it. Mr Gould said that this was "probably a fair assessment". I think that on this point, there is a resonance to what had been said by Mr Gerrard at DC8.

443. On Reason 6, Mr Colton KC said that the SFO's compulsory powers would have arisen anyway, because of the large volume of material held by ENRC. But that was always the case. The point is about the risk of its disposal and other information that Mr Gerrard could not access. That goes back to DC23 and 24.

444. Reason 3 deals with Kazakhstan. It was not the main focus of DC23 and 24. As it has been stated as a Reason here, it can hardly just be dismissed as a wrong reason. What one can say and I think the prior references in Reasons 1 and 2 suggest it, is that this was a lesser or subsidiary point. After all, that was Mr Thompson's take after his first look at the Kazakhstan report. It was also Sir David Green's view back in January that the Kazakhstan allegations seemed to be no more than frauds on ENRC, not by ENRC (and see here my observations to the same effect and my view that the SFO was in truth much more interested in Africa than Kazakhstan, at J/122 and 125). This was a theme of the SFO's view of Kazakhstan. The note from Mr Gould and Mr Thompson provided in advance of the meeting on 21 January and dated 18 January said the same thing and it is also reflected in Mr Thompson's note dated 1 March following DC23 and DC24, set out at paragraph 400 above. In evidence, Sir David Green accepted that the SFO would not prosecute where the company was the victim, although he then said it depended. But he went on to say that under s7 of the Bribery Act 2010, if the company was the victim it could not be criminally liable thereunder. Sir David Green's note of the meeting (one part of which has been redacted) also included a reference to Kazakhstan and there being a negligible chance of getting evidence.

445. In addition, I think it is reasonable to say that in the event, it is unlikely that the CI did include Kazakhstan. The SFO has not set out the actual scope of the CI on the grounds of privilege. That is its right, but it does not mean that any suggestion that Kazakhstan was not in fact the real focus of the CI is mere speculation. It was a theme of the SFO's observations for a considerable period of time that Africa is what it was really interested in, if anything. Certainly, Mr Coussey thought so on 14 June 2013 (in the context of the brown envelope and the June 2013 Material claim from the Phase 1 Trial) when he said that Kazakhstan, at least at that point, was not something likely to be investigated. Moreover the SFO's own announcement of the closing of the investigation (quoted at paragraph 31 above) said that its focus was on mining contracts in the DRC.

446. In my judgment, it is realistic to conclude that Reason 3 was clearly subservient to Reasons 1 and 2. It is also surely correct, that if there had been no Africa dimension to the investigation and the Kazakhstan report was delivered in the form it was, there would never have been a CI.

447. Reasons 4 and 5 come from the Acceptance Criteria, almost verbatim. They are of a different kind and are there to show effectively that if there was to be an investigation because of

suspected offences, it is the SFO that should be doing it. That is something that has to be shown in order for the CI to proceed.

The CEB

448. As against all of that, there is the CEB. As already noted, a CEB meeting would normally comprise Mr Milford, Mr Rappo and the case team, and it would make a recommendation for the Director who would then thereafter decide whether or not to open a CI. In this case, Sir David Green attended the meeting because it was said to be urgent. The CEB was an essential document for any consideration of whether or not there should be a CI. Sir David Green said that he would have spent time reading it before the meeting.

449. So I accept that it would be odd to suggest that a CI was made on the basis of factors wholly outwith what a CEB report would say. As it happens, that is not so here.

450. First, paragraph 10 refers to Dechert wishing to bring new material to the attention of the SFO. That is obviously a reference to DC23 and DC24 though not in great detail. Paragraph 11 suggests that the purpose of the meeting on 3 April was now not to reveal new material but to discuss the way forward. That was somewhat disingenuous of Mr Gould, given the terms of the letter he wrote to Fulcrum on 5 April; but in any event his point seems to have been about the significance of the new material which they might not now get, in the context of Dechert's dismissal and the section 2A Notice.

451. There is then a reference at paragraphs 16 and 17 to Mr Gertler and how the buyout enabled Dechert to make swift progress on Africa.

452. What was said in the CEB on Kazakhstan is actually reflected, in summary form in Reason 3 of the Reasons Email.

453. A further point on the CEB is that many parts of it were redacted on the grounds of privilege. Again, that is the right of the SFO, but it does mean that we do not have a complete picture.

454. Paragraphs 23-33 refer to "Other Material". However, paragraphs 24, 26, 28 and 30-32 are wholly redacted. Paragraph 23 refers to SARS (which I deal with as a topic below) and then there is a reference to intelligence said to be not in evidential format, referring to bribery and corruption allegations not forming part of the Dechert report. These involved kickbacks to family members of at least one of the founding shareholders, namely Mr Ibragimov and then there is a family connection to Mr Turdakhunov, the President of SSGPO. The later unredacted paragraphs then refer to an opportunity to disrupt "professional enablers" who launder funds back to the principals. Finally, paragraph 33 refers to a matter of interest to the

UK, but not necessarily the SFO, concerning massive share dealing in ENRC shares by entities owned by the Ibragimov family and "convoluted corporate structures". I discuss the significance or otherwise of this below.

455. The SFO points to Mr Gould's evaluation of option (a), set out at paragraph 423 above, and in particular the reference to a concern that the report into Africa will not be as open and frank as the SFO demanded. This was to challenge ENRC's position that absent DC23 and DC24 and the other IDCs, any review at that stage would have recommended option (a). Mr Colton KC says that this concern would have been there anyway, because of the lack of an update about Africa at the 3 April meeting, along with shifting excuses for the delay in the Africa report, the PwC SAR and the possible resignation of Mr Dalman. The difficulty about this is that any such concern must have had as its main (even if not exclusive) consideration what Mr Gerrard had said in DC23 and DC24 which plainly enunciated an intended lack of frankness on the part of ENRC. As already noted, the dismissal of Dechert (and the appointment of Fulcrum) has to be seen in that context and the fact that there is no evidence anyway that the SFO actually saw or relied upon the PwC SAR.

456. A final point is that, as a working document, Mr Thompson had expressed some reservations about it in his emails of 12 and 14 April. Indeed, Mr Milford said that if he had the time, he would have rewritten it completely. And at the end of the day, Mr Thompson was senior to Mr Gould and he was the one approached to provide the relevant parts of the CAN.

Conclusion

457. In my judgment, and simply taking the CEB and the CAN in themselves and on their face:

(1) The CAN is the document which best represents the key reasons for opening the CI;

(2) Reasons 1, 2 and 6 are clearly drawn from DC23 and 24;

(3) Reason 3, on Kazakhstan, is subsidiary to Reasons 1, 2 and 6; and

(4) Reasons 4 and 5 are irrelevant for these purposes.

Events in 2013 prior to the 17 April meeting

458. However, I now need to consider other factors. First I consider the potential impact of other events occurring between January and 17 April. This is the period on which both parties have concentrated.

The 21 January Meeting

459. First, there was a meeting on 21 January, leading up to the Rappo Letter. Sir David Green did consider a CI then, but decided not to do so at that stage. It was intimated, but only in the context of a possible non-delivery of the Kazakhstan report. If nothing else had changed, that threat would not become a reality because the Kazakhstan report was delivered within the timescale stipulated.

460. The SFO points out that Mr Peck's manuscript notes of this meeting recorded that Mr Milford thought there should be a CI at that stage. Mr Colton KC therefore suggested that the fact that there was no decision to commence a CI then must have been a close-run thing. I am not sure that this follows because ultimately, it was the thinking of Sir David Green that mattered; but if the question was finely balanced at this stage (in a context which concerned Kazakhstan only) it could fairly be said that what DC23 and 24 subsequently did was to tip the balance.

461. So in my view, that decision and the Rappo Letter are neutral factors. And it is important to recognise that while the SFO now was taking a tougher line in terms of giving no assurances and threatening the CI, the position on the ground, as it were, had not changed. See once more, Mr Thompson's email of 18 December and the view expressed by Sir David Green and others that actually, the situation had improved since Mr Dalman became involved.

The Kazakhstan report

462. I then turn to the Kazakhstan Report. I have already said that Kazakhstan was only a subsidiary reason for the CI Decision. The report on Kazakhstan at the end of the day identified no criminality and Mr Thompson clearly thought ultimately that it was something of a "damp squib". Of course, in a proper SR process, ENRC would not have been delivering a report at all but just informing the SFO that no criminality (and hence no basis for a civil settlement) had been identified.

463. The most that could be said is that the falsification of documents etc identified in the Kazakhstan report at least showed that there were elements in Kazakhstan (and so associated with ENRC) capable of disrupting an investigation. This is how Mr Gould put it in his section 2A Note. I see that but overall, it is still the case that any concern over or interest in Kazakhstan was very much less of a priority than Africa.

DC25

464. The next event was DC25 which I have described at paragraph 404 above. Here, the SFO contends that this was another reference to the new material on Africa and this was not an IDC, although it was a DC where Mr Gerrard was in breach of duty. It is correct that Mr Gerrard again referred to sanctions and material to suggest that the $35m had gone on bribes with the main suspect being Mr Hanna. There is also a reference to wishing to make an early briefing in the context of ENRC wanting to suspend one or two people and Mr Gerrard not wanting to jeopardise any subsequent investigation. There is no reference here to Mr Gerrard being denied access to materials as such.

465. Notwithstanding that content, I do not think that DC25 deprives DC23 and 24 of their causative force.

466. First, ENRC's primary position is that none of the DCs would have occurred had the SFO acted properly at the beginning and refused to deal with Mr Gerrard on a private basis. Second, quite apart from that, had DC23 and 24 not occurred, there is no reason to think that DC25 would have occurred. In any event, Mr Rappo had, of course, already been appraised of DC23 and 24 by Mr Thompson. Also, when it came to the s2A Notice, what Mr Gould specifically referred to were the calls on 27 and 28 February.

27 March meeting, the s2A Notice and Dechert's Dismissal

467. One then comes to the events of 27 March. The SFO says that the very fact of Dechert's dismissal was a reason to commence a CI, just as it was the immediate reason for issuing a s2A Notice against the now-dismissed Dechert the same day.

468. However, this has to be seen in context. First, Mr Gould's "Reasons" section of his "Decision" note referred to DC23 and 24 specifically as I have just mentioned. There is the reference to new material. He later referred to the fact that Fulcrum had not made any mention of the new material or the timing of any report on Africa. He then referred to the concerns, now that Dechert had been sacked, as to what the new incriminating material was (since Dechert at least would not now be reporting it) and "ENRC's intentions". That latter point must reflect, at least in part, what Mr Gerrard had said in DC23 and 24 about the possible loss of evidence and evidence to which he had not been given access.

469. Under normal circumstances, it is hard to see why a change of law firm, even at this stage, would have led to the sort of reaction which the SFO had on Dechert's departure. In my judgment its dismissal was of particular concern precisely because Mr Gerrard had made it

clear to the SFO through the IDCs that ENRC could not be trusted in some material respects and he was the "honest broker" or conduit, as it were. When one adds to this the notion that Dechert might have had to resign in order to give the SFO the best chance not to lose incriminating material, it is not surprising at all that the SFO acted as it did on 27 March. But none of this dispels the causative force of DC23 and DC24.

470. All of that is, in my view, much more important than the question of a delay on the Africa report caused by the change in representation. As already noted, Mr Gould in fact kept communicating with Fulcrum about producing new material and a report, until just before the meeting. It is not the case that the new team signalled an approach of being less co-operative or forthcoming; quite the contrary.

The Position of Mr Dalman

471. As at the date of the CI Decision, Mr Dalman had intimated (on 27 March) that he might resign. However, there is no evidence that this played a part in the CI Decision itself, although in his email of 12 April (see paragraph 415) Mr Thompson did refer to the possibility that Mr Dalman might not be re-elected at a Board meeting on 16 April in the context of urgency. But if Mr Dalman's possible departure had played a role, it is all of a piece with the reason for the impact of Dechert's dismissal. That is because his "full and frank" approach to the SFO had been largely driven by Mr Gerrard's advice, so Mr Dalman could be seen as part of the same "team" as Mr Gerrard. But of course, the importance of Mr Gerrard to the SFO was the information which he was communicating in the IDCs. So, insofar as one could divine the SFO's thinking about the possibility of Mr Dalman resigning, the latter could not be seen as a free-standing factor; and the likelihood is that it would have been seen as suggesting Mr Dalman's position was compromised in some way, as with Dechert.

Dealings with Fulcrum in April

472. All of this was then followed by the SFO's dealings with Fulcrum. Although the SFO presents what happened with Fulcrum as something like "the last straw", in fact the SFO was engaging with Fulcrum as to future work and, it seems, without any criticism; see paragraphs 409 - 414 and 470 above.

Conclusion

473. Overall, I cannot see that the events of 2013 leading up to the CI Decision were such that they, rather than DC23 and 24 (and in the context of the prior IDCs), were the real cause of that decision and that DC23 and DC24 had no causative impact.

Other Material

474. I now turn to the other information which the SFO said was available which would have justified a decision to open a CI in any event, and which did not emanate from DC23 and 24. I should emphasise, as noted above, that the relevant material is that which the SFO was aware of and acted on, rather than what was simply "available out there", as it were, and which could, if acted upon, have justified a CI Decision.

475. When necessary, I will refer back to points made concerning other material that I considered in the context of the SFO's Secondary Case on causation generally, at paragraphs 210 - 228 above.

DCs other than the IDCs ("the Other DCs")

476. The SFO says that significant material was obtained here. Insofar as it relies upon DC25, I have dealt with that at paragraphs 464 - 465 above. Otherwise, I think it is correct to say that the Other DCs would not have occurred anyway, in a counterfactual where the SFO should not have dealt with Dechert privately. See paragraphs 182, 194(2) and 194(4) above.

The OMs

477. I have dealt with this point at paragraphs 211 - 213 above in the context of causation as against the SFO generally.

478. Further, and so far as any CI was concerned, there was no decision to open a CI following the OMs, which ended in November 2012. And as already mentioned, the SFO had viewed ENRC as being constructively engaged in the SR process especially after Mr Dalman was appointed. The fact was that no relevant criminality was shown thus far. Compare all of that with what Mr Thompson was told at DC23 and 24.

479. So I do not see the information provided at the OMs as being a real contributing factor to the CI Decision.

Press Articles

480. I have dealt with this topic at paragraphs 215 - 219. The points made there apply equally to their relevance to the CI Decision.

Global Witness

481. There is in fact no reference to GW material in the CEB at all. It is correct that Mr Thompson's note for the meeting on 21 January did refer to GW, who had contacted the SFO specifically about ENRC and had made representations (see paragraph 391 above). No decision to commence a CI then was made, of course.

482. Later, in the context of the Rappo Letter, Mr Rappo said (while awaiting a reply from ENRC) that Kevin Davies, the SFO's then Chief Investigator, should contact GW to see what additional material it held or whether it had a whistleblower who might be willing to speak to the SFO. On 12 February 2013 Mr Davies met with GW along with Mr Rappo. Mr Davies noted that the bulk of GW's data was in the public domain or on the Internet although there was intelligence from other sources and some of that was "positively marked"; the latter term was not explained by GW. GW said that it would consider providing information which might otherwise be subject to confidentiality and it would report back in two weeks. It is not clear whether GW did provide any further information.

483. However, the day after that meeting, Mr Rappo sent an email to Mr Gould to say that Mr Coussey would be reviewing the (first) Kazakhstan report. He also said that once the addendum to it (on stripping) and the report on Africa were produced, consideration could be given to providing a recommendation to the CE Board about commencing a CI.

484. The position by 27 March was then set out in the section 2A Notice referred to above. One part of it read thus:

> "Information from global lobby groups strongly suggests that bribery and corruption has taken place in DRC in relation to mining interests held by ENRC. However no evidential material has been obtained from these groups which would lead to a formal criminal investigation; it is suspected that Dechert is holding material upon which such a decision could be based."

485. In fact, of course, the s2A Notice was not effected in terms of obtaining documents held by Dechert until after the CI Decision had been made. So any information produced by GW could not have been material.

486. Accordingly, it does not seem to me that any GW information took the issue of a CI much further.

Intelligence referred to in the CEB

487. I have described this at paragraph 454 above. Given the redactions, it is difficult to assess what the significance of this might have been but on its face, it certainly does not appear to have concerned Africa and appears to relate to entirely different matters. In addition, it does not feature in the CAN as a reason for the CI and there is no specific evidence about reliance on this intelligence. In my judgment, it does not take the matter much further so far as the basis for the CI is concerned.

The RAID report

488. I have dealt with this in the context of general causation at paragraph 222 above.

489. It is correct that Mr Gibson said at paragraph 99 of his WS that by around 2011, there was enough open-source material, including investigations done by RAID, to justify the opening of a CI. In cross-examination, he accepted that this was 3 years before he joined the SFO and he did not know why he was opining on this material in his WS. While he said he had read the RAID report in 2014 when he joined the SFO, he could not remember reviewing any of the underlying materials (including this report) specifically for the purpose of his WS. He maintained, however, that he still thought there was adequate information to open an investigation. While this may have been his view, it seems he had not gone back to the RAID report to check that view and of course it is also the case that he had some *animus* towards ENRC (as set out in J/1612).

490. However the important thing is that if this was Mr Gibson's view, it was not shared by Mr Collins or Mr McCarthy.

491. Finally, since RAID is a lobbying group like GW, what was said by Mr Gould in his section 2A Note (referred to at paragraph 484 above) is equally applicable here.

The Depel Interview

492. I have dealt with this matter comprehensively at paragraphs 316 - 328 above. It does not assist the SFO here, in my view.

The other s2A interviews

493. These consisted of interviews with Sir Ken Olisa and Mr Richard Sykes.

494. Mr Richard Sykes was interviewed on 19 June 2012 by Mr Elton and Mr Thompson. In that interview he said that he had never seen any evidence of corruption in Africa involving ENRC. He later said that they had found no evidence at all of corruption in the DRC.

495. Sir Ken Olisa was interviewed on 9 July 2012 by Mr Wilson and Mr Thompson. In the course of the interview, Mr Thompson suggested that Sir Ken Olisa's concern was really over corporate governance and how the company was run as opposed to outright wrongdoing "per se" and Sir Ken Olisa said that was exactly right. He later said that he had not seen even a whiff of corruption and did not think, from what he had observed, that ENRC was "one for the SFO".

496. No internal reports were made by the SFO in respect of these interviews. Given the content of the interviews, there appeared to be no relevant knowledge about corruption on the part of Mr Richard Sykes and Sir Ken Olisa which would otherwise have been relevant for criminal offences.

497. Further, the CEB itself said this at paragraph 22:

> "22. A review of the information obtained from the totality of the Section 2A interviews has led to the formation of a number of lines of enquiry which would be appropriate to explore in the event a formal criminal investigation is commenced. There is no material within the interviews which would be sufficient upon which to base a prosecution."

498. Given all those circumstances, there is no basis for saying that the section 2A interviews had any causative impact on the CI Decision.

SARs

499. I have dealt with this subject at paragraphs 220 and 221 above. There was a reference to SARs at paragraph 23 of the CEB as follows (with a redaction of the last line):

> "23. A vast array of material is available to the investigation as a result of Suspicious Activity Reports ('SARs'). Periodic reviews have taken place but resources have not permitted a full assessment of the lines of enquiry which this information source can provide."

500. Given what is said there, it cannot be said that the SFO never looked at SARs, and of course the JD SAR was something that Mr Gould in particular was keen to have progressed since it would enable the Gertler buyout, which in turn would enable ENRC to access more material. However, as paragraph 23 makes clear, there had not been a full assessment.

501. Mr Colton KC points out that the fact that the SARs were essentially filed in order to obtain SOCA consents does not mean that their content should be regarded as irrelevant. As already noted, I would agree with that; but the fact remains that the SFO did not fully assess them and there is no real evidence that it relied upon them.

The SFO's alternative case on making the CI Decision

502. The SFO contends, in the alternative that even if it would not have made the CI Decision when it did in the absence of DC23 and 24, it would still have made the same decision somewhat later. For this purpose, the SFO relies on certain events which occurred after 19 April.

Resignations

503. Insofar as the SFO rely upon the actual resignation of Mr Dalman on 23 April, I do not accept that this would have provoked a later CI Decision; but if it did, it was tied back to the SFO's own wrongdoing in the IDCs. See paragraph 471 above.

504. Certain of ENRC's officers also resigned, namely Mr McCarthy and Mr Nolan. The Company Secretary Ms Penrice also resigned. In the latter context, the SFO relies upon an email sent by Ms Penrice to Mr Vulis, Mr Dalman and Mr Wilkinson on 17 April. In it, she sets out her concerns that an outsider might conclude that there was a lack of willingness within the ENRC Group to resolve the issues facing it. She refers to the delay in carrying out

the remedial action plan at SSGPO, the dismissal of two firms of lawyers and the delay in convening a Board meeting to discuss the concerns of non-executive directors, among other things. She prefaced this by saying that Mr Vulis might be leaving himself open to accusations that he was not being sufficiently robust in tackling corruption within the Group. If the company could not commit to dealing with these issues speedily, then Ms Penrice could not continue as Company Secretary. Mr Vulis's terse response to this email was to say "Noted".

505. I see all of that, but there is no evidence that the SFO saw this email at the time and every reason to suppose that it did not.

506. It is worth noting that Mr Wilkinson, who was a director, and who said on 27 March that if Mr Dalman went, then so would he, in fact stayed on until October 2013. The same applies to Mr Burrows and Mr Khalil who were other non-executive directors.

507. On the hypothetical that the CI Decision was not made when it was, I fail to see that these resignations would have made the difference subsequently.

Addleshaw Goddard

508. Addleshaw Goddard's retainer in relation to the investigation, Dechert and secondment was terminated at around the same time as Dechert's, although its invoices suggest some discussions up to 31 March. There is little or no evidence that in this hypothetical, the dismissal of Addleshaw Goddard would have played a role in any later putative CI Decision. Under normal circumstances, the replacement of one firm by another (i.e. here Fulcrum) would not cause any particular concern.

509. If the argument is that the departure of Addleshaw Goddard would have added to the concern over Dechert's dismissal, then this really goes back to the basis for any concern over Dechert's dismissal which I have dealt with at paragraph 469 above.

Failure to produce an Africa report

510. It is, of course, the case that no Africa report was produced. However, ultimately Fulcrum was never given the chance to produce one. But prior to the CI Decision, the SFO had been communicating to Fulcrum that it was prepared to deal with it by, for example, indicating what areas on Africa it wished Fulcrum to cover, and that was in the knowledge that Fulcrum had just come on board so there was bound to be a delay. See paragraph 472 above.

511. The truth was that on the basis that the CI Decision was made when it was actually made, part and parcel of that process was for the SFO no longer to engage with Fulcrum (or ENRC

generally) over the SR process. It is quite impossible to say that if the CI Decision had not been made then, the SFO would still also have ceased to engage with Fulcrum despite their communications in April.

Conclusion

512. It follows from the above that I reject the SFO's alternative case which is that even if the CI Decision was not made when it was made, it would have been made shortly afterwards in any event.

Overall conclusion

513. In my judgment, and for all the reasons given above, but for the SFO's wrongdoing (being DC23 and DC24 either by themselves or along with or in the light of previous IDCs) the CI Decision would not have been made. Alternatively (and this would be sufficient in law) the SFO's wrongdoing was on any view an effective cause of the CI Decision even if there were other causes too.

DEFENCES RAISED BY THE SFO

Introduction

514. I did not understand Dechert to be contending that ENRC's losses were not reasonably foreseeable. Indeed, given the amount it has now paid to ENRC that would be difficult to do; it would also in any event be hopeless to suggest that the losses were not reasonably foreseeable. Essentially, therefore, the issue for Dechert is over quantum.

515. It is correct that Dechert has taken some points as to the level of HSF and AG fees (see paragraph 31 (d) of the Dechert SOC), but I have dealt with these in context when dealing with quantum.

516. Mr Gerrard does not separately take any points on reasonable foreseeability.

517. Accordingly, I am here dealing with the points taken by the SFO on reasonable foreseeability.

518. I dealt with the law on reasonable foreseeability at paragraphs 155 - 163 above. I repeat here that none of the findings in my judgment on the Phase 1 Trial were directed to the question of whether the type of losses sustained by ENRC here were reasonably foreseeable, which is an objective question. So, for example, my observation on the question of actual knowledge or probable loss in respect of misfeasance at J/871 that "…generally, from a common-sense point of view, knowledge of the losses claimed by ENRC is not obvious at all from the nature of the SFO's breaches of duty." is not determinative of the reasonable foreseeability question

here. Equally, neither is my observation at J/870 that the 18 June Letter "…It simply had the prospect that ENRC would now engage more extensively with the SFO than before. At one level, I can see that if this meant that ENRC would have to look for and disclose more information than previously, it was foreseeable that legal and other costs would increase.".

519. The first question is the type of loss with which I am now concerned. The relevant losses here are Unnecessary Work, Unnecessary Costs and WMT in circumstances where there would have been some Necessary Work, Necessary Costs and management time anyway. It would be obvious to anyone working at the SFO having the roles of Mr Gould, Mr Thompson, Mr McCarthy and Mr Alderman (among many others) that any investigation work by a company done in response to enquiries from the SFO or for the purpose of the SR process or something like it, would cost a substantial sum, to include fees of lawyers, other professionals and investigators. I also think it would be obvious that management time would be spent. In this context, the amounts also were likely to be substantial given the size and nature of ENRC's operations in particular in Kazakhstan and Africa and the fact that it was a listed company here at the time.

520. I think it follows from the above that if the investigation to be undertaken by ENRC expanded, by covering new areas or by being more detailed or in greater depth, those relevant costs would increase, too.

521. Thus far, I do not understand the SFO to suggest otherwise.

522. However, the SFO says that this is not sufficient to establish reasonable foreseeability for the losses claimed here, essentially for two reasons:

(1) It was not reasonably foreseeable that the SFO's wrongdoing would lead to any expansion in the work involved in the investigation; see paragraph 8 (4) of the SFO SOC and paragraph 28 (3) of its submissions ("the Expansion Point");

(2) In any event, what had to be reasonably foreseen was not simply any expansion of the investigation work generally but rather expansion in relation to particular workstreams. This point arises out of how the SFO puts its case on causation of loss as well, or at least partly so; see paragraph 45 of its submissions ("the Workstream Point").

523. I consider each in turn.

The Expansion Point

524. This begins by noting, correctly, the nature and extent of Dechert's own breaches in terms of unnecessary expansion, disproportionate approach, scope of the investigation and failing to set boundaries, among others. In this regard, I have already held that these breaches did not constitute a *novus actus* so far as causation and the SFO's wrongdoing is concerned.

525. It is obviously correct that the SFO was not aware of the detail of the particular advice given (or not given) by Mr Gerrard to ENRC. Nor was it aware of the detail of the costs incurred. That said, Mr Thompson accepted that he had never disputed that at every stage Dechert's investigation was costing ENRC a very large sum of money.

526. However, the SFO was aware that the investigation was likely to expand and that awareness arose out of the IDCs. There are two aspects to this. First, what Mr Gerrard told the SFO about the investigation and second, what the SFO openly said to ENRC about it.

527. As to both of these aspects:

(1) In DC4, Mr Gerrard said that ENRC needed to understand the "big problem" and other things, all of which I found to be designed to arouse the SFO's interest, quite apart from being damaging to ENRC and without its authority (J/520-544); but if the SFO was going to take an interest, or more of an interest than before, the likelihood is that ENRC would have to incur further legal and other fees in dealing with it;

(2) In DC5, Mr Gerrard said that he had given a message back to his client and that it was "serious/concerns" and he later referred to various factions within the company (see J/546-556);

(3) Then, in DC7 (J/572-582) Mr Gerrard told Mr McCarthy that the meeting (OM1 on 3 October) had "truly shaken" the company and they would enter the SR process. Of course, I have held that ENRC's decision to enter the SR process was not caused by SFO wrongdoing. But in the context of IDCs like this, one can legitimately say that with ENRC's increasing engagement with the SFO, costs were bound to increase;

(4) In DC8 (J/587-601) Mr Gerrard stressed the need for "full and frankness" on all issues and the SFO needed to make the position clear to ENRC and the consequences of not doing so;

(5) In DC13 (J/642-648) Mr Gerrard continued the theme of ENRC not accepting the full scope of what was needed in the investigation (which had been referred to earlier in DC9 and DC10) and that the SFO needed to give a clear message;

(6) Finally, there is DC15 and the pre-agreed 18 June Letter (see J/725-750). I dealt with this at paragraphs 298 - 300 above. This was in the context where I found that Mr Gerrard wanted the SFO to "up the ante". In holding that there was a reckless breach of duty on the part of Mr Thompson, I thought that his motive in agreeing to write the letter was to help Mr Gerrard to exert pressure on his client "to play ball" rather than to assist him to expand his remit to charge more fees. But from the point of view of reasonable foreseeability, it was reasonably foreseeable that if the SFO encouraged or required ENRC to do more work, or more detailed work, it would cost more money. This was in the context of what the SFO then said at OM6 about ENRC being in the "last chance saloon" and Mr Gould's "overblown" references to a raid (see J/735-737).

528. In addition, the SFO knew from the IDCs, at least in general terms, that Mr Gerrard was saying that he was struggling to get ENRC to follow his advice about what they needed to do in terms of the investigation. That obviously meant his advice was for them to do more, not less. If the SFO assisted him in this respect by sending "messages" to ENRC, then it was reasonably foreseeable that such messages would increase the amount of work to be done.

529. The next question is whether, nonetheless, ENRC must show that it was reasonably foreseeable to the SFO, not merely that the investigation would expand, but that it would expand essentially through Dechert's own breaches, referred to above. I do not think so. First, I have rejected the notion that the SFO's wrongdoing played no causative part in the incurring of the losses, as a matter of factual causation. Second, I think it goes too far to say that it needs to be shown that it was reasonably foreseeable to the SFO that Mr Gerrard would give wrong advice on raids or wrong advice as to what the investigation required or that he would make the investigation disproportionately large.

530. So, for those reasons, I reject the Expansion Point.

The Workstreams Point

531. This is about the level of detail or "granularity" of the losses that had to be reasonably foreseen. I do not accept that it has to be reasonably foreseeable to the SFO that the result, for example, of one or more IDCs was an increase in a particular workstream, or indeed the creation of such a workstream. I think it is sufficient if there was reasonable foresight of the increased cost of the investigation, which the SFO knew concerned particular activities in Kazakhstan and a range of activities, including the acquisition of Camrose, CAMEC and Chambishi and other matters, in Africa.

532. In the context of factual causation and quantum, I reject a similar point made there, in paragraphs 550 - 554 below.

Conclusion

533. Accordingly, I consider that the requirement for reasonable foreseeability in respect of the SFO's wrongdoing has been made out.

Remoteness: Novus Actus Interveniens

534. I have already rejected this defence in the context in which it was raised. See paragraphs 183 and 207 above, but also in paragraph 541 below.

Failure to mitigate on the part of ENRC

535. The SFO alleges in paragraphs 68-70 of its SOC and at paragraph 48-52 of its submissions that ENRC failed to mitigate its loss. This was because it did not take any steps to reduce the disproportionate amount of legal fees being charged and the other costs it was incurring. Alternatively, it says that this excess amounted to an intervening act on the part of ENRC itself.

536. The SFO relies on the fact that ENRC says that it has paid to Dechert much more than it should have done. Also that there were indications by some of ENRC's advisers, or by some working at ENRC, that Dechert was charging too much or doing Unnecessary Work. See the statements relied upon by, for example, Mr Richards of JD, Mr Prosper and Taylor Wessing, and also comments made by Mr Ehrensberger, Mr Zinger and Mr Ammann set out at paragraph 68 (2) and (3) of the SFO SOC. Just pausing there, I can see all of that, but the problem was that ENRC, and in particular Mr Dalman (but others before him) were relying on Mr Gerrard's advice about the extent of the work that needed to be done and how it should be done. At the time, Mr Gerrard was effectively able to close down arguments about restricting the scope or depth of the work, not least by saying that this is what the SFO expected. And of course, at the time, ENRC did not know of Dechert's (or the SFO's) serious breaches of duty. This was in a context where Mr Gerrard was a senior and apparently respected partner in a City firm, and a specialist in corporate crime. While ENRC was obviously a sophisticated commercial entity with no lack of experience of using lawyers, it was new to the SFO and its processes, especially the SR process and needed considerable guidance. This is what Mr Gerrard purported to give.

537. Further, to some extent, the SFO itself was downplaying to ENRC the views of JD and Mr Ehrensberger which in turn had been derived or partly derived from Mr Gerrard. For

example, see Mr Gould's reference to JD being "too close" and Mr Ehrensberger being "defensive" at OM5 and the SFO expressing concern about JD at OM6; see J/653 and 736. So from Mr Dalman's perspective, any comments by JD and Mr Ehrensberger as to the scope of the investigation being too great must be seen in this context.

538. I also held that ENRC relied on advice from Dechert in preference to that from other advisers - because it trusted Dechert at the time. See J/1091, 1095, 1097 and 1246 (2) (b) and (c).

539. I note also that on 27 January 2017, in the Costs Proceedings, Master Rowley held as follows:

> "90. I cannot decide the cause of the breakdown of the relationship without evidence being given but it seems to me that the need to keep the SFO onside regarding the self-investigation is not disputed. I accept that this state of affairs required the claimant to keep Dechert onboard, at least for the period of the relevant invoices. I consider this to be a special circumstance since that the claimant could not realistically challenge its solicitors' fees within the month required by the Solicitors Act to avoid needing subsequently to demonstrate special circumstances."

540. Of course, I am not bound by that decision, and neither is the SFO. Nonetheless I think it is a correct view of the situation facing ENRC while Dechert was instructed.

541. For all those reasons, I do not accept that there was a failure to mitigate or any intervening act, which can assist the SFO.

APPROACH TO THE DETERMINATION OF QUANTUM

General Approach on Unnecessary Work

542. ENRC and Dechert have criticised each other's general methodologies, and have taken the position that their own methodology must be followed without reference to the other's. That is unrealistic and unnecessary, in my view. It has in fact been possible for me to determine quantum by using an amalgam of both methodologies in a common-sense way.

543. This is because (a) each side has divided its analysis into the Earlier and Later Periods and (b) each has addressed every individual line item in the invoices.

544. The only additional point is that for the Earlier Period, Dechert has re-allocated the labels given to some line items by ENRC. In particular, where ENRC has applied Reasons 2, 3, 4 and 6, Dechert has usually attributed the relevant line item to Africa, Kazakhstan or Both.

545. Where it has done so, I proceed on the basis of that re-allocation. ENRC has not challenged it as such, and as Dechert did the work, it is reasonable to assume that when it has attributed a line item to a particular workstream or activity it has done so correctly. After all, that is effectively what it had to do for the invoices rendered in respect of the Later Period because of the Costs Proceedings.

546. In the analysis which follows, I have carried out essentially two tasks, for both the Earlier and Later Periods:

(1) I have decided the points of principle dividing the parties and which are ultimately responsible for the different positions as to what was Necessary and Unnecessary Work; and

(2) I have allowed, in whole or in part, ENRC's claimed reductions on line items; where ENRC has contended that a particular class of a line item's work was Unnecessary, but I consider that some allowance should be made, or, to put it another way, part of that class of work was Necessary, I have applied a percentage reduction as I consider appropriate.

547. The approach I have taken for the second task is necessarily somewhat broad-brush but it seems to me to be the most practical and fair way of determining the quantum of the Unnecessary Work claim, and it is a permissible approach. It should mean that the parties should be able to work out the precise figures from those determinations.

548. Because precisely the same sums are not claimed as against the SFO since the Period 1 losses are claimed only against the DDs, there will have to be an adjustment to take account of this, which ENRC and the SFO should undertake. I do not anticipate that it will be unduly difficult.

General Approach on Unnecessary Costs

549. The approach to Unnecessary Costs is necessarily parasitic on what I determine in relation to Unnecessary Work since that gives effect to my view as to what, in the counterfactual, was the proper scope of the investigation by reference to what was the Necessary Work on the part of Dechert which was leading the investigation. As will be seen, ENRC's approach to the quantification of what were Unnecessary Costs follows that approach. As a matter of principle, that must be correct.

Objection by the SFO to ENRC's approach on quantum

550. Quite apart from its points on causation, which I have considered above, the SFO makes a further point relating to both causation and quantum in respect of Unnecessary Work. At paragraphs 43 and 44 of its submissions, it has set out a table of references to ENRC's and the SFO's respective SOCs which deal with the Reason Codes supplied by ENRC in its Quantum exercise. In its SOC, the SFO has set out a case why its wrongdoing could not have been the cause of the individual Reason Codes and the workstreams to which they relate. It

points out that ENRC has not sought to demonstrate why any particular workstream, if Unnecessary, was caused by the SFO's wrongdoing. It also says, correctly, that for the most part, ENRC's SFO Reply does not seek to counter in detail, the points made by reference to each workstream in the SFO SOC.

551. On that basis, the SFO effectively says that ENRC's quantum exercise cannot run against it at all. ENRC says that this is too granular an approach. One is entitled to take a common-sense approach. The court, it submits, does not have to trace a causal connection between every sum claimed by reference to individual line items and the work described therein, to SFO wrongdoing. Rather, it says that "*Once ENRC has proved, as a matter of principle, that the SFO's wrongdoing caused ENRC to suffer a loss of paying for Unnecessary Work in any given month following such wrongdoing, it has only to prove quantum by comparing what it actually paid Dechert versus what it should have paid a reasonably competent solicitor.*"

552. The SFO counters that what should have been paid to a reasonably competent solicitor is a proper counterfactual as against Dechert, but not as against it. However, I fail to see why not. At the end of the day, it is only by understanding what a reasonable solicitor would have done and charged (and by extension, what should have been charged by third parties instructed by it or working according to an investigation scope set by it) that one can decide what was Necessary and Unnecessary. The SFO's position seems to ignore the true nature of ENRC's case on causation and which I described (and endorsed) at length in paragraphs 131 - 139 and 172 - 214 above.

553. On the basis that ENRC is entitled to make a case based on the cumulative effect over time of concurrent and consecutive breaches of duty by both Dechert and the SFO which were intertwined, common sense would dictate an approach of the kind which ENRC has undertaken on quantum.

554. Accordingly, I reject this objection by the SFO. For the same reason, I have already rejected above the notion that issues of reasonable foreseeability are to be assessed by reference to individual workstreams.

SFO objection based on payments by ENRC Management (UK) Limited

555. It is common ground that the fees charged by B2, HSF (for the most part) and KPMG (among other providers which are not now relevant), along with the salaries of Mr Ehrensberger and Mr Zinger were paid by a wholly-owned subsidiary of ENRC, namely ENRC Management (UK) Limited ("ENRC Management"). It is also the case that Mr

Ehrensberger's and Mr Zinger's respective service agreements were made with ENRC Management, as opposed to ENRC, although the services they rendered were in real terms to ENRC.

556. At paragraph 63 (2) and 66 (1) of its SOC, served on 29 November 2022, the SFO took the points that ENRC cannot recover for the sums claimed in respect of those 3 providers or (through its WMT claim) in respect of Mr Ehrensberger and Mr Zinger. This is because ENRC Management, not ENRC, paid them. As ENRC Management is not a party to this claim, ENRC's claim to that extent must be disallowed in any event.

557. ENRC's response to this was set out at paragraph 64 of its SFO Reply, served on 23 December 2022. Its first answer was to say that it was too late for the SFO to take this point - it should have been made in the underlying substantive statements of case, not least because the Phase 1A Trial did not allow for new evidence - the relevant materials were limited to the evidence given in, and the documents in the trial bundle for, the Phase 1 Trial only.

558. The SFO points out that originally, it had disputed ENRC's claim for losses and said that this claim was not particularised and did not disclose that ENRC was not the entity that paid all the relevant sums. When asked for Further Information in relation to the sums paid by ENRC, it said in its initial response on 26 February 2020 that the request was disproportionate, and ENRC had otherwise pleaded to the issue in question. The SFO had also asked specifically if the relevant personnel were employed by ENRC or not, and if not, how ENRC alleges that it had suffered the loss. Again, ENRC said that the SFO was not entitled to this information.

559. Subsequently, ENRC served its Unnecessary Work Further Information on 3 June 2021, which included Schedule 2, dealing with WMT. This document cross-referred to Mr Ehrensberger's service agreement with ENRC Management.

560. As for ENRC Management paying HSF, B2 and KPMG, the relevant invoices (or most of them in the case of HSF) are addressed to ENRC Management. The SFO would have had access to these, or many of them, since the time of original disclosure in back June 2020.

561. I appreciate that once the Phase 1 Trial started the parties were concentrating on that, and once it was decided that most questions of causation and loss would be deferred, the priority would have been on the issues being debated at the Phase 1 Trial. Nonetheless, and even accepting that it is for ENRC to prove its case, the point taken in the SFO's SOC could have

been raised much earlier in my view. That is especially so in the context of the agreement that the Phase 1A Trial would not admit any new evidence.

562. In these circumstances, I would not rule out the SFO's point on payments being made by ENRC Management altogether, but I think as a matter of fairness and practicality, some leeway should be given to ENRC in how it responds to it. I would certainly accept that there may well have been insufficient time, as at the end of 2022, to take steps like obtaining an assignment. Of course, in this case that might have been of limited utility since ENRC Management did not have its own cause of action against Dechert and the SFO in any event. However, I think it was reasonable for ENRC to decide not, in the event, to seek to put in further evidence.

563. What ENRC does do is to rely upon its Accounts, filed for the financial years ending 31 December 2011, 31 December 2012 and 31 December 2013. In each case, reference is made to ENRC Management as a 100%-owned subsidiary and to the fact that ENRC owed to ENRC Management in respect of management recharges the sums of $32m, $33m and $55m respectively. In each case those recharges were repayable on demand. The figure for 2010 was $41m. ENRC says that it can be reasonably inferred from this that it had at least incurred a liability to ENRC Management for the sums which the latter had paid to entities or individuals for the services they rendered to ENRC.

564. Mr Colton KC submits that this is not enough. He says that, in particular, the increase in the amounts owed by ENRC to ENRC Management as between 2011 and 2012 is only $1m. However, that could not possibly accommodate all the relevant payments made by ENRC Management in the year ending 31 December 2012. It may be that ENRC had repaid some of its debts to ENRC Management while further liabilities accrued, but there is no evidence on the point. I see this, but I think it can be reasonably inferred that this is exactly what was going on. This is especially true for HSF and the other providers, where the underlying contracts were not with ENRC Management at all. Either they were with ENRC or with Dechert.

565. In my judgment, there is sufficient evidence that ENRC has in fact either paid, or still remains liable to ENRC Management for, the sums which the latter has paid out to the individuals and providers concerned.

566. If necessary, ENRC also makes the further point that even without that evidence of payment or liability, it has a claim for what ENRC Management has paid out, but which is to be

classed as Unnecessary Costs or WMT. That is because it can say that the losses sustained by ENRC Management (which has no claim in its own right) are equal to the diminution in value of ENRC's own shareholding in ENRC Management.

567. As to that, Mr Colton KC makes reference to what Lord Sales said at paragraph 132 of his (partially dissenting) judgment in *Marex Financial Ltd v Sevilleja* [2021] AC 39:

> "Where the company suffers loss and this affects the value of shares in it, there is obviously some relationship between the loss suffered by the company and the loss suffered by a shareholder, so that in a loose sense it might be said that the latter loss reflects the former. But the loss suffered by the shareholder is not the same as the loss suffered by the company. There is no necessary, direct correlation between the two. The loss suffered by the shareholder does not reflect the loss suffered by the company, in the stricter sense of there being a one-to-one correspondence between them."

568. I see that, but in my view a more relevant passage is that at paragraph 32 of the judgment of the majority, given by Lord Reed as follows:

> "Since the value of a company's shares is commonly calculated on the basis of anticipated future distributions, it is possible that a loss may result in a fall in the value of the shares. That is, however, far from being an inevitable consequence: companies vary greatly, and the value of their shares can fluctuate upwards or downwards in response to a wide variety of factors. In the case of a small private company, there is likely to be a close correlation between losses suffered by the company and the value of its shares. In the case of a large public company whose shares are traded on a stock market, on the other hand, a loss may have little or no impact on its share value."

569. Obviously, ENRC Management is far from being a small company, but it is a private, wholly-owned subsidiary of ENRC nonetheless, whose own shares are not traded on the stock market and which is described in the group accounts as a "Group Management Services Company". Here, I think it is permissible, if it were necessary, to take the value of the "losses" sustained by ENRC Management as equal to the diminution in value of ENRC's 100% shareholding in it. (There is no problem with the so-called "reflective loss" principle since ENRC Management has no cause of action against the defendants in this case.) However, strictly, it is not necessary to resort to this in the light of my finding at paragraph 565 above.

570. Accordingly, going forwards, I shall assume that all the relevant losses claimed by ENRC were indeed its losses.

QUANTUM ANALYSIS: UNNECESSARY WORK IN THE EARLIER PERIOD ON KAZAKHSTAN AND AFRICA

Introduction

571. As already noted, ENRC's basic position is that, save for some very limited exceptions, no work on Kazakhstan should have been done after 31 October 2011. Accordingly, this general point feeds into not only the Earlier but the Later Period as well. Dechert disagrees up to a point.

572. ENRC's original Reason 1 was framed as work on Kazakhstan post-31 October 2011. However, this was supplemented in the final version of the Unnecessary Work Further Information by what I have referred to Reason 1B. It needs to be considered separately from Reason 1A.

573. Most of the work done by Dechert in the Earlier Period was on Kazakhstan. According to Dechert, it invoiced £2,004,698.78 on Kazakhstan, £644,173.08 on Africa and £614,310.19 on Both in this period. Ultimately, the amounts in dispute between ENRC and Dechert were £1,003,461.42 on Kazakhstan, £294,330.53 on Africa and £111,752.08 on Both. ENRC's Reasons in respect of the Earlier Period concerned particular workstreams rather than Africa as a whole, namely Chambishi and Sanctions.

Kazakhstan - Reason 1A

Farm

574. The issue here is whether there is any basis for saying that there was Necessary Work to be done on the Farm after 31 October 2011. For its part, Dechert contends that after 28 September 2011, 50% of the fees incurred thereafter in the Earlier Period were Necessary and therefore 50% were not. The 50% which remained Necessary was attributed to dealing with the wrongful use of SSGPO employees and equipment. See the Dechert SOC at paragraph 80 and the Earlier Period Appendix 1 for the Earlier Period.

575. In fact, ENRC says that the Farm investigation should have been closed in the week after 31 May 2011. I agree with that. Mr Pickworth said at the 31 May AC meeting that this was now closed, subject only to Mr Gerrard producing a clear opinion, which he could and should have done then. Dechert seems to have chosen 28 September 2011 as a date for the closure of the Farm investigation because Mr Gerrard said at the AC meeting of 28 September that it could be closed (subject to a review by Mr Kowalewski). But in truth there was no reason why it could not have been closed earlier, subject to Dechert's point about SSGPO.

576. As for the wrongful use of SSGPO employees and expenses, I can see no basis for any allowance for work after 31 October. After all, this had been part of the original complaint in WB1 back in December 2010. Moreover, Mr Gerrard himself had said the investigation could be closed on 28 September 2011. There is nothing in J/1232 which suggests that the SSGPO investigation should have persisted beyond 28 September 2011.

577. Yet further, it is very unclear why 50% of all later work done on the Farm is a proper estimate for SSGPO work. ENRC made this point at paragraph 28 of its Reply SOC.

578. Accordingly, the reduction after 31 October 2011 in respect of the Farm should be 100% and not 50%.

Procurement

579. I made observations about this at J/1233-1236.

580. Again, Dechert has applied a 50% reduction only, for the period after 28 September 2011. At paragraph 87 of the Dechert SOC, it admits that the investigation itself would not have gone beyond October 2011. However it says that there would still be further work done to produce the report for the SFO, liaising with it, and taking appropriate remedial steps for ENRC, as set out in Appendix 1. This point is made in relation to a number of Kazakhstan workstreams.

581. Paragraph 71 of the Dechert SOC also admits that the vendor audit was Unnecessary. I had observed that it was hard to see that a detailed vendor audit was really required. In relation to the Later Period, where Dechert's 50% of the work in relation to Procurement is maintained, it said that this was to account for my observation about vendor audit. See Appendix 1/4/7. But this is difficult to follow, given that Dechert had already admitted that it was unnecessary. Dechert also said that the vendor audit had itself given rise to "other issues that required investigation along the way". However, first, if there was no need for a vendor audit, the other issues would not have arisen. Second, and in any event, it is very unclear what these further issues were and whether they would have been Necessary items of work anyway.

582. So what one is left with is the question of the production of a report, liaison with the SFO and remedial actions. See paragraph 77 and 86 of the Dechert SOC, as responded to by paragraph 24 of ENRC's Reply SOC.

583. This question gives rise, first, as to whether <u>any</u> report on Procurement was Necessary, for the purposes of the SFO. In my view, it was not. No relevant criminality was found and the only point of such a report within the SR regime would have been to identify some criminality as the basis for a potential civil settlement.

584. The context here, is of course that the substantial part of the Kazakhstan investigation, so far as a report was concerned, was Procurement, and Dechert accepts that the Procurement investigation itself should have ended by 28 September 2011. Since there was no criminality found, there was no need for a report. But even if there was, it would have been drastically shorter than the 10 chapters over 438 pages which occupied the report eventually provided to the SFO. And as I said at J/1235:

> "…The point was that once the SFO became involved, the focus should have been on what was important to it. Yet fundamentally, this allegation had always been about internal fraud. In theory, any aspect of procurement wrongdoing could be said to flow from WB1, but that was not the focus once the SFO became involved."

See also J/121-125.

585. In contrast, what was likely to have been of "real interest" to the SFO would have been something in relation to bribery and corruption. See J/1094, 1102 and 1221.

586. It is also material to refer to paragraph 14 of the JD note of OM3 which said this:

> "NG gave the SFO an update in respect of Kazakhstan. In relation to NG's explanation of the likely fraud on the company that had taken place, Mark commented that there may be jurisdiction issues. By way of example he said that if it involves UK people then it may be relevant but in the context of the report back to the SFO he wanted the company to consider not over-burdening the SFO…"

587. This shows that the SFO did not want to be overburdened by the material supplied. As to the point that if "UK people" were involved it "might be relevant", Dechert (at paragraph 71 of its SOC) said that there were potentially frauds on ENRC involving such people. It gave the example of the UK-based Mr Vulis and Ms Zaurbekova who had been suspected of wrongdoing, although none was found. But in the case of Mr Vulis, this was in connection with the Education Allegation and in the case of Ms Zaurbekova, this was in connection with the Stripping Allegation which came about later, in 2012.

588. Notwithstanding the possible criminal offences triable here that might conceivably have been possible before any investigation established the facts (see paragraph 71 (vi) of the Dechert SOC), I fail to see how this assists Dechert. That is because the narrow question is whether, in the context of the Procurement investigation being closed by 28 September 2011, there was any basis for a reasonable solicitor to report anything to the SFO. In my judgment, and as at that point, plainly not. No relevant criminality had been disclosed at that point. Here, it must be remembered that the decision to engage with the SFO only came later, on 9 November 2011. The fact that ultimately, and very much later, the SFO opened the CI which was said to include Kazakhstan is not to the point. First, we do not know what aspect of Kazakhstan may have potentially been of interest, if anything. Secondly, the overwhelming likelihood is that the CI did not in fact embrace Kazakhstan. See J/1594, 1595, 1598 and 1603 and paragraph 445 above.

589. Accordingly, in my judgment, even on the basis that ENRC had agreed to enter into the SR process on 9 November, there was in truth nothing to report. Nor do I see that any formal report on Kazakhstan would have been required for internal purposes either. Once a workstream was closed down when it should have been, a reasonable solicitor, if asked, could have written a letter which briefly set out the steps taken and conclusions reached, as

ENRC contends should have happened. In fact, there was no evidence that the AC requested such a formal report.

590. It also follows from the above that no "liaison" with the SFO was needed when the investigation should have ended at the latest by the end of October 2011. If, on the other hand, by liaison, Dechert just means general communications with the SFO updating it on aspects of its investigations, this echoes the concept of a "running commentary" which should not have occurred anyway. See J/1014.

591. Finally, as to remedial actions, ENRC has actually given credit for this in respect of the Later Period. All work relating to "remedial activities" for Both was accepted as Necessary save in two minor respects, being Sanctions and Internal.

592. For all those reasons, I reject the claimed 50%-only reduction by Dechert in respect of Procurement work after 31 October 2011.

Iran

593. I dealt with this at J/1237 and 1238. Dechert proposes a reduction of 60% for the entirety of the Earlier Period. Appendix 1 says only that there was no finding by me that the work was Unnecessary. It accepts that the Iran investigation was closed at the end of May 2011.

594. However, Dechert says that this investigation was justifiably re-opened in November 2011. It refers to the fact that in J/1237, I did not expressly state that the remark made by an interviewee did not justify re-opening the investigation then. Accordingly it says that it should be taken into account. However, while I recorded the fact of it being re-opened and why, this did not mean that I was disavowing any suggestion that this re-opening was unjustified. In my view, it was unjustified. Moreover, I cannot see how it would justify 40% of the fees incurred after 31 May 2011 as being Necessary. The same applies to the further re-opening in March 2012 because of a suggestion by Mr Depel which Ms Gonzalez regarded as "far-fetched". Dechert relies on other parts of the email where she said this. In total, it reads thus:

> "Mmm, I do not dispute that this could be an issue but I think this is too far fetched. We should focus on the straightforward sanctions issues. Widening this even further is likely to create even more issues with the client than we already have now ... M"

595. This is plainly advising against taking the matter further. She was correct to do so for the reasons she gave.

596. So the two re-openings later on did not justify a reduction of only 60%.

597. That then just leaves the arguments that it was necessary to produce a report, liaise with the SFO and take remedial action. I have already rejected that submission in relation to Procurement and that rejection applies even more strongly here.

598. Accordingly, the contention that 40% of the work done in respect of Iran was still Necessary after 31 October must be rejected. The 100% reduction claimed by ENRC must remain. I should add that there is no reason not to reject this contention insofar as it is made by Dechert in relation to the Later Period.

Education

599. Dechert accepts that all work relating to Education after 28 September 2011 was Unnecessary. In fact, ENRC has allowed work up to 31 October, so Dechert gains from this somewhat, as it does in respect of these date differences for other workstreams. Otherwise there is no issue between the parties on quantum here.

Stripping

600. At J/1240 I said this:

> "ENRC accepts that this is a matter that had to be investigated once it arose in December 2011 but in my view, Dechert should have let KPMG get on and investigate it instead of challenging that assignment (disingenuously in my view) and then disputing some of KPMG's conclusions. This was important because that argument then held up the production of the Kazakhstan report."

601. ENRC's position is that none of the work done by Dechert here was Necessary because it should have let KPMG get on with it. This aspect of the investigation could have been led by IA.

602. For its part, Dechert says that all work on Stripping up to 23 October 2012 was Necessary. This is when KPMG was instructed. For the period after that, a reduction of 50% has been applied.

603. Stripping first arose in December 2011 i.e. after ENRC's general cut-off point for the Kazakhstan investigation. Most of the work done in respect of Stripping was in the Later Period. Dechert contends that external solicitors' assistance was still needed and IA could not have led the investigation alone. On this point, Dechert refers to the email from PwC to Mr Ehrensberger dated 10 February 2012 to say that the external investigation team needs to continue the work on stripping because any issue might be a matter for the primary financial statements of ENRC. It is correct that in the summary statement attached to that email, there is reference to the stripping allegations requiring follow-up by both IA and an investigator (as opposed to an external law firm). I see that, but I do not think that this excludes Dechert's

prior point about the continued involvement at least to some extent, of the external investigation team.

604. I can also see that the purpose of the review was to identify any criminality for the purposes of the SR. This would involve external lawyers at least to some extent.

605. Dechert also says that its involvement would still have been significant, because of the issue which developed between it and KPMG over the correct figures (see paragraph 68 (f) of Dechert's written submissions) and J/1213-1219. Here, I disagree with Dechert. If it had let KPMG get on with it, Mr Gerrard would not have become embroiled in a dispute with KPMG where he challenged their assessment. I make this point in J/1240.

606. The upshot is that I am prepared to say that there should be an allowance for some external lawyers input going forwards but only at a very high level and not in the way in which Mr Gerrard actually conducted himself. Here I would be prepared to allow 10% of the Dechert work on Stripping as Necessary.

Kazakhstan - Reason 1B

607. It will be recalled that Reason 1B was added relatively recently before the Phase 1A Trial, as explained at paragraph 83 above. It is not deployed as a free-standing challenge to a line item which has not previously been challenged. It is not always clear that it has been applied consistently. By way of an example, it is applied to line item 128 of invoice 5025408 (see K1/47.2/1) but not to the item immediately above at 1274, being work done the previous day by the same fee-earner, Mr Anderson, and where Cyntel and Mr Kowalewski featured in both narratives.

608. I agree with Dechert that this new Reason has the appearance of something of a makeweight where the "internal" and/or "unclear" Reasons have already been used (as to which see below).

609. I consider that this Reason should simply be removed as a Reason. Accordingly the line items in question to which it has been applied will be treated by reference to the other Reasons applied to them, and then as determined by me below.

Documentary Review, IT issues and other unnecessary work ("Document Review") - Reason 2

610. This is stated by ENRC at paragraph 2 (2) of the Unnecessary Work Further information as follows:

> "As pleaded at paragraph 180.1 of the RRRAPoC and paragraphs 89-110 of the SoC, had Dechert and Mr Gerrard not breached their duties, ENRC would have sought to limit, so far as possible, the extent of work promised to the SFO to prospective work to: (a) improve ENRC's systems and controls;

> and/or (b) the completion of FRA's books and records review in Africa; and/or (c) a limited review of the due diligence associated with the Camrose and CAMEC acquisitions, to involve interviews with professional advisers, members of the board and senior management. Instead, (as pleaded at paragraph 174) Dechert and Mr Gerrard repeatedly and wrongly expanded the scope of their investigations into Africa to include a disproportionate and unnecessary data recovery, analysis and review exercise, involving data from ENRC's servers in London and Zurich, and Africa. Work done beyond the scope of that pleaded at paragraph 180.1 of the RRRAPoC and paragraphs 89-110 of the SoC is unnecessary. This comprised largely work on document review and IT issues, but also other matters such as investigations into other subsidiaries, research and trips. This code has also been used in respect of certain work on document review and IT issues where Dechert's invoices do not allow for clear identification of whether it relates to Kazakhstan or Africa."

611. This Reason has been applied to both Kazakhstan and Africa work. It is separate from Reasons 1A and 1B. Therefore the cut-off date of 31 October 2011 in respect of Kazakhstan work does not apply. On ENRC's case, therefore, it applies to Kazakhstan work before 31 October which would otherwise have been allowed. Where Reason 2 has been applied to a line item, that item is disallowed by ENRC in its entirety.

612. Dechert says that ENRC's approach is something of a catch-all and is not sensitive to any particular workstream in Kazakhstan or Africa. Although Dechert says that there is no need for this separate Reason, it has in fact given some reductions against it. For Kazakhstan, it is part of the weighted average mix as already noted. A 60% reduction is given for the whole of the Earlier Period on Document Review in the Kazakhstan Response. But this is then translated into the overall reduction of 30% pre-28 September 2011 and 50% afterwards for all work on Kazakhstan.

613. Where Dechert has determined that both jurisdictions were involved, it has applied a 60% reduction.

614. Dechert also says that Reason 2 is flawed to the extent that the expression "Document Review and IT Issues" is itself too vague. It rejected this Reason at paragraph 88 of the Dechert SOC as being "vague and speculative". Moreover, Dechert says that the application of this Reason was unclear because in some cases (for example line 1306 of invoice 3028104 at K1/94.2) there are various items with various descriptions. It is not clear if ENRC is saying that all of these were Unnecessary because they constituted Document Review or not. I appreciate that Reasons 3 and 4 are also applied to this particular line item. But the point is still the same.

615. As against that, I think there is force in ENRC's overarching point that my judgment made clear that there was an excessive amount of general work on documents, reviews etc. being done. That is not fully taken into account by determining when certain workstreams should have stopped.

616. Doing the best that I can, and in relation to Kazakhstan at the moment, I consider that the right approach is to make a deduction as Unnecessary for Document Review but not at 100%. Instead, I would adopt Dechert's primary percentage of Necessary Work under this head which is 40% prior to it being taken into the weighted average. Accordingly, the reduction to be made is 60% in the case of Document Review for Kazakhstan.

617. In the Kazakhstan Response, IT Issues are treated as a separate item with an 80% deduction before, again, being absorbed into the weighted average. I think that where it is possible to distinguish between Document Review and IT Issues, that 80% deduction should also be applied, to the latter. Otherwise it is to be the 60% reduction referred to in paragraph 616 above.

618. All of the above concerns Reason 2 as it is applied to Kazakhstan work only.

619. As for Africa, this is dealt with in the separate "Doc Review IT Issues" tab of the Earlier Period Appendix 1 spreadsheet for the Earlier Period. Four Africa work streams are listed, being CAMEC, Camrose, Chambishi and imaging the African server in Summer 2012. Here, Dechert has applied a 50% reduction across the board, save for the imaging of the Africa server where it agrees a 100% reduction. See, for example, line item 2006 of invoice 3028933 where only Reason 2 has been applied. Dechert has attributed this to Africa and applied 50%. In argument, ENRC suggested (and it was not challenged by Dechert) that the logic for a reduction of 50% here must have been because collection and review of documents on the Africa servers was Unnecessary, but such collection and review <u>was</u> Necessary in relation to the London and Zürich servers. See the qualification made to the admission at paragraph 122 of the Dechert SOC.

620. If this was the logic of the 50% reduction, ENRC points out that I made negative observations about the size of the document review generally (and not limited just to data on the Africa servers) at J/1306-7, 1311 and 1321. That is correct.

621. So the question is whether 50% is enough in relation to Africa. In my judgment, it is insufficient, having regard to the plainly excessive nature of work done in respect of Africa generally but also, here, my particular conclusions on the separate Chambishi Reason 6 at paragraphs 651 - 669 below. I think the correct reduction should be 70%.

622. There are some line items marked Document Review which Dechert considers related to both Africa and Kazakhstan. In such cases, it applies a 60% reduction. However, I have increased

the percentage reductions for both Africa and Kazakhstan and so in my judgment, the reduction here should not be 60% but 80%.

623. If there are cases where both Reason 2 and Reason 3 have been applied, it is the relevant Reason 2 percentage deduction which should apply. If Reason 2 has not been applied at all to a line item but Dechert has marked it as a Document Review item, it should be treated as a Document Review item and the relevant percentage applied.

624. If, where Reason 2 has been applied, the workstream description given by Dechert would yield a higher percentage deduction (for example "Kazakhstan-Post-28 September 2011") then that higher percentage deduction applies.

Internal - Reason 3

625. This is described by ENRC as follows:

> "Internal: As pleaded at paragraph 180.1-180.2 of the RRRAPoC and in the section of the SoC dealing with Issue 67, had Dechert and Mr Gerrard not breached their duties, their investigations would have been limited in the manner set out therein. Accordingly, no more than de minimis time should have been spent on internal liaison and this work is unnecessary. Work done on the supervision and training of junior members of Dechert's team (e.g. trainees and paralegals) and purely administrative tasks (e.g. printing, billing and reading in) is also unnecessary."

626. Again, if this Reason is applied, it treats as Unnecessary any line item, regardless of when the work was done or the workstream to which it related.

627. In the vast majority of cases Reason 3 is not applied on its own; rather it is applied with other Reasons, usually Reasons 1A or 1B and/or 2 and/or 4. According to ENRC, there are only about 500 lines which it would otherwise have accepted as Necessary, but which were rendered Unnecessary by reason of Reason 3 applying on its own. This amounts to about £100,000 worth of Dechert's fees. ENRC says that an exercise of judgment has been applied before deploying Reason 3. This is why some line items that might justify the appellation of "Internal" (like, for example, lines 1312 and 1343 at K1/94.2/1) are agreed by ENRC to be Necessary. In other words, some critical examination of the line items was brought to bear by ENRC.

628. Dechert's main point, however, is that this should not be a free-standing Reason at all. Some internal work in relation to a particular workstream might be regarded as excessive or Unnecessary. But it does not follow that all such work was. Reason 3, as described above is meant to remove more than minimal work on internal liaison or training of junior members of the Dechert team or administrative tasks. But on that basis again, it is hard to see why a line item like 1306 on invoice 3028104 should have attracted Reason 3, especially as only part of it could have attracted Reason 2.

629. Notwithstanding that Dechert's approach is effectively to concede nothing in respect of Unnecessary internal work in the context of otherwise Necessary Work, I can quite see that where there are entries as to a team meeting it might be something significant to a workstream, or it might not. Given the overall findings I have made about Mr Gerrard's practice of inflating the size of the job, it seems to me that I should give effect to that, not just in terms of the scope of the workstream and when it should have stopped. After all, to give perhaps an extreme example, even if the team working on Procurement produced a report and even if it went beyond October 2011, it is impossible to see how the actual 438 page report was justified or proportionate.

630. Dechert's approach is to treat the relevant line items according to the workstream to which they actually related. If this was a workstream at a point in time when Dechert said it was Necessary, this item would have a 0% reduction. See, for example, line items 1371 and 1375 of Invoice 3028104. Or a 50% reduction might be applied because it dealt with Kazakhstan after 28 September 2011 - see for example line 1374. So where there is a line item to which Reason 3 has been applied, it may still be reduced by Dechert. For an early example see lines 8 and 12 of invoice 3025199.

631. It follows that as I have said that work after 31 October 2011 on Kazakhstan was Unnecessary, line items which ENRC called "Internal" and to which for some reason, Reason 1A was not applied (probably because it was not clear that it was Kazakhstan), but which Dechert has said <u>was</u> Kazakhstan, the line item should be regarded as Unnecessary. Again, see line item 1374. If ENRC had already applied Reason 1A, that line item would be out anyway. For other examples, see items 377-381 on Invoice 3026272. Here, Dechert has said that 2 out of the 5 line items are for pre-28 September 2011 work while the other 3 are for post-28 September 2011 work. Since all the work was done on 6 December 2011, I think the reference to pre-28 September 2011 work must be mistaken. But the point is that where Dechert has classified work disallowed by ENRC on the basis of "internal" and in fact it related to Kazakhstan, the reduction should be not 50% but 100%.

632. In reality, for Kazakhstan in the Earlier Period, the dispute over Reason 3 only makes a difference in the pre-31 October 2011 period where it forms, on ENRC's case, a "carve-out" to its general position that all work in that period is Necessary.

633. There are some cases where a line item challenged on the basis of this Reason is then allocated by Dechert to, for example, "Africa-CAMEC/Camrose/Chambishi". It seems to me that if the narrative shows that the subject was CAMEC/Camrose then there should not be the

0% deduction offered by Dechert because that would not give effect to the fact that in my view, internal work is also subject to deduction because there can be such work which is plainly excessive. In my judgment, in such a case, the deduction should be 50%, as opposed to the 100% sought by ENRC and the 0% offered by Dechert. If the narrative shows that the real focus of the work was Chambishi, then this falls in truth under Reason 6 and would be subject to the 10% deduction referred to in paragraphs 651 - 669 below. It will be for the parties, hopefully, to agree what the focus of the work was, by reference to the narrative.

634. If Reason 3 has been applied along with Reason 2, I consider that the relevant Reason 2 percentage should be applied across the board for that line item.

635. In some cases, where Reason 3 has been applied, Dechert has allocated the line item to "Africa-Doc Review/IT". In that case, the relevant Reason 2 percentage deduction should be applied, even if Reason 2 was not the basis for the challenge to that line item.

636. Finally, where Reason 3 has been applied, but Dechert has allocated the line item to "Sanctions – Pre-5 March 2012", a deduction of 50% rather than 0% (as offered by Dechert) should be applied. This is, again, in order to give effect at least in part to the notion that there must have been excessive internal work.

Unclear - Reason 4

637. I can take this issue shortly. At the time when ENRC originally analysed the invoices for the Earlier Period, it is quite right that some of the line item entries were unclear, especially as to the workstream to which they related. This was not the fault of ENRC - rather, Dechert should have made the invoices clearer.

638. What ENRC did was to create Reason 4 in these terms:

> "The narrative description does not contain sufficient detail or information to justify the work said to have been done."

639. However, regardless of whether it was appropriate to classify all such unclear entries as Unnecessary, the position has moved on. Dechert's own Appendix 1 has identified the jurisdiction and/or workstream to which such entries related. ENRC could then have amended its analysis accordingly, since the items were no longer "unclear". However, it chose not to.

640. Further, where Reason 4 is not the only Reason applied, it could be said that the line item could not have been unclear, otherwise it would not have been possible to apply other Reasons to it by dint of its content. I accept, of course, that the argument could be that it was

just one part of the line item which was unclear and the remainder attracted the other Reasons.

641. There are some instances where Reason 4 is the only one applied. See, for example, line 1403 of Invoice 3028104. It reads as follows:

> "Preparation and attendance at meeting with Beat Ehrensberger to discuss SFO presentation. Follow up items and amendment of slides. Emails in and out."

642. It is very difficult to see what is unclear about this. If in fact ENRC is saying that it is the reference to "Emails in and out" and that is the only point, the other part of the line item would be Necessary. The only way it could be deemed Unnecessary is by the application of Footnote 4 which would seem disproportionate here. A similar example can be found at line 1440.

643. In my judgment, there is no basis for Reason 4 and I reject it. It simply falls to be treated according to the relevant workstream allocated to that line item by Dechert. There will be no additional Unnecessary Work as a result of it that would not otherwise be classed as Unnecessary anyway, according to my determination.

Sanctions – (after 5 March 2012) Reason 5

644. This reads:

> "As pleaded …had Dechert and Mr Gerrard not breached their duties, ENRC would have sought to limit, so far as possible, the extent of work promised to the SFO (see above). Moreover, as pleaded at paragraphs 92.2, the SFO stated at the 5 March 2012 meeting that no further reports to the SFO on any alleged sanctions violations were required (J/1263, 1275). Accordingly, the sanctions investigation would not have continued beyond 5.3.12, save for a limited investigation of (i) the allegation that Mr Prosper made a suspect payment to Mr McCormick, and (ii) the concern that a conflict of interest arose from Mr Prosper acting for Mr Rautenbach, which would not have been a "huge task" and would likely have consisted of no more than a short document review and meeting with Mr Prosper (J/1275, J/1295, J/1319). ENRC has approximated the likely costs of such an investigation by identifying (so far as possible based on the limited detail provided in Dechert's invoices) all narrative entries recorded in connection with preparation for a meeting with Mr Prosper on 22 May 2012, after these issues were raised in Dechert's Project Kitchen report of 4 May 2012 (J/1275). The total fees incurred in connection with those narrative entries amounts to £20,102.50, adopting a generous approach to entries where there is some doubt whether they relate to these issues. ENRC accepts that 75% of these costs would have been incurred in any event as part of the Necessary Work, for which it does not claim. ENRC has given credit for this sum of £15,076.88 above."

645. For the Earlier Period, this is a relatively small item, since that period ends on 17 May 2012. Nonetheless, any line items relating to this are classed as Unnecessary save for ones dealing with the matters concerning Mr Prosper.

646. The dispute between the parties here is narrow and in effect it concerns the size of the credit to be given for the work done on the allegation of a suspect payment from Mr Prosper to Mr McCormick and a possible conflict of interest in Mr Prosper acting for Mr Rautenbach. Dechert says that my judgment does not go so far as to say that there should only have been a

short document review which is, according to Dechert, the basis for ENRC's credit of £15,076.88. It suggests that this credit is not enough and that there needed to be an investigation into the relationship between Mr Prosper and Mr Rautenbach and the suspect payment. What Dechert has done is to identify all line items that appear to relate to either of those matters and then apply a reduction to them. Any other sanctions work which came after 5 March 2012 has been deducted 100% by Dechert.

647. I have not tried to work out the actual value of Dechert's proposed credit for the relevant work as opposed to ENRC's. However it seems to me that only a brief written review was required and I therefore conclude that ENRC's credit was sufficient. If that credit is given, then all the entries after 5 March 2012 should be classed as Unnecessary.

Disproportionate Requests - Reason 7

648. This is stated as follows:

> "As pleaded…had Dechert and Mr Gerrard not breached their duties, ENRC would have sought to limit, so far as possible, the extent of work promised to the SFO (see above). The information and document requests made by the Defendants went far beyond such a limited review."

649. Dechert says that this cannot apply as a free-standing Reason because it is likely to duplicate other Reasons, it is very general and it cannot be applied outside of the context of the work to which it relates.

650. I agree with Dechert here. Accordingly, line items which attract Reason 7 will be attributed to the relevant workstreams and Dechert's substantive case on that workstream which will either succeed or not succeed, depending on my determination.

Chambishi - Reason 6

651. This states as follows:

> "As pleaded…had Dechert and Mr Gerrard not breached their duties, ENRC would have sought to limit, so far as possible, the extent of work promised to the SFO (see above). This would not have included an investigation into Chambishi (see paragraphs 102-105 of the SoC). Moreover…the scope of work discussed with the SFO on 5 March 2012 did not include the Chambishi acquisition."

652. The first line item to which this Reason was applied is line 1644 of Invoice 3028350 for work on 14 March 2012. There are, in total, 6 line items affected in the Earlier Period.

653. ENRC contends that no work on Chambishi should be allowed. This is on the basis that no reasonable solicitor would have advised that there be an investigation nor would they have advised that Chambishi as a subject be referred to the SFO at all. Any work that was necessary could be done internally. Alternatively at the most, a brief written report could have been submitted to the SFO explaining that there was no illegality and no criminality.

654. For its part, Dechert contends that all of the Chambishi work was Necessary save that where ENRC had applied Reason 2 to a line item (but not Reason 6 as well) and which Dechert has attributed to Chambishi (or Chambishi as part of Africa work) a 50% deduction is applied. This is consistent with Dechert's general approach to apply a 50% deduction where Reason 2 had been applied to line items.

655. Although ENRC has only described 6 line items as being related to Chambishi, Dechert has described many more as falling within or including the Chambishi workstream. However, the key point of principle is whether Chambishi work should be disallowed as Unnecessary in its entirety or whether there should be some sort of allowance (ENRC does not say how much) for a brief report. This point of principle of course extends into the Later Period.

656. It is common ground that the key potential issue over Chambishi concerned its acquisition by ENRC in February 2010. Chambishi was and is the owner of the Chambishi copper and cobalt mine in Zambia. On that acquisition, due diligence for ENRC had been carried out by JD, EY, PwC and SRK Consulting. Two fair-value opinions had also been obtained, from Credit Suisse and Lazard.

657. On Chambishi, I said this at J/1320-21:

> "1320. As for Chambishi, it is correct that ultimately the SFO wanted an assurance that there had been no illegal activities on the acquisition. However, this was essentially a concern about a purchase from a related party where in fact there had already been two independent valuations.
>
> 1321. I also agree with ENRC that the amount of documentation reviewed and the number of persons interviewed were plainly excessive."

658. On 23 June 2011, an internal report was produced for ENRC management by Mr Kowalewski and Ivan Kharitonov, Senior Management of IA ("the June 2011 Report"). It was a post-acquisition review of CAMEC and Chambishi. It said that one year on, it was recognised locally and at group level that the original optimistic views and plans initially expressed for integration, restructuring and improving efficiency, had not been realised as expected. This is then described in detail over 5 pages followed by over 70 pages of detailed proposals for concrete actions. One of the 5 major business issues identified was an insufficient basis for the valuation assumptions used for the Chambishi acquisition, because such assumptions were not sufficiently proven. Further assumptions might not be realised either. In more detail it was said that production levels had been overstated in Credit Suisse's model, as compared with current management plans. Also, forecasts for the completion of a new plant were too aggressive, which affected the cash-flow forecast. Other points included assumed tax losses which could not be utilised, and the possibility that the then Chambishi management's data which it supplied for the purposes of cash-flow forecasts was not

accurate. Dechert relies on these observations, and others, to support the notion that Chambishi was on ENRC's radar as a serious problem at the outset.

659. I see what was observed in the June 2011 Report, but there was nothing here which suggested criminal activity, although obviously, going forward, there were potential problems in terms of financial performance. Dechert also says that there were legal matters and points to where the report said this:

> "Tax and Legal risks: Incompliance with tax, ecology, subsoil use, labor and other legal requirements, which may lead to significant fines and penalties as well as discontinuance of operations;"

660. However, I cannot see what that has to do with any potential SFO involvement here.

661. In terms of any investigation or implementation of the matters raised by the June 2011 Report, it is hard to see why that could not have been done by IA. There was no resource problem and if an external investigator like PwC was required, IA could supervise them. See J/1123 and 1126. As for Mr Kowalewski, Dechert criticises the appropriateness of his running any investigation by reference to what Mr Depel said about him in vituperative terms in the Depel Interview - see items 10 and 19 in the extract quoted by me at J/664. However, my references to his involvement were not in negative terms; see J/968, 1126 and 1181.

662. Dechert also relies on the fact that the SIC was seriously concerned about Chambishi issues and strongly desired Mr Gerrard to investigate them, as Mr Dalman made clear at the 9 May 2012 SIC meeting. What happened was that according to Ms Black's note, Mr Dalman said that the focus was now going to be on Camrose and Chambishi and then the report to the SFO. Mr Gerrard said this was a sensible way forward. Here, context is important.

663. On 20 February 2012 at a meeting between the SFO and Mr Gerrard and Mr Pickworth, Mr Gerrard mentioned Chambishi although it was not on the table then (J/1261). Dechert then proposed to put Chambishi in its presentation for OM4 but it then removed it at the request of JD which had suggested that ENRC should first consider whether the matter be referred to the SFO at all (J/1262). On 12 April 2012, Dechert made very extensive information requests including about Chambishi; Dechert said that this is what the SFO expected (J/1265).

664. Here, it is also worth noting my general observations about Mr Dalman:

> "1095 Fourth, there is no doubt that for the most part, Mr Dalman went along with what Mr Gerrard suggested. He said in evidence that he thought he was committed to the investigation and "to carry it forward in what he saw was the best interests of ENRC his client". However, that is not necessarily inconsistent with the investigation in fact being unnecessarily expanded. At the end of the day, in my judgment, Mr Dalman was guided by Mr Gerrard, whom he regarded as the expert. Moreover, of course, Mr Dalman did not know of Mr Gerrard's wrongful conduct in relation to the DCs, the August, December or March Leaks, and the Depel Interview. In addition, the contemporaneous documents show occasions when Mr Dalman also thought that Mr Gerrard was stepping out of line.

> 1097 The first point concerned Mr Dalman's approach of "investigate everything". I refer here back to my observations about him in paragraphs 1095 above. It is also said that Mr Dalman offered no criticism of Dechert's approach to the investigation. But as the documents show that is not entirely accurate. Further, the documents do not actually show, overall, that Mr Gerrard's approach was subservient to Mr Dalman. That is because Mr Dalman was guided by Mr Gerrard and even then, sometimes pushed back. And as for his judgment that Mr Gerrard always had the best interests of ENRC in mind (which, objectively, I do not think he did) that would not itself prevent a finding of negligence."

665. I accept that these observations do not refer specifically to why Mr Dalman raised the question of Chambishi at the 9 May meeting. However, Dechert had previously been angling to get Chambishi on the agenda and any message that this is what the SFO would have expected would certainly have influenced Mr Dalman's view. However, the key point is this: no reasonable solicitor would have advised that it was a sensible way forward to do a detailed investigation into Chambishi and put it on the agenda for the SFO as at 9 May 2012. Had a reasonable solicitor advised that Chambishi should not be raised at the SFO at that stage, Mr Dalman would undoubtedly have accepted it. Had he accepted it, he would not have mentioned it at OM5 on the following day. So it is irrelevant that I said at J/1272 that it was unclear why Mr Dalman referred to Chambishi, albeit not by name, at OM5. Finding, as I do, that if a reasonable solicitor had been advising, Chambishi would not have been raised by Mr Dalman is not in any way going behind what I said at J/1272 (cf paragraph 80 of Dechert's written submissions).

666. I agree with Dechert that it is possible that the reference of Chambishi to the SFO on 20 February 2012 may, taken on its own, have been sufficient to arouse the SFO's interest even if nothing was said on the subject thereafter. But this does not really matter. If it was sufficient, this was down to Mr Gerrard mentioning it when he should not have done. If it was not sufficient, the fact remains that properly advised, the SIC would not have decided as it did at the 9 May SIC meeting.

667. On the question whether a short report to the SFO would have been sufficient, had it been decided to raise the matter with the SFO at all (ENRC's secondary case), Dechert refers to what was said at OM5 by Mr Thompson, whose note records this:

> "… the SFO was concerned to make sure that whatever disposal was eventually agreed or decided upon, it was important that we were satisfied the company had indeed been transparent and had put in place arrangements that would be robust going forward."

668. This was a general remark about any disposal ultimately agreed with the SFO. I fail to see why it would rule out a brief report which did not disclose any criminality in relation to pre-BA events and was actually unnecessary, but gave the SFO some comfort that Chambishi was effectively a non-event for the SFO. It needs also to be remembered that the remark made by Mr Thompson was against the background of DC13 and what Mr Gerrard had told

Mr Gould (see J/646). This was an important backdrop to Mr Thompson's statement at OM5 about a lack of progress and nothing substantive having yet been reported. This is not the statement relied upon by Dechert as set out in paragraph 667 above, but it is reasonable to assume that it would have influenced the other comments he made. The fact is, that as far as the SFO was concerned, Chambishi was not a substantive matter.

669. In my judgment, Chambishi should never have been put before the SFO at all and the SIC would certainly have accepted advice to that effect. I can see that even here, there might have to have been some limited solicitor involvement to lead up to and explain that advice. Perhaps erring on the side of generosity towards Dechert, I would for this reason allow as Necessary 10% of the Chambishi work across-the-board. This would include line items where ENRC has specifically referred to Chambishi or where Dechert has allocated work to Chambishi even though ENRC did not. Had I been wrong in that conclusion and some form of report should have been put to the SFO I would have allowed 20%.

Footnote 4

670. I referred to this at paragraph 79 above. It deals with the position where a line item contains both Unnecessary and Necessary work but it is not possible to say how much time was spent on each. I do not think it is appropriate here simply then to class the entire line item as Unnecessary.

671. It seems to me that some attempt must be made to divide up the line item cost into what is Necessary and Unnecessary, having regard to my findings above, and on the basis that ENRC started from a position in these cases where it recognised that there was at least some Necessary work. It seems to me that the correct way forward is to enable the parties to see if the relevant line items can be "split" in some way, once ENRC has identified which the relevant line items are. If the parties are all agreed on a methodology or outcome for dealing with these cases, that would be preferable. But if they cannot, it seems to me that the fairest and most proportionate way of dealing with the relevant line items is to split the costs 50-50. That will be the default position.

QUANTUM: UNNECESSARY WORK IN THE LATER PERIOD ON KAZAKHSTAN

672. For the reasons given above in respect of Kazakhstan work in the Earlier Period, I agree with ENRC that all Kazakhstan work done in the Later Period is Unnecessary, save for a 10% allowance for Dechert work on stripping (see paragraph 606 above) and that done in respect of Ms Zaurbekova.

673. As to Ms Zaurbekova, ENRC has given a credit which is set out at paragraph 6 of the Unnecessary Work Further Information. This credit is for £23,556.38 which is 10% of the total value of fees charged in respect of narrative entries in invoices on or after 16 October 2012 and which appear to relate to Ms Zaurbekova and the PwC WBE. The basis for this credit is as follows:

> "ENRC accepts that there would in any event have been some investigation into Ms Zaurbekova once the whistle-blower allegation that she had defrauded ENRC of USD 20 million arose in October 2012 (J/1233) (the "**PWC WBE**"), which investigation would have formed part of the Necessary Work. However, such investigation would have been limited, because it was not a "*matter for the SFO, at least not in any great detail, since again* [it] *essentially concerned possible frauds on ENRC, not instances of bribery and corruption*" (J/1102). The work done by Dechert in connection with Ms Zaurbekova does not fall within a specific Workstream (see paragraph 3(2) above) and accordingly ENRC has conducted a review of the narrative entries recorded on or after 16 October 2012 to identify work which relates to Ms Zaurbekova. The total value of that work amounts to £235,563.75. However, the narrative entries relating to Ms Zaurbekova do not clearly distinguish between work which relates to the PWC WBE, and that which relates to other allegations being investigated by Dechert, such as the allegations in connection with education and procurement. That work was plainly unnecessary and excessive: J/1221-1244. Accordingly, only a small proportion of the fees incurred in connection with Ms Zaurbekova from 16 October 2012 to 31 March 2013 would have been incurred in any event as part of the Necessary Work, which ENRC estimates amounts to 10% of the overall total. This totals £23,556.38, for which ENRC does not claim. ENRC has given credit for this sum above."

674. At paragraph 70 of its written submissions, Dechert contends that the credit offered by ENRC is insufficient. Reference was made to its Appendix 1 but this did not state what Dechert said should have been credited, nor why ENRC's credit was wrong. Accordingly, I asked for some further information on the point and on 23 October 2023 the following explanation was provided by email:

> "In ENRC's Amended RRFIs at paragraph 6 on page 24 {C1/11.1/24}, ENRC identified a sum of £235,563.75 as being work undertaken in the period 16 October 2012 to 31 March 2013 ("the **Period**") potentially relating to the investigation of Zaurbekova's connection with the PWC WBE. ENRC contend that only 10% of this work was necessary resulting in a figure of **£23,556.38**. No specific entries were identified by ENRC.
>
> Adopting the same date range within the Period, it is Dechert's position that 50% of £303,996.15 should be allowed i.e. **£151,998.08**. This has been calculated with reference to the following:
>
> - During the Period, a large portion of the fees incurred have been coded as "Multiple" meaning that numerous Kazakhstan workstreams (as identified in Appendix 1 {C1/22.4} have been included in the individual fee entries within the Period.
> - The percentage reduction applied for Unnecessary Work during the Period is 60% and 50% respectively, which is applied to all entries coded as follows: "Multiple" {C1/22.4/1} – 60% reduction; SSGPO – UK Intermediaries {C1/22.4/11} – 60% reduction; Industria Yuga Group {C1/22.4/5} – 60% reduction; Electro Intermediaries {C1/22.4/3} – 60% reduction; Transstroy 2003 {C1/22.4/11} – 60% reduction; Wildorf Holdings Limited {C1/22.4/11} – 60% reduction; and SSGPO – Stripping {C1/22.4/9} – 50% reduction (pertaining to all entries after 23 October 2012).
> - For purposes of this calculation, those entries relating to the SSGPO – Stripping allegation that were not reduced by Dechert at all and those relating to SSGPO – Iran have been excluded.
> - The residual entries equate to £678,658.70 of which Dechert pleads that £303,996.15 is deemed Necessary.
> -

In conclusion, it is Dechert's position that the appropriate figure to allow would be **£151,998.08** (being 50% of £303,996.15) and not £23,556.38 (being 10% of £235,563.75) as pleaded by ENRC."

675. As to this, it is correct that the specific entries relating to Ms Zaurbekova were not identified by ENRC, although it seems that at no point did Dechert ask for them. In any event, ENRC did review the narrative entries. On the other hand, it seems that Dechert has not attempted a similar exercise. Rather, it has identified all Kazakhstan entries over the relevant period and from its position on the different workstreams (as set out in its Appendix 1 Kazakhstan Reasons) it has followed its general approach and applied a reduction of 60% or 50%, first so as to reach what it says overall, was Necessary i.e. £303,996.15. It has then reduce this by a further 50% to arrive at what it says is the appropriate credit for the relevant work in relation to Ms Zaurbekova, namely £151,998.08.

676. However, this approach has two flaws. First, it starts from the premise that only a 60% or 50% deduction is sufficient for this period on Kazakhstan, whereas I have now held generally that it should be 100%. Second, it assumes that 50% of the relevant work was attributable to Ms Zaurbekova but I cannot see the basis for this.

677. In those circumstances, ENRC's calculation seems much more focused on the issue in question. Since Dechert has not proposed a different figure based on ENRC's methodology, I consider that the 10% credit offered by ENRC is the correct one. I therefore reject Dechert's alternative credit.

QUANTUM: UNNECESSARY WORK IN THE LATER PERIOD ON AFRICA

Introduction

678. First, and again for the reasons given above in relation to the Earlier Period, all bar 10% of the work on Chambishi was Unnecessary.

679. Second, I do not need to deal with the following classes of work:

(1) On Africa,

(a) Remedial Actions, because ENRC accepts that it was Necessary; and

(b) Project Mallard, because Dechert accepts that it was Unnecessary;

(2) On both Data Protection and RAID Training, because ENRC has accepted both as Necessary.

Africa Whistleblower

680. This relates to charges made by Dechert for work done in March 2013. There is very little material on this matter. According to the costs breakdown provided by Dechert in the Costs Proceedings, this workstream was because "A new whistleblower emerged in March 2013 alleging cash payments being made to senior government officials via an ex-pat payment scheme".

681. At page 11 of Schedule 1 to ENRC's Unnecessary Work Further Information, ENRC said that this workstream was Unnecessary. According to footnote 9, this was because the workstream fell outside the work described in paragraph 180.1 of ENRC's 2017 Re-Re-Re-Amended Particulars of Claim ("the ENRC 2017 POC"). In other words, it should be excluded because it did not fall within work to improve ENRC's systems and controls, completion of FRA's books and records review in Africa or the limited review of the CAMEC and Camrose acquisitions.

682. Dechert's response, as set out in its Africa Reasons document, is to say that there was nothing specific in the Judgment relating to this workstream, and accordingly there should be a 0% reduction. And there the matter rests. No other, more detailed submissions have been made by any party. This is different from the other work streams under challenge where there have been more materials to work from.

683. On the face of what Dechert said, it would appear as if this was a new matter arising because of a new whistleblower and that can be seen if one looks at some of the individual line item entries. On the other hand, this does seem to fall outside paragraph 180.1 of the ENRC 2017 POC, and it would have been possible for Dechert to address the justification for these particular fees in more detail. The fact that I made no reference to this workstream in the judgment does not mean that it must be allowed in full. It is also probably the case that the amount of work done here was excessive, in common, with other items of work. However, as it appears to have been a new development I should not exclude it entirely. In my judgment there should be a reduction but it will be 50% are not 100%.

Camrose and CAMEC

684. I can deal with these together. ENRC accepts that both workstreams were Necessary but it has disallowed as Unnecessary any activity which is classed as Document Review or Internal. For its part, Dechert contends that a 60% reduction on those particular items is sufficient for CAMEC and a 50% reduction is sufficient for Camrose.

685. In support of these and other points made in relation to the Later Period, Dechert relies upon what I said at J/1317-1323 which I reproduce here:

> "1317. On the assumption that both CAMEC and Camrose were part of the investigation for SFO purposes, leaving to one side how CAMEC came in after it had been taken out, I do consider that Dechert was really re-doing the due diligence on these acquisitions, not simply assessing its reasonableness or otherwise.
>
> 1318. It is therefore very difficult to see why it was really necessary to obtain images of the Africa data when, given that these were acquisitions by ENRC, one would expect the relevant data would be in London or Zürich.
>
> 1319. On Camrose, there was the additional matter of the loans and whether any of them were "soft" and the question of the promissory notes. They obviously took some time to investigate but it was not a huge task in my view. Nor was doing the further work on sanctions in the light of Mr Prosper's connection to Mr Rautenbach.
>
> 1320. As for Chambishi, it is correct that ultimately the SFO wanted an assurance that there had been no illegal activities on the acquisition. However, this was essentially a concern about a purchase from a related party where in fact there had already been two independent valuations.
>
> 1321. I also agree with ENRC that the amount of documentation reviewed and the number of persons interviewed were plainly excessive.
>
> 1322. Overall, and as with Kazakhstan, it seems to me that Dechert, and in particular Mr Gerrard and those he was directing, had again lost any sense of proportion in the Africa investigation. That is even taking into account that it was, of course, of far more interest to the SFO than Kazakhstan. And as with Kazakhstan, Mr Gerrard was able to get away with it because of his explanation that whatever he recommended was what the SFO would want, together with his encouragement of the SFO to take a dim view of ENRC anyway, by reason of the DCs. None of that is to say that the three acquisitions in particular did not pose real issues to be investigated. Nor that any particular line of enquiry could be said to be theoretically irrelevant if one had infinite resources and all the time needed. But that was not the case here-there simply appeared to be no limits to what Dechert thought should be done, remarkably, given the Rappo Letter and a March deadline approaching.
>
> 1323. In my judgment, therefore, the extent and depth of the Africa investigation was expanded unnecessarily by Mr Gerrard. Since it was allied to his bad faith in relation to the DCs and warnings of raids etc I take the view that he simply did not care whether he was acting within reasonable bounds or not. Indeed if anyone at ENRC challenged his view, he more or less decided they were an enemy of the investigation. Yet despite that, Dechert did not really pursue its case of obstruction at the trial. Finally, and as with Kazakhstan, even if there was not recklessness (which I have found) Mr Gerrard was undoubtedly negligent."

686. The thrust of those paragraphs is that the work done overall was plainly excessive. The reference in paragraph 1317 to Dechert really re-doing the due diligence on the acquisitions as opposed to assessing whether the due diligence which had been done was reasonable and not reckless is important because the latter exercise is what the SFO was really looking for. See, in this context, J/1085, 1254, 1255, 1260 and 1264.

687. There is little or nothing from Dechert as to why the particular percentage reductions offered are sufficient. It has made the general point that it would be wrong in principle simply to excise all document reviews and internal discussions undertaken by a firm of solicitors in respect of particular work. I see that, but as Dechert's own proposed reductions show, it is all a question of fact and degree. In the light of what I said in my judgment, I consider that any

reduction must be significantly more than 50%. I consider that the appropriate reduction for both of these activities is 80%.

Books and Records

688. Again, ENRC here accepts this workstream as Necessary save for activities marked Internal. For its part, Dechert has offered no reduction, on the basis that there was nothing specific about this workstream in my judgment. I agree that there was no specific reference; nonetheless, consistent with what I have found generally about the excessive and disproportionate approach taken by Dechert to its work overall, there is no reason not to assume that its approach on Books and Records was likewise excessive. Again, therefore, I discount the Internal activities by 80%.

Data Protection

689. The same issue arises here as with Books and Records. For the same reason, I apply a reduction of 80%.

General Bribery

690. Here, ENRC accepts this workstream as Necessary except for Document Review and Internal activities. Dechert proposes a 50% reduction for Document Review on the basis of J/1321 but no reduction for Internal. However, I see no reason not to apply again an 80% reduction for both activities.

IT Issues

691. Here, ENRC says that all of this activity was Unnecessary. Dechert accepts that this is so where the activity relates to the imaging of data from the Africa server. That concession is plainly correct. But Dechert then says that there should be no reduction at all where the work related to the imaging of data on the London and Zurich servers. It also proposes a 50% reduction where the line item entry was relevant to the imaging of data on all these servers.

692. However, in my judgment, Dechert's approach does not take sufficient account of what I said at J/1321 (see paragraph 685 above) and also at J/1306-7 and 1311. I appreciate that to some extent, the activity of reviewing documents in the context of data on the servers will or might be covered by Document Review which is a separate activity but I suspect not all of it will; in particular the collection and assembly of documents to be imaged. But obviously, if there were too many documents to be imaged in the first place (regardless from which server) there would need to be a reduction in respect of that collection, assembly and imaging activity. The point is that the whole documentary exercise should have been much more focused and

limited. That is why there is an impact not just on the Africa server but on the London and Zurich servers too.

693. I consider that the proper approach is as follows:

(1) A 100% reduction for the imaging of data from the Africa server;

(2) A 50% reduction in respect of all other IT Issues-related activities, which would include those relating to the imaging of the London and Zurich servers alone and those relating to the imaging of data from all servers.

Multiple

694. According to Dechert, this covers multiple workstreams. ENRC has marked all of this workstream as Unnecessary save for activities relating to FRA-Books and Records, one entry for JD and one for HSF. ENRC has allowed all of those as Necessary.

695. Dechert's approach is instead to apply a 60% reduction for Multiple. This is said to take account of reductions applied to Africa workstreams generally and my comments at J/1318 and 1321 (see paragraph 685 above). However, given that I have rejected Dechert's case on Chambishi and increased the percentage reduction sought by Dechert on CAMEC and Camrose and on other items, it seems to me that the 60% reduction proposed by Dechert is not sufficient here. It should be 80%.

696. Finally, I have to deal with Footnote 10, referred to at paragraph 88 above. This is the same kind of issue as Footnote 4 and I will apply the same approach as I did there, as set out in paragraphs 670 - 671.

Red Flags

697. ENRC has classed this as Unnecessary because it falls outside the scope of the much more limited work which it says would have been done in the counterfactual. See paragraph 180 of the ENRC 2017 POC. The only exception is FRA's ongoing Books and Records review if work related to this is contained in any of the Red Flag line items.

698. Here, Dechert has referred to what I said at J/1250, 1252, 1254, 1275, 1280, 1290 and 1295. Some of those observations concerned the issue that had arisen over Mr Prosper. But ENRC has already given a credit in relation to that. Also, as J/1252 makes clear, at OM2, Mr Alderman had said that any investigation of red flags should be guided by what the SFO said it was interested in. It was not to be open-ended.

699. In addition, to the extent that the SFO did adopt an "enquiring approach" at OM2, this, of course, had been conditioned to a significant extent by what Mr Gerrard had told it at the previous IDCs.

700. I agree that I did not suggest in my judgment that Red Flags *per se* were out of scope, as it were; but that does not mean that this work was Necessary. Given that the issue of Mr Prosper is already dealt with and ENRC will give credit for any Red Flag work relating to the Books and Records review, I do not consider that any further allowance is appropriate.

Sanctions

701. As already noted, it is common ground that the Sanctions work should have stopped by 5 March 2012. Afterwards, it was simply a question of the credit for the work done in relation to issues affecting Mr Prosper. But ENRC has provided a separate credit for that and I have dealt with it above in the context of the Earlier Period. So it is correct here to determine that the Sanctions workstream was Unnecessary.

QUANTUM: UNNECESSARY WORK IN THE LATER PERIOD ON BOTH

Data Protection

702. This is allowed as Necessary by ENRC save where the activity is Internal. Consistent with my approach in paragraph 689 above, I consider that an 80% reduction should be made in respect of that activity.

ENRC Raid Training

703. The same applies here. I agree with ENRC that, to allow Raid Training at all is somewhat generous, given that, without the breaches of duty, it would not have been undertaken, since there was no real risk of a raid anyway. See J/997, 1018-1019, 1063 and 1070.

IT Issues

704. The parties' positions here are the same as for IT Issues-Africa. I take the same position here as I did there. See paragraphs 691 - 693 above.

Multiple

705. ENRC contends that this is Unnecessary save for one item for JD. The parties' positions are the same as for Multiple-Africa and I take the same approach here as I did there. See paragraphs 694 - 695 above.

Remedial Actions

706. On Africa, ENRC allowed all of this as Necessary. Here, it excludes any work related to Sanctions and also any Internal or Document Review activities.

707. Dechert argues that this is an inconsistent approach. I agree, except that if there are entries relating to work on Sanctions they should be excluded as Unnecessary because that is a substantive matter which I have determined. Otherwise this workstream should be classed as Necessary.

QUANTUM: UNNECESSARY COSTS

Introduction

708. Obviously, the issue of Unnecessary Costs is linked to the issue of Unnecessary Work. Where work done by Dechert has been found by me to be Unnecessary because in the counterfactual, the work done would have had a more limited scope, that will carry through to the relevant third-party costs. The obvious example is Kazakhstan where (apart from Stripping and matters relating to Ms Zaurbekova) no work should have been done after 31 October 2011.

709. The 6 Reason Codes applied by ENRC to describe costs which are Unnecessary are as follows:

Reason code (1)	Kazakhstan should have ceased by end October 2011
Reason code (2)	Unnecessary work on Stripping
Reason code (3)	Unnecessary work on Camrose, CAMEC and Chambishi
Reason code (4)	Disproportionate information/ document requests
Reason code (5)	Unnecessary work on sanctions after 5.3.12
Reason code (6)	[Deleted by amendment]
Reason code (7)	Unnecessary AG secondment work

710. As with the claim in respect of Unnecessary Work, the figures referred to below are exclusive of VAT.

Addleshaw Goddard

Introduction

711. In July 2012, AG had been approached by Mr Dalman and the SIC to be a "shadow firm", working alongside Dechert. AG was already doing work for ENRC on employment matters, including the grievance claim brought by Mr Depel. In his letter dated 20 September 2012, Mr Simpson described AG's role as providing strategic input into the investigation, shadowing it, and monitoring the work carried out. It was also advising the SIC on the independence of those conducting the investigation and ensuring that it was being competently executed. As I noted at J/1414, such an appointment was unusual.

712. In addition, following Mr Zinger's departure on 21 September 2012, AG agreed to temporarily fill the gap left by him and this was done by seconding Ms Coleman and a small

team which included Ms Caswell. As Mr Simpson put it in his email letter to Mr Gerrard on 23 October 2012:

> "Simon Zinger had been diverted almost exclusively to SIC matters and left on short notice. AG agreed to temporarily fill the gap at short notice and Clarissa Coleman was seconded in with Louisa Caswell to assist her. She has secured delegated authority on terms which I believe she is comfortable with enabling her to liaise with and, whenever appropriate, instruct Dechert on a day to day basis so as to ensure that it is able to carry out its role to the Company's satisfaction."

713. The total amount invoiced by AG for its work was £1,201,549 including disbursements. 7 of its invoices were in respect of "SFO Investigation" and a further 7 in respect of "Secondment". ENRC claims that a total of £1,154,810 constitutes Unnecessary Costs. Of this, Dechert has admitted that £146,465 was Unnecessary and so the amount in dispute is £1,008,345.

714. One or more of Reasons 1, 3, 4 and 7 have been applied by ENRC to each of the invoices leading to reductions of 100% or less. Reason 7 applies only to AG's invoices. It is labelled "Unnecessary Secondment Work" but in fact encompasses both of AG's roles as described above, and it is applied to every invoice.

AG's Secondment Costs

715. ENRC's core point is that Mr Zinger's time was spent exclusively, or almost so, on the investigation. However, if the investigation had been proportionate and well-run, it would not have been necessary to appoint him as in-house counsel at all. It follows that it would not have been necessary to engage someone else to replace him once he left. It follows, therefore, on ENRC's case, that there is no allowance made for any of the work comprised in AG's invoices for "Secondment". All of it is said to be Unnecessary.

716. Dechert's overall position is to make a reduction of 50% for the secondment work. In fact, it has put forward three different alternative cases as to the costs which should be regarded as Necessary. The primary case is based on the contention that the appropriate costs base should be that of a General Counsel, paid at the same rate as Mr Zinger, with two associates. This is Dechert's Scenario 1 and generates the 50% reduction, yielding Unnecessary Costs of £146,645. Scenario 2 is based on the fees actually charged for Ms Coleman after deducting what Dechert says was work on a matter unrelated to the investigation. 50% of those net fees is then taken to produce a higher amount of Unnecessary Costs of £174,096.25. Scenario 3 takes what Dechert says are the fees charged for the whole of the AG secondment team which are £863,506.50 and then, once more, reduces this by 50%, yielding Unnecessary Costs here of £431,753.25.

717. There is in fact a Scenario 4; however this deals with AG's SFO Investigation work as well, and so I deal with it separately below.

718. The first issue is the extent to which Mr Zinger was occupied with the investigation as opposed to other matters. He was employed by ENRC from 6 June to 21 September 2012. During this period, Dechert's fees and third-party costs escalated significantly. In the period from 1 June to 30 November 2012, Dechert's fees were £4.6m and third-party costs were £3.8m. That period is obviously somewhat longer than the period of Mr Zinger's employment, but nonetheless, it gives an indication of the mounting costs of the investigation. On that footing, it would be surprising if most of Mr Zinger's work was not related to the investigation. As already noted by Mr Simpson in the email quoted at paragraph 712 above, he took the view that Mr Zinger was occupied almost exclusively with the investigation. Mr Simpson had also referred to Mr Zinger's "SIC role" in his letter to Mr Dalman about the secondment dated 19 September 2012. Mr Zinger had told Mr Simpson that his primary responsibility was work for the SIC on the investigation with a secondary responsibility for legal compliance matters. But such matters could be handled adequately by General Counsel, Mr Ehrensberger, or ENRC's compliance department. Also, at paragraph 13 of his WS, Mr Zinger said that his role was to facilitate the Dechert investigation and act as a liaison. Mr Zinger was not called as a witness and therefore was not cross-examined. However, it is difficult to see why he should not have described his role accurately.

719. Dechert does not accept that Mr Zinger's primary role was indeed to manage the self-report and ENRC's engagement with the SFO. But in the light of the evidence referred to above, I reject that position. I think it is unrealistic to suppose that Mr Zinger was only 50% occupied with the investigation. The key point is surely that, absent the breaches of duty, he would not have been appointed at all, or at least it is highly likely that he would not have been. It is possible that in the event, a modest proportion of his work was not related to the investigation. To reflect that, I consider that the reduction in respect of AG's Secondment invoices should be 80% and not 100%.

720. The next question concerns the appropriate costs basis and Dechert's three alternative scenarios. I do not accept Scenario 1. In circumstances where AG was already involved in doing work on the investigation, it made sense for lawyers from that firm to act as secondees. This was an entirely reasonable course for ENRC to take in the circumstances that actually prevailed at the time especially as (a) this was intended to be a temporary measure and (b) AG agreed discounted rates for Ms Coleman's services.

721. As to Scenario 2, I reject this also. This Scenario is based on the fees of Ms Coleman alone. Dechert in fact recognises that at least two assistants would be required because that is what Scenario 1 assumes.

722. Accordingly, I consider that Scenario 3 is the correct one so far as the costs basis is concerned. As I understand it, this reflects the fees actually charged by AG for the secondment work less an item which Dechert says was unrelated. I do not accept that adopting this basis, but with an 80%, not 50% reduction, is somehow too remote, or is due to a failure to mitigate on the part of ENRC or is a set of costs otherwise not caused by the breaches of duty.

723. On that basis, £690,805.20 of AG's fees for the Secondment are Unnecessary. That is 80% of Dechert's starting figure of £863,506.50 referred to in paragraph 716 above.

AG's Investigation Work

724. The basic point made by ENRC here is that, absent the breaches of duty, AG would surely never have been appointed to monitor either the work of Dechert or the operation of the investigation. Much of the investigation would of course not have been there (i.e. Kazakhstan), and what was properly left in relation to Africa would not have required a second firm of lawyers. I agree with ENRC that, apart from advising on remedial actions and liaising with Dechert on any overlap due to the matters raised by Mr Depel's grievance, none of AG's investigation work was Necessary.

725. Here, Dechert's Scenario 4 is relevant. On the basis of that Scenario, Dechert would accept that AG's Unnecessary Costs on both its Secondment and Investigation work would be £541,327.25. Dechert arrives at this figure essentially by discounting all of AG's fees by 50% after excluding £30,978.04 worth of disbursements because there was "insufficient information" and another £14,964.50 for items where Dechert queried if they flowed from the breaches of duty or could be reasonably claimed as damages at all. Dechert then adds £90,486 worth of items which it accepts constituted Unnecessary Costs.

726. Part of the reason, it seems, for the overall 50% reduction by Dechert is because it contends that the actual rates charged by AG were too high and therefore too remote. Instead, AG's fees for the investigation should be on the same basis as the fees charged on the Secondment. I do not accept this, and indeed AG's fees were generally somewhat lower than Dechert's.

727. Otherwise, the 50% reduction is unsustainable because it does not reflect the fact that, save for the exceptions made by ENRC, none of AG's investigation fees were Necessary at all. They simply would not have been incurred. Accordingly, I would hold as follows:

(1) 80% of AG's secondment fees were Unnecessary;

(2) all of AG's investigation fees were Unnecessary save for the exceptions made by ENRC; and

(3) in relation to the amount deducted by Dechert for items where there was insufficient information or a question as to whether they were recoverable, I do not propose to investigate the invoices to that level of detail. I will exclude those items from the Unnecessary Costs figures with permission to ENRC to have them determined subsequently, if no agreement can be reached.

Bridge 2 ("B2")

Introduction

728. ENRC claims that all of the fees charged by B2 for the month of October 2011 onwards were Unnecessary. The amount involved is £890,374. For most of the invoices, ENRC has applied Reason 1 i.e. Kazakhstan. Otherwise, it is Reason 3 i.e. Unnecessary Costs on Africa. Reason 1 only started to be applied to invoices for work done after 31 October 2011, so this is consistent with ENRC's case that all work on Kazakhstan (subject to the stated exceptions) should have stopped by that date.

729. Invoices from B2 labelled Project Maria relate to Kazakhstan and those labelled Project Kitchen relate to Africa. The vast majority of the invoices concerned Kazakhstan rather than Africa. ENRC has applied its Reason Codes, based on the description of the invoice.

730. Dechert has accepted £416,726 of this work as Unnecessary, leaving £473,648 in dispute. It arrives at that figure by applying its own 4 Reason Codes or other comments on individual line items in the B2 invoices. Its Reason Codes are as follows:

(1) <u>Reason (1)</u>

> • Bridge2/Cyntel instructions - Bridge2 was retained by ENRC in connection with its internal investigations from January 2011 to July 2012 (J/Para 33(4)).
>
> • Initial instructions to Bridge2 provided by ENRC to trace the source of the Whistleblower report and carry out background checks on the individuals and companies named therein. Bridge2 were also instructed to image Edata in London and Zurich in January and June 2011; collect additional Edata in London and Zurich relevant to the Kazakhstan and Africa investigation in June/July 2012, process and apply search terms to this Edata; host the additional London and Zurich Edata as part of the Kazakhstan document review undertaken in July 2012; undertake forensic data analysis. Also instructed to perform

investigative work and attend and assist at some interviews with ENRC employees in Kazakhstan in October 2011 and May 2012.

(2) Reason (2) - Transfer of Edata (Jan 2011 and Oct 2011 collections) to FRA

• J/Para 1709: 'Although Dechert refers to ENRC's awareness of B2's shortcomings in July 2011, the first pleaded date comes in September 2011. Mr Ehrensberger had queried why B2 did not already have some "kit" and questioned whether the job might be too big for it. Mr Findlay say that in any event, the person closest to B2, and who would have had the most acute awareness of any shortcomings on its part, was Mr Gerrard...'

- J/Para 1710: 'It is correct that there was a problem in December 2011. The imaged data would need to be reviewed on an E-discovery platform. Neither B2 nor Cyntel had one and they decided to invest in a platform known as Nuix which costs $110,000. On 6 December, Mr Findlay said that B2 could carry out the relevant review work, but he withdrew that 2 weeks later. He said that there would not be enough time. There was therefore a modest delay, while all the data was being transferred over to FRA. All that Cyntel would do was process the data. Later on, it was asked to OCR the data but then this work was transferred to FRA as well'.

(3) Reason (3) - Kazakhstan jurisdiction post - 28 September 2011

• Work undertaken after 28 September 2011 is Necessary (For example: Stripping, Procurement).

(4) Reason (4) - Limited evidential communications between Dechert and Bridge2/Cyntel during February 2012 to around May 2012. As set out in the Judgment, Bridge2 were involved in other projects directly for ENRC

• J/Para 1715 - 'It is clear from the documents that while B2 and Cyntel transferred their work on the SSGPO data to FRA, as agreed, in January 2012, by February and March Mr Findlay and Mr Gerrard were again speaking about further work. In the interim. B2 and Cyntel continued to do work for ENRC, albeit on other projects'.

• J/Para 1716 - 'By 22 February, in particular, Mr Findlay was in contact with Mr Gerrard about applying search terms to the London and Zurich servers in relation to Africa. He had also been asked to do imaging of computers in Rudny. However, he said that B2 did not want to do this because it was not commercially viable and as FRA were hosting the Project Maria material they should deal with the imaging. Mr Gerrard replied, among other things, to say that he was disappointed that Mr Findlay felt unable to image in Rudny because he thought "Rob [i.e. Mr Trevelyan] and the team were excellent." He then asked whether Mr Findlay could assist with interviews in Rudny.'

• J/Para 1717 - 'Without going into further detail, the above does not suggest any negligence on the part of ENRC in continuing to use B2 and Cyntel for some work after January 2012.'

• J/Para 1718 - 'They were then given further work to do by Mr Zinger in June and July. At the SIC meeting on 9 July, Mr Gerrard did raise concerns over B2 and as to why ENRC had used them. Mr Zinger explained that it was done for efficiency because B2 had most of the data in its possession. But he agreed that if it was necessary, they would use a different specialist. That is ultimately what happened.'

731. A variety of different percentage reductions has been applied. Dechert does not have a Reason Code which responds specifically to ENRC's Reason 3. Where that has been invoked, Dechert sometimes says that not all of the work was in fact for Africa.

732. At paragraph 75 of its Dechert Reply, ENRC has responded to the Dechert Reasons. I agree with ENRC that essentially, these reasons just state a number of facts and some parts of my judgment. But there is no real explanation of how they drive the particular percentage reductions applied to each line item by Dechert.

733. Dechert's Reasons 1 and 3 are said by it to relate to Kazakhstan work (see paragraph 137 (a) of its submissions). In fact, on some occasions, Dechert has applied these Reason Codes to invoices dealing with work on Africa. As a result of my findings above on Kazakhstan, work done in that regard after 31 October 2011 is Unnecessary anyway. Under Dechert Reason 1, there is also reference to work done in early 2011 which is not being claimed for by ENRC.

734. On Dechert Reason 3, it has retained as Necessary, work done on Procurement after 28 September 2011 when it had otherwise accepted that no such work was Necessary (other than in relation to Stripping). Further, Dechert brings in work related to the back-up of Zürich data which it says was deemed Necessary according to J/1318, quoted at paragraph 685 above. But I did not there say that such work was positively Necessary. See also my conclusions at paragraphs 692 - 693 above.

735. As for Dechert's Reason 2, this relates to the transfer of SSGPO data from B2 to FRA in January 2012. Dechert has applied a reduction of 25% here. This is said to take account of the argument (and indeed my finding) that the amount of data being handled should have been much smaller. Subject to that, Dechert says that these transfer costs are effectively part and parcel of the work carried out by FRA, once it became clear that B2 could not host the review of image data on an e-discovery platform, which it did not have. B2 then said that it could not do the work in time anyway.

736. I do not accept Dechert's latter point. First, on the basis that this work related to Kazakhstan, there should not have been any such work by then anyway. Second, I held that there was no contributory fault on the part of ENRC in engaging B2 which then had to transfer the data to FRA. See J/1710. I should add that in relation to later matters concerning the review of Africa data (which is not part of Dechert's Reason 2) I also held that ENRC was not at fault. See J/1719-1724. Finally, it cannot be said that the need to transfer the e-data from B2 to FRA was some kind of break in causation. It was really part and parcel of the work done by B2 and FRA.

737. Accordingly, when Dechert's Reason 2 is invoked as the basis for a less than 100% reduction, I reject it.

738. Dechert's Reason 4 is about invoices which are unclear. Dechert says that they may have covered work done by B2 for ENRC which had nothing to do with the investigation. It is correct that at the time, B2 was engaged in other projects for ENRC. Under Reason 4, Dechert has applied a 25% reduction only. However, all of the relevant invoices are said to

relate either to Project Maria or Project Kitchen and not something else. Also, as ENRC points out, some invoices did contain narrative as to the work done. Finally, B2 was instructed by Dechert and as we know, Mr Findlay and Mr Gerrard often met. So Dechert should have known what services B2 was providing.

739. In order to make a fair allowance for any uncertainty in the work described, I would make a deduction of 90% (as opposed to 100%) and not 25%.

740. Dechert also says that in cases of multiple document review, J/1321 (see paragraph 685 above) assists it because I used the expression "plainly excessive" and did not expressly say that the work was Unnecessary. I have dealt with that point at paragraph 734 above. There is nothing in it.

741. Nor is there anything in the additional points about a lack of evidence to support certain disbursements or airfares. Many of the latter relate to meetings which Dechert also attended. And as to the former, most disbursements were for the purchase of hard-drives which was all to do with copying data on Dechert's instructions. There should be no allowance here at all.

742. Accordingly, all of B2's fees were Unnecessary save where Dechert has applied only its "lack of detail" Reason. Here the reduction should be 90%.

FRA

Introduction

743. FRA's total fees and disbursements as invoiced came to £5,276,669 for the period 1 October 2011 to 28 May 2013. ENRC accepts that FRA's fees in relation to its Books and Records review on Africa were Necessary. Accordingly, it has allowed all line item entries dealing with that. These are shown under the "Balance of Invoice" columns for FRA in ENRC's Costs Further Information Schedule. Further, related disbursements have also been allowed albeit in a column headed "Unnecessary Disbursements". The total credit given by ENRC here is £715,742. This leaves a claim for £4,560,927 for Unnecessary Costs. ENRC says that, apart from the Books and Records review, the remainder of FRA's costs were all Unnecessary. The Reason Codes applied by ENRC here are Reasons 1 and 3. ENRC does not claim for any sums invoiced by FRA for the period prior to 1 October 2011.

744. Dechert admits that £2,074,126 of FRA's costs were Unnecessary, which leaves £2,486,800 in dispute.

745. Dechert has adopted a methodology similar to that used in respect of B2. It has employed 6 different reasons here, supplemented by comments made in respect of particular line items.

Where its reasons have been applied, a variety of percentage reductions is given, as against each line item.

746. Dechert's Reason Codes here are as follows:

(1) Reason (1) Kazakhstan jurisdiction post - 28 September 2011

• Work undertaken after 28 September 2011 is Necessary (For example: Stripping, Procurement).

(2) Reason (2) Africa jurisdiction

• At para 1321, not declare that the document review was unnecessary but rather that it 'plainly excessive'.

• Para 1319, the Judge acknowledges that additional work was necessary on the matter of the loans and the question of the promissory notes - 'They obviously took some time to investigate but it was not a huge task in my view. Nor was doing the further work on sanctions in the light of Mr Prosper's connection to Mr Rautenbach'.

(3) Reason (3)

• Includes work undertaken in respect of other workstreams although the invoice is described as either (1) Maria(Kazakhstan)/(E-Discovery); (2) Kitchen (London/Africa) etc. The blanket disputes raised are therefore not a true reflection of the position. See also Reasons (1) and (2) above.

(4) Reason (4) - Transfer of E-data (Jan 2011 and Oct 2011 collections) to FRA

• Para 1709 of Judgment: 'Although Dechert refers to ENRC's awareness of B2's shortcomings in July 2011, the first pleaded date comes in September 2011. Mr Ehrensberger had queried why B2 did not already have some "kit" and questioned whether the job might be too big for it. Mr Findlay say that in any event, the person closest to B2, and who would have had the most acute awareness of any shortcomings on its part, was Mr Gerrard...'

- Para 1710: 'It is correct that there was a problem in December 2011. The imaged data would need to be reviewed on an E-discovery platform. Neither B2 nor Cyntel had one and they decided to invest in a platform known as Nuix which costs $110,000. On 6 December, Mr Findlay said that B2 could carry out the relevant review work, but he withdrew that 2 weeks later. He said that there would not be enough time. There was therefore a modest delay, while all the data was being transferred over to FRA. All that Cyntel would do was process the data. Later on, it was asked to OCR the data but then this work was transferred to FRA as well'.

(5) Reason (5) IT Issues (London Server)

- Para 1318 of Judgment - 'It is therefore very difficult to see why it was really necessary to obtain images of the Africa data when, given that these were acquisitions by ENRC, one would expect the relevant data would be in London or Zürich'.

(6) Reason (6) SSGPO (Stripping)

• Para 1240 of Judgment - 'ENRC accepts that this is a matter that had to be investigated once it arose in December 2011 but in my view, Dechert should have let KPMG get on and investigate it instead of challenging that assignment (disingenuously in my view) and then disputing some of KPMG's conclusions. This was important because that argument then held up the production of the Kazakhstan report'

747. For its part, ENRC has then responded to Dechert's Reasons in detail at paragraph 79 of its Dechert Reply.

748. I deal with Dechert's Reason Codes in order, below.

749. Before doing so, however, I should deal with two general matters raised by Dechert in respect of a number of items. First, Dechert says that it had no control over "poor management of the fees incurred". It makes this point where, for example, it suggests that the time charges made by FRA were excessive, all the fees charged were unreasonably high or too many people from FRA were involved in the work in question. No specific deductions are made by Dechert, but this point presumably feeds into the overall percentage reduction that Dechert was prepared to accept for the invoice in question. It has said that the percentage reduction applied was similar to that which it applied in relation to its own fees for the same period.

750. However, FRA contracted with Dechert. This contract set out the hourly rates that FRA would charge. Dechert also accepted that FRA acted under its direction other than in respect of the Books and Records review - see Dechert's Defence at paragraph 42 (2). Dechert's response to this is to say that ENRC in fact paid the invoices which were addressed to it by FRA. That is true, but I fail to see why this affected Dechert's contractual responsibility to control FRA. In addition, the actual percentage reduction applied to take account of this factor does not seem to have much logic if it is tied to the percentage reduction for Dechert's fees (and which reductions in many cases I have rejected as being insufficient, anyway).

751. Accordingly, I consider that Dechert cannot rely on this point where it has been raised (in respect of 34 invoices, according to ENRC).

752. Secondly, Dechert has also applied a reduction similar to that applied to its own fees where it says that there is no evidence for or a breakdown of the FRA fees claimed. ENRC says that this has been applied to 16 invoices. As for this, there is, as far as I can tell, only one invoice where Dechert has not applied some other comment as well and this is for the period 29 June-28 July 2012 (K2/126/1). In most cases, this general comment is supported by others including the application of the Dechert Reasons. I have found 5 cases where the sole comment is a lack of time breakdown and one case where it is said there was no expenses breakdown. What appears to have happened is that in a minority of cases, there is the invoice but not its accompanying narrative document which seems to have gone missing. See, for example, K2/126 which is invoice CU005-0003 and CU 007-0001.

753. However, the actual subject-matter of the work done on these invoices is clear enough. Had the time breakdown been provided, the likely response from Dechert (if any) would have been that the time spent was excessive. But I have already held that a complaint of this kind cannot be sustained since, regardless of the fact that ENRC paid the bills, FRA was under the

direction of Dechert which was, of course, in charge of the investigation. Accordingly, no allowance in favour of Dechert should be made in respect of a lack of time breakdowns.

754. Where expenses are claimed and there is no breakdown, and this is the only complaint on part of an invoice, I would accept Dechert's proposed reduction which should be 0. ENRC has had enough time before the Phase 1A Trial to obtain the relevant narrative for the expenses, but did not do so.

Dechert Reason 1

755. This refers to invoices on Kazakhstan. I have already found that, except for Stripping, there should have been no work done on Kazakhstan after 31 October 2011. The invoices to which this Reason has been applied are in respect of work from December 2011-March 2013. Accordingly, there should be no allowance for any FRA work on the basis of Dechert Reason 1. In fact, the narrative on Dechert Reason 1 gives examples of Procurement and Stripping as Necessary Work after 28 September 2011. However, Dechert has admitted at paragraph 87 of its SOC that the Procurement investigation would not have continued beyond October 2011. And as for Stripping, first, ENRC has actually allowed a number of FRA invoices which refer specifically to the work they did at the behest of KPMG with the heading "E discovery - KPMG Kazakhstan Review". The only invoice which has been disallowed is that which is for work done in this regard between 29 January and 28 February 2013. This is consistent with ENRC's general case to the effect that there should not have been any work on Stripping after the time when KPMG submitted its draft report on 25 January 2013. I deal with that point in the context of KPMG below.

756. But the short point here is that it is very hard to see what FRA work was justified in respect of Stripping beyond that which ENRC has allowed in any event.

757. For those reasons, I reject Dechert Reason 1.

Dechert Reason 2

758. This refers to Africa. Here Dechert has simply referred to J/1319 and 1321 cited at paragraph 685 above. However, J/1321 did not declare that all Document Review was Necessary. See my comments about this at paragraphs 686-690 above, where I applied a reduction of 80% rather than the 50% contended for by Dechert. As for J/1319, ENRC has said that its credit for FRA's Books and Records work includes its work on loans and promissory notes. Dechert does not now suggest that it did not.

759. Dechert has also accepted that FRA's costs in collecting and reviewing Africa data were Unnecessary. See paragraph 125 (a) (ii) of its Defence.

760. Moreover, Dechert accepts that its position on Africa generally follows its position on Africa so far as its own fees are concerned which I have generally rejected above.

761. Accordingly, I reject Dechert Reason 2.

Dechert Reason 3

762. This is applied to multiple cases where the work done appears to relate to both Kazakhstan and Africa. ENRC challenges Dechert's description of what the invoices here (8 of them) are actually for. But beyond this, and as a matter of principle, my general conclusions on Kazakhstan and Africa must feed in here, just as they have for Dechert Reasons 1 and 2. This is likely to mean that the percentage reductions offered by Dechert are insufficient anyway.

763. Sometimes where Dechert Reason 3 is invoked, it has also relied on its "poor management" of FRA's fees, a point which I have already rejected.

764. I am not going to analyse each of the invoices separately. However the conclusion is that unless the invoices are in fact in relation to FRA work which is accepted as Necessary (i.e. Books and Records and pre-25 January 2013 Stripping work) there should be a 100% reduction here and Reason 3 is rejected.

Dechert Reason 4

765. This is the mirror image of Dechert's Reason 2 for B2, and my conclusion on it is the same.

766. ENRC says that there is an additional point here, because much of the work relates to matters other than the actual data transfer, for example the creation of an EDR platform for Dechert's document review, processing and OCR'ing the data, applying search terms and training. That work was Unnecessary anyway according to ENRC and it cannot be "saved" by Dechert's Reason 4, even if otherwise valid. Dechert's response is to say that all these costs are interlinked with the original transfer of data and a document review platform was Necessary.

767. I do not think that these additional costs were interlinked. In any event, this response begs the whole question of whether all of this document review work was Necessary in the first place. I have already held, as a matter of principle, that it was not. In fact, the vast majority of invoices to which Dechert Reason 4 was applied were for "E discovery Kazakhstan", in which case, that work should not have been done anyway, as it was post-31 October 2011.

768. However, I can see that some allowance should be made for the setting up of a document review platform in relation to Africa on the basis that even if the amount of documents to be reviewed was greatly reduced, a platform would be necessary in any event. Rather than attempt to discern each particular element of these invoices which refers to document review platform and then taking account of the fact that Kazakhstan work should not have taken place then anyway, the appropriate course for these invoices is to make a 90% rather than 100% reduction.

Dechert Reason 5

769. This refers to J/1318, cited at paragraph 685 above. However, by that paragraph, I did not conclude that all work relating to collection and review of data on the London and Zurich servers was Necessary. In fact, (a) as I have already held, there should have been no work on Kazakhstan at all after 31 October 2011, and (b) it is common ground that the investigation into Camrose and CAMEC would have been limited and would not have re-done the due diligence on those acquisitions. Dechert Reason 5 has been applied to invoices for work on both Kazakhstan and Africa with various discounts applied.

770. However, in my judgment, ENRC is correct overall that FRA's work here was all Unnecessary save Books and Records (and that relating to KPMG on Stripping). Accordingly, Dechert Reason 5 should be rejected. In fact, in most cases, this Reason is applied along with other Reasons or comments which I have already rejected. Dechert makes the point that there must have been some basic collection and IT work done by FRA. But that cannot be justified in relation to Kazakhstan and would allow only for a very small percentage allowance on Africa. To that end, I would hold that the appropriate deduction here should not be 100% but 90%.

Dechert Reason 6

771. This is applied to a single FRA invoice relating to Stripping, being the one which ENRC has said was Unnecessary because it related to work done after 25 January 2013 (see paragraph 755 above). In my judgment, and for the reasons I give when dealing with the KPMG costs at paragraphs 824 - 828 below, ENRC is correct to some extent to regard any Stripping costs for work done after 25 January 2013 as Unnecessary. However, in relation to KPMG, I have given a modest allowance in respect of the cost of its work after 25 January 2013, and I think I should do the same with FRA here. I therefore agree with Dechert's proposed deduction of 50%.

HS

Introduction

772. Herbert Smith LLP ("HS"), as it was known at the time, had been one of the firms involved on the due diligence relating to the acquisitions of Camrose and CAMEC. Its involvement in the investigation sprang from the fact that a very substantial amount of information and documents were required of it by Dechert.

773. I have already found that the work that should have been done on these acquisitions should have been much less, and limited to a review of the due diligence undertaken rather than re-doing the due diligence which in effect, is what happened. See J/1317 referred to at paragraph 685 above.

774. HS's total bill came to £2,223,961. Of that, £112,243 was for its work up to 21 March 2012. ENRC accepts that all of this latter work was Necessary and has given credit for that smaller sum. The balance, being £2,111,718, was for work done from 21 March 2012 to 29 March 2013. ENRC says that all of this was Unnecessary. Dechert accepts that £285,101 was Unnecessary but contends that the rest was Necessary. So, £1,826,617 is in dispute.

775. For each disputed invoice, ENRC applied its Reasons 3, 4 and 5 together, save for the first 4 invoices where it applied Reasons 3 and 4.

776. Dechert has not here set out a discrete set of Reasons it wishes to invoke in response. Instead, it has, in column M of its spreadsheet, commented on ENRC's percentage deductions by reference to a variety of matters. In addition, it set out some general comments in a Preamble. ENRC has extracted 8 discrete main reasons used by Dechert on which it comments in its Reply.

777. These are as follows:

(1) Reason 1:

"No breakdown/insufficient information"

(2) Reason 2:

"early on in instructions"

(3) Reason 3:

"Dechert had no control over the management of Herbert Smith" / "Dechert did not have control over HSF's output"

(4) Reason 4:

"Disclosure with respect to HSF's files and work products was limited due to ENRC's assertion of privilege, therefore neither the Court nor Dechert have had access to working products, internal emails and the general file kept by HSF during the period which damages are being claimed"

(5) Reason 5:

> "work undertaken in connection with reason 3 (CAMEC/Camrose acquisitions) are necessary and where quantum appears to be unreasonably high due to HSF hourly rates and utilisation of resources, [Dechert] should not be penalised."

(6) Reason 6:

> "A reduction for reason 4 (information and document requests sent to professional advisers) of 5% has been applied for the extraction of unnecessary fees, which also takes into account that ENRC has not set out how and / or what elements of this entry or subsequent entries satisfies their assertions under reason 4. Dechert disputes that reason 4 would result in a full removal of related fees in any event. This percentage also takes into account the lack of disclosure and vague narratives prepared by HSF fee earners."

(7) Reason 7:

> "Fees in connection with reason 5 have been extracted at either 30%; 35% or 50% to reflect the Judgment"

(8) Reason 8:

> "Fees in excess of £2m appear to be excessive in light of the document requests and interactions between Dechert and HSF."

778. Broadly speaking, Dechert resists the application of ENRC's Reason 3 altogether. As for Reason 4, taken by itself, Dechert has allowed a reduction of only 5%. In relation to Reason 5, Dechert has given deductions of 30%, 35% or 50% "to reflect the judgment".

779. Dechert also says that HS's fees were unreasonably high and at least for the unreasonably high element cannot be claimed from Dechert because this element was not caused by any breach of duty and/or it is too remote or it was caused by ENRC's failure to mitigate its loss.

780. ENRC responded to Dechert's case on the HS costs (as set out in its Appendix 2 HS) at paragraphs 82-85 of its Reply. Dechert, in turn, responded to this at paragraphs 141-144 of its submissions.

781. Since, in the light of what I have already decided, as a matter of principle, ENRC's Reasons 3, 4 and 5 are *prima facie* well-founded, I propose to consider Dechert's response, principally by reference to its 8 Reasons.

Dechert Reason 1

782. This has been applied to the entirety of HS's first 3 invoices, being 11205912, 11206045 and 11207407.

783. However, I do not follow this objection. To take invoice 11205912 as an example, there is a detailed narrative which accompanies it and which sets out the total hours of each lawyer at HS and their rate. There is then a series of line items (to which ENRC has applied its Reasons). The line items have been set out in Dechert's Appendix 2 HS. What are not present

in the narratives for these invoices are details of the time spent by each individual lawyer on each line item of work, and the date when they did that work.

784. I see the difference, but the description of the line item of work is the same for all invoices and there is no reason why Dechert could not have responded to it. For example, line items 3, 6, 8 and 9 from invoice 11205912 read as follows:

> "Reviewing files and emails to locate relevant correspondence regarding the submission of SAR to SOCA and circulation of SAR."
>
> "Preparing a bundle with SAR-related correspondence following request from Paul Judge"
>
> "Review of note on SFO confiscation."
>
> "Reviewing documents; responding to emails re Dechert inquiry"

785. This failure to respond is important. If Dechert wanted to say that none of these line items should form part of the Unnecessary Costs because this was <u>other</u> work done by HS for ENRC, unrelated to the investigation, it could have said so. This is especially where HS's work was being done directly in response to Dechert which was leading the investigation. See also paragraphs 805 - 811 below.

786. Accordingly, I reject Dechert's Reason 1.

Dechert Reason 2

787. This reason is applied to many line items between June and November 2012. Dechert says that this relates to the fact that these represent initial work done at Dechert's request and constituted Necessary Costs. However, I do not follow this; if it was work to do with the investigation in terms of responding to Dechert's request for information and documents, then the overall points about the limited work that should have been done in relation to the Camrose and CAMEC due diligence exercises still apply. Dechert does not suggest that this was entirely different work unrelated to the investigation.

788. ENRC has also pointed out that Dechert actually worked with HS on the investigation since September 2011, and also that in relation to its own fees in respect of work it did with HS before November 2012, Dechert reduced its fees (as being Unnecessary) by around 60%. On that basis, a large proportion of HS's work with Dechert over that period was also Unnecessary.

789. For those reasons I reject Reason 2.

Dechert Reason 3

790. This reason has been applied to invoices from late 2012 and early 2013. It is usually invoked along with other Reasons. Dechert says that this Reason concerns cases where HS appears to

have incurred unreasonable sums where the onus was on ENRC to monitor the sums that HS were billing.

791. It is actually difficult to discern from the line items where Reason 3 has been applied, whether Dechert is saying that the hourly rate was too high or that too much time was spent on the job. I deal with the former point at paragraphs 805 - 811 below.

792. As to time spent, Dechert does not expressly say, in respect of any line item, that excessive time was spent. Nor is it apparent to me that it was. If one takes line item 1455 from invoice 11216837 as an example, it is not clear to me why 5 hours at £149 per hour is obviously excessive for the task of:

> "Responding to queries and carrying out searches for T Wood regarding Q.1.1.4 of Dechert's July 2012 Information Request in relation to Gough Aviation. Carrying out searches for R Weston in order to determine whether and what (e.g. worldcheck) checks were done on Vipar."

793. It is further the case that Dechert did make disproportionately broad and excessive requests, consistent with the excessive and expansive scope of the investigation which it said at the time was Necessary. It is also pertinent in this context that Mr Gerrard stated in April 2012 that Dechert would require "a fair amount of HSF's time".

794. Dechert was also kept up-to-date with the work which HS was doing. In addition, it is clear, for example, from Dechert's requests made in documents or recorded in meeting notes, dated 16 March, 4 April, 10 April and 31 August 2012 just how extensive these enquiries were. See also Ms Black's email to Mr Lombers of HS dated 4 September 2012 asking when HS would be sending documents and information in relation to Dechert's requests from 9 February and 16 March 2012. The dates of these requests belies the suggestion that this was "early" work unrelated to the investigation.

795. Other documents from October and November 2012 and February 2013 (HS's spreadsheet of documents sought by Dechert) again reveal the extent of Dechert's enquiries of it. There is no suggestion in any of the documents referred to that HS was over-reacting, as it were, in terms of the documents and information it provided. Indeed, Dechert was clearly expecting the sort of thing, and its scale, which it received. This is consistent with Dechert telling the SFO in its presentation for OM8 on 28 November 2012 that it had reviewed 204,482 documents from Zürich and 14,033 documents from Africa and had obtained 230 files from ENRC, HS and others. This is a good example of the "kitchen sink" approach taken by Dechert, as if the sheer volume of material would impress the SFO. See also J/1307 and 1322.

796. It is very hard to see from the above how Dechert can seriously contend that it had no control over HS's output. On the contrary, Dechert dictated it.

797. Accordingly, and for all those reasons, I reject Dechert's Reason 3.

Dechert Reason 4

798. This reason has been applied to 340 line items, usually along with several other responses. In most cases, Dechert has made a 5% reduction only. The line items usually had ENRC's Reasons 3 and 4 applied to them. Dechert says that it has offered "a reasonable fee" in these instances for HS's work i.e. an amount which is a more "reasonable" starting point for the line items said by ENRC to be Unnecessary. However, in the event, and no doubt because Reason 4 is accompanied by other responses, there was only a 5% reduction of the cost as Unnecessary, as noted above.

799. In fact, the line items describe the work done, all in response to Dechert's requests for information and documents. ENRC has claimed privilege in relation to various line items. As far as I am aware, Dechert did not seek to challenge that claim to privilege during the disclosure process in this litigation. In any event, I do not see why the assertion of privilege over certain HS documents made it difficult for Dechert to comprehend what work HS was charging for. Dechert itself is aware of what information and documents it sought from HS and when. It was in a position to say, if it wished, that this was work claimed for which was not responsive to those requests but it has not done so.

800. Accordingly, I reject this reason.

Dechert Reason 5

801. This appears in the initial General Comments section of Dechert's Appendix 2 HS. It reflects, first, the general difference, as a matter of principle, between ENRC and Dechert on the proper scope of work on the CAMEC and Camrose acquisitions. Here, I have, in the main, already preferred ENRC's position to Dechert's on this question. Much of the force of its Reason 5 is therefore attenuated.

802. In fact, at paragraph 11 of its SOC, Dechert admitted paragraph 98 of ENRC's SOC which said this in relation to Camrose:

> "But for the relevant wrongdoing, there would have been a limited investigation (including in relation to Metalkol), which would not have re-done the due diligence on the acquisition (J/1317), would not have included a large-scale document review, and would have included only a limited number of interviews with professional advisers, members of the board and senior management. Some work would have been required on whether loans were "*soft*" and on the question of promissory notes, but this would have been limited:"

803. This admission was subject only to two qualifications. First, that there would still be a need to produce a report, liaise with the SFO and take appropriate remedial steps. I have essentially rejected that proposition above. Second, it is then said that the work required was

as set out in Dechert's Appendices 1 and 2. The problem with this is that in many cases, the actual amount of work said to be Necessary by Dechert is inconsistent with any general acceptance that due diligence was not to be re-done and that the investigation should be limited. The same position obtains in relation to CAMEC; see paragraph 118 of Dechert's SOC.

804. I also accept, as ENRC says, that Dechert's position on HS's fees is inconsistent with the fact that it allowed a reduction of 50-60% in respect of its own fees as against ENRC's Reason concerning Document Review, and many line items in this context concerned work done in respect of HS. In fact, of course, I found that even this amount of reduction was insufficient.

805. As for HS's hourly rates and utilisation of resources making the quantum here "unreasonably high" this is a general objection; it is not actually applied to individual line items. However, to deal with this general objection, first I should consider the table of comparisons produced by Dechert at C1/32 which sets out HS's and Dechert's hourly rates for Partner/Consultant. HS's hourly rates range from £608-£630 while Dechert's ranged from £485-£685. Mr Gerrard's hourly rate from September 2012 was £685 (it is not actually clear from the table what his rate was before that date but I doubt it was as low as £485) while that of the main HS partner, Mr Lombers, was £630 as from July 2012. For senior associates and equivalent lawyers, HS's rates were £549-£567, with Dechert's being £400-£475. Below that, the rates did not differ very much. Both HS and Dechert are City firms and I do not consider overall that it can be said that HS rates were much more than Dechert's, especially when one bears in mind the hours put in by Mr Gerrard himself who had the highest hourly rate. Moreover, and although it does not mean that HS had a "blank cheque" to charge what it liked, it was, of course, the only firm that could have been instructed by Dechert on the due diligence points, since it was ENRC's corporate adviser at the time. Further, Dechert was aware of that from an early stage of its involvement.

806. While I appreciate that ENRC was the party instructing HS and paid its bills, like B2 and FRA, the extent of its work was governed by what Dechert said it needed from it.

807. A further point made by Dechert is a comparison of the simple fact that HS charged over £2m for its work, whereas Dechert's work on CAMEC, Camrose and sanctions was only, as it were, £3.2m as from May 2012, and yet it was leading the investigation. I do not entirely follow the figure of £3.2m, because Dechert's own document on its fees showed that it charged £6.8m for Africa, post-17 May 2012 (with a further £0.9m for Both after that date).

Of course, there was work on Chambishi as well but I doubt that explains the difference between £3.2m and £6.8m.

808. As already noted, the requests made of HS were not merely to supply documents. They were also to provide information as to what had happened during HS's work on the acquisitions. See Dechert's document of 16 March 2012 referred to above. There were also numerous meetings between Dechert and HS at an early stage in order to obtain information from HS about the transactions. These included meetings on 9 December 2011, 30 January, 8 March and 4 April 2012. These were all during the period that Dechert discounted as involving early instructions of HS.

809. Dechert also makes the point that HS had in total 78 different fee-earners on its work. This was to support the notion that HS had over-utilised its resources. But it did not have 78 fee-earners working on a given piece of work all at the same time; we can see that from the narrative sheets which say how many were involved in relation to any piece of work invoiced to ENRC. Often it was around 6 or 7 lawyers of which a number were junior solicitors. So again I do not think that this point adds very much.

810. In my judgment, it cannot be said that HS's hourly rates were such as to make the losses claimed in respect of its invoices somehow too remote because not reasonably foreseeable or evidence of a failure to mitigate on the part of ENRC or anything like that. The same applies to HS's utilisation of resources.

811. In fact, at the end of the day and while he made the points about remoteness, failure to mitigate etc. Mr Millett KC accepted that this general objection did not go to some kind of percentage reduction of potentially claimable HS fees, because no such reduction was actually proffered. But he said that it went to the burden of proof and the need to scrutinise HS's invoices very carefully. I am not sure that this point goes very far. Either I am satisfied that ENRC has established its loss in this respect or it has not.

812. Overall, then, I reject this Reason.

Dechert Reason 6

813. This is Dechert's response to ENRC's Reason 4. Dechert says that the items which ENRC has disallowed here are "essentially necessary costs" against individual line items. Dechert applies a reduction usually of only 5% where ENRC has asserted its Reasons 3 and 4. In other cases, as part of the answer to ENRC's Reasons 4 and 5, Dechert has given a larger reduction of 35%.

814. ENRC's Reason 4 is really allied to its Reason 3 on scope, because its general case is that information-gathering (which is where HS comes in) should have been completed by 21 March 2012. By that time HS had produced 28 bundles of documents. Anything sought of HS by Dechert after that date was Unnecessary.

815. Really, ENRC is saying that further work for HS was either beyond the scope of what the counterfactual limited investigation should have been, or the work required by Dechert was disproportionate anyway. While Dechert submits that ENRC has not said exactly why a particular line item is excessive (as well as being out of scope) and while this is ultimately a matter of judgment, I think there is sufficient information the narratives for each line item for ENRC to be able to say that there had been disproportionate work required. I do not think that it is impossible for Dechert to understand ENRC's case here. Dechert was the party directing HS's work and as it was "driving" it at the time, it should surely be able to say why a particular line item of work was Necessary either because it was in scope or because proportionate. It is in a much stronger position than ENRC to address particular line items and justify them as Necessary.

816. Finally, and again, I think there is force in ENRC's point that in comparison to Dechert's own fees, where it often allowed a 60% reduction of its charges dealing with its documentary requests to HS, Dechert appears to have allowed much less to HS in respect of the same requests.

817. Again, therefore, I would reject Reason 6.

Dechert Reason 7

818. This also comes from the General Comments section. It responds to ENRC's Reason 5 relating to Unnecessary Work on sanctions after 5 March 2012. It follows Dechert's general approach to Sanctions work. There is no particular justification given for the percentages applied and the relevant parts of the judgment are not set out here.

819. Dechert's general position on Sanctions in its SOC was to contend that more work was needed after 5 March 2012 into Sanctions than simply to deal with the two matters relating to Mr Prosper. It said that Sanctions issues which arose during the course of the investigation itself and the creation of sanctions compliance policies were also Necessary Work. However, in its submissions, Dechert accepts that the Sanctions question was closed out after 5 March 2012 save for the matters concerning Mr Prosper. Nonetheless, it contends that here, more work was needed than simply a short documentary review and a meeting with Mr Prosper.

However, as already indicated, I fail to see why more was needed. I agree that my judgment did not specifically say that the Necessary Work was no more than that for which ENRC contends. But that hardly means that ENRC's contention as to the proper scope is wrong. If in fact no more work was needed (and therefore ENRC's credit in respect of Dechert fees relating to Mr Prosper of £15,076.88 was sufficient) there should have been no other Necessary Work.

820. Indeed, Dechert accepts that anything else has been treated by it as Unnecessary. This includes line items on Sanctions which also refer to HS.

821. But if all the above is correct, I do not follow Dechert's Reason 7 here. I can see no reason why HS needed to be involved here at all. Again, the reduction should be 100% and not the lesser percentages advanced by Dechert.

Dechert Reason 8

822. This is just a repeat of the general point made as part of Dechert Reason 5 which I have dealt with above. So the answer here is that, as with Reason 5, it should be rejected.

Conclusions on HS Costs

823. It follows from what I have said above that Dechert's case on the quantum of HS costs must be rejected. Essentially this is because (a) I have rejected Dechert's general case as to the true scope of the work that should have been done on Africa which involved HS, (b) I do not accept that any narrative entry is so unclear that Dechert, as the directing party of HS's work, cannot understand it and (c) there is no valid point concerning the level of fees charged by HS or the amount of time taken on the work requested of it by Dechert.

KPMG

824. It is common ground that all of KPMG's work following its appointment by letter dated 30 October 2012 related to its investigation and report on Stripping. It raised 16 invoices in the total sum of £2,025,503. Each invoice referred to Project Poseidon, the code-name given to the Stripping investigation, but there is no breakdown of the actual work done; each invoice simply gives a charge for time costs and another for outlays.

825. However, Dechert closely supervised KPMG's work, as it informed the SFO at OM8. The final Kazakhstan report sets out KPMG's work in detail and attached as an annex KPMG's own report. ENRC has credited £1,597,211.77 of KPMG's work as Necessary. This covers all its charges for work up to 25 January 2013. The various charges for work done by KPMG afterwards, being £428,291.45 are disallowed by ENRC as being Unnecessary and so this is

the amount claimed here. The logic of this position, according to ENRC, is that by 8 January 2013 when it produced its draft note, KPMG had reached its key conclusions. Then, on 24 January 2013 it gave an oral report to the SIC. At that meeting, Mr Dalman said that if SSGPO could not on 25 January 2013 produce figures which would iron out the discrepancies found by KPMG, then ENRC would "go with" the KPMG report. This 50 page document was delivered in draft to ENRC on 25 January 2013.

826. KPMG's eventual report was produced on 25 February 2013. It came to around 90 pages including lengthy appendices. I have not been invited to undertake a detailed comparison between that final report and the draft submitted a month earlier. I agree, however, with Dechert that it does not follow that none of KPMG's work after 25 January can be classified as Necessary. On the other hand, it is obvious that much of KPMG's work after that date would have arisen from Dechert's disagreements with it which had materialised by 24 January. See the chronology of this dispute at J/1213-1219. It is obvious that the work done by KPMG would have been significantly less in the period after 25 January had Dechert just let it "get on with it" and stopped interfering - see J/1240.

827. Doing the best that I can on the materials before me, and recognising that the lion's share of KPMG's work and fees obviously came when it was undertaking its investigation, as opposed to writing up its conclusions and having to engage with Dechert, I would say that of the amount claimed by ENRC of £428,291, 50% should be regarded as Unnecessary.

828. Dechert has, of course, taken the overarching point that I should not allow any part of ENRC's claim in relation to KPMG because of a lack of breakdowns in the invoices. This is unrealistic. Dechert sought and obtained ENRC's approval for it to supervise KPMG, and Dechert was well aware of all the work which it did. There are 275 line items in Dechert's invoices which relate to KPMG's work on Stripping between October 2012 and February 2013, including numerous meetings, calls and emails. Thus I reject Dechert's contention that the claim should be disallowed entirely. Instead, and for the reasons given above, I allow ENRC's claim for Unnecessary KPMG costs to the extent of 50%.

PwC

829. ENRC's claim here is in respect of a single invoice from PwC for £98,649, dated 23 November 2012 in respect of work done up to 15 August 2012 on Project Maria i.e. Kazakhstan. PwC were ENRC's auditors.

830. Since the work related to Kazakhstan where the investigation should not have extended beyond 31 October 2011, all of these costs should be classed as Unnecessary, unless some were for work done before that date. Dechert's substantive response is that the work should be regarded as Necessary in the absence of evidence from ENRC that it related to Unnecessary work streams. But in the light of my overall finding on Kazakhstan, that response is not correct.

831. Dechert also questions whether the appellation given in the invoice of "Project Maria" is correct, since some of FRA's invoices were coded as such, but had elements of Africa as well. Even if that were the case, I fail to see why on a single invoice for a relatively modest amount, I should assume that PwC got it wrong.

832. The main point is that in truth, Dechert should not have been dealing with Kazakhstan after 31 October 2011, by reference to PwC or otherwise. In fact, it did so engage, in early 2012 and onwards (see, for example, J/1040 and 1045-8). Dechert also received updates from PwC as well as discussing the scope of the investigation. Dechert disagreed with PwC's recommendation that most of the Kazakhstan workstreams should be closed. See, for example, Dechert's meetings with PwC on 15, 17 and 20 February 2012. Dechert's own invoices refer to meetings with PwC.

833. In those circumstances, I reject the contention that the lack of a breakdown of PwC's costs disqualifies ENRC from raising the claim. I agree that there were £98,649 of Unnecessary Costs here.

The Risk Advisory Group ("TRAG")

834. TRAG is a global risk management consultancy. It was engaged, on Dechert's recommendation, to hire Private Investigators to review and do background checks on a number of individuals and entities relevant to Africa. The written contract dated 31 January 2013 made between TRAG and Dechert provided for payment to TRAG of £120,000 in total, plus database charges and expenses. This contract also provided that ENRC should pay the bills. Dechert invoiced ENRC for its own time in dealing with TRAG.

835. TRAG invoiced a total of £127,802 by two invoices, dated 30 January and 26 March 2013. ENRC says that all of these costs were Unnecessary because they constituted Unnecessary Work on Camrose, CAMEC and Chambishi.

836. Dechert says that all of these costs should be treated as Necessary because there was no breakdown of the invoices. However, this was a fixed price contract. It was not an

engagement for services rendered on a time-charge basis. See clause 3.2 of the contract. And as Ms Black explained at paragraph 170 of her WS, the purpose of engaging TRAG was "to conduct investigations into specific individuals and entities connected to the Camrose, CAMEC and Chambishi transactions". So no point can be taken on a lack of breakdown in my view.

837. However, Dechert also says that for ENRC simply to invoke its Reason 3 here is insufficient because at least some work on Africa was Necessary. As to that, of course, I have upheld ENRC's general case that an investigation into Chambishi was Unnecessary and the work on CAMEC and Camrose should have been limited. In fact, the actual scope of TRAG's work can be seen from its draft report produced for "Client Dechert LLP" dated 20 February 2013. It says that its specific instruction was to investigate individuals and companies involved in these transactions. The 43-page report's contents demonstrate that they do not relate to the limited work on CAMEC and Camrose which I said was Necessary, and in any event it was not work which could be carried out by TRAG anyway. Finally, of course there should have been no work on Chambishi at all. As to all of that, Dechert raises one specific matter which relates to TRAG's work on Metalkol; it says that this work, at least, was Necessary. Dechert refers to footnote 5 of ENRC's Unnecessary Costs Further Information. But that footnote did not create a carve-out for Metalkol costs as being Necessary. Rather, ENRC is saying that such work should not have been done because the work on the Camrose acquisition (including Metalkol) was to be limited to a review of the due diligence.

838. Accordingly, I uphold ENRC's claim in respect of the TRAG costs.

WASTED MANAGEMENT TIME

839. Here, ENRC has claimed a total of £232,156 for the WMT of Mr Ehrensberger, Mr Dalman, Mr Vulis and Mr Zinger. So far as the investigation is concerned, and as my Judgment on the Phase 1 Trial makes plain, all of these individuals were significantly involved in aspects of the investigation and devoted substantial time to it. This is unsurprising where Mr Ehrensberger was General Counsel, Mr Dalman was a Director and Chairman of the Board as well as an SIC member for most of the relevant period, Mr Vulis was CEO and attended many meetings, and Mr Zinger when undertaking the role of Deputy General Counsel spent most of his time on the investigation.

840. So far as all but Mr Zinger are concerned, ENRC adopted the approach set out at Schedule 2 to its Unnecessary Work Further Information. There were 2 strands of activity to be covered.

First, meetings with Dechert by one or more of the 3 individuals where the relevant activity was Unnecessary so far as Dechert's fees were concerned. Second, the time they took on emails that could be regarded as Unnecessary. Both of these exercises thus attempt to tie the WMT to matters which were themselves Unnecessary pieces of work.

841. On the first strand, ENRC has calculated the number of hours spent by the relevant individuals on SIC meetings or other meetings. Where the time is specified, it is used. Where it is not, ENRC has applied an assumed time of 2 hours for an SIC meeting and one hour for any other meeting, as set out in the tables at pages 17-19 of Schedule 2.

842. As for emails, ENRC has taken the total number of emails sent from and received by the individuals. It had assumed that they spent an average of 12 minutes on each outgoing email and 6 minutes on each incoming email. ENRC then takes 12% of the total number of hours for each individual to come to the number of hours for each individual that would be allowed as Necessary. The figure of 12% comes from the fact that on ENRC's case on Unnecessary Work, if it succeeded entirely, then Dechert would be entitled to no more than 12% of the total fees it charged.

843. In principle, and arriving at the number of hours of each individual that interfered with their other work, ENRC's approach seems to me to be reasonable and proportionate.

844. It is necessary at this point to refer to the decision of the Court of Appeal in *Aerospace Publishing Ltd v Thames Water Utilities Ltd* (CA) [2007] Bus LR 726. At paragraph 86 of his judgment, Wilson LJ said this:

> "I consider that the authorities establish the following propositions. (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established. (b) The claimant also has to establish that the diversion caused significant disruption to its business. (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time."

845. Here, it is said by Dechert in particular, but also by the SFO, that the inference that the work disrupted would otherwise have been revenue-earning work cannot be applied here, because there is really no evidence of significant disruption. It is said that ENRC's method of calculating the significant disruption was inadequate because it was not "evidence". But in my view, that is not correct because the derivation of the hours spent on meetings is taken from the evidence as to the fact of those meetings and ENRC's characterisation of them (or in

the event, my determination of them) as Unnecessary, based on my Phase 1 Trial judgment which is in turn derived from the evidence before me then.

846. If there was a Dechert activity that was Unnecessary, it stands to reason that any management time spent on it must be Unnecessary also. Given the extent to which I have now found that there was Unnecessary Work on the part of Dechert, it is hopeless for the SFO to suggest that management time spent dealing with Dechert on such work does not constitute significant disruption. Dechert makes the same point by saying that what the individuals were doing here was just carrying on the day-to-day business of ENRC. I do not accept that. Again, having to deal with an investigation that had got seriously out of control from a scope point of view was hardly day-to-day business. Accordingly, the *Aerospace* inference can and should be drawn so far as the meetings are concerned.

847. In the end, all that Dechert could really say was that ENRC could have taken some samples from the particular line items to show how they indicated WMT. But I do not see what more that would have shown when we know that the methodology involved picking out Unnecessary line items where the relevant individuals were involved.

848. As for emails, it seems to me again that ENRC's approach was a reasonable one. It would have been disproportionate to try and go through every single email and attempt to allocate it to Unnecessary Work on the part of Dechert. Rather one has to try and estimate what proportion of the email traffic was likely to have covered work which was Unnecessary. It is again reasonable in principle to do this by applying a percentage which reflects what proportion of Dechert's work is found to be Unnecessary.

849. Here, Mr Hain makes the point that what the 12% figure overlooks is that part of ENRC's case as to what is Unnecessary focuses on internal work which was excessive. He says that this should not "count" when calculating the overall percentage of Dechert's work which was Unnecessary. I think there is some force in this although I have actually adjusted the application of the internal Reason code anyway - see paragraphs 625 - 636 above.

850. Rather than try to extract the internal element altogether from the percentage so far as WMT is concerned, the more appropriate and proportionate course is to give effect to that point by raising the percentage to be applied by 2%. In other words, if 12% were otherwise the correct discount to be applied on hours spent on emails, it becomes 14%. The 12% starting point will

not now in fact be correct because of what I have found to be Unnecessary and not, but the principle is that an extra 2% will be added.

851. A further point is taken as to the assumption of 12 minutes for outgoing and 6 minutes for in coming emails. Of course this is only an estimate but it seems to me to be a fair one which is not excessive and no alternative timings have been positively proposed by the other parties.

852. Accordingly, I consider that ENRC has shown significant disruption across the board, including email activity, which is the starting point for the *Aerospace* inference.

853. I need here to make one important qualification. As can now be seen, I have not found as Unnecessary all the line items that ENRC claimed were Unnecessary. This difference will have to be factored into the analysis of the hours spent on meetings and on emails. It should be possible proportionately to adjust the hours of the 3 individuals concerned to reflect this.

854. I then turn to the calculation of the notional hourly rate for the individuals. This was extrapolated from their salaries, as set out at page 17 of Schedule 2. As to that, Mr Millet KC argued that the extrapolation of an hourly rate from a salary is arbitrary because a salary is not calculated in the first place as a multiple of priced hours work based on a notional hourly rate. When asked what the alternative was, however, Mr Millett KC accepted that there was not a ready answer, save to say that the smaller the unit of time used (i.e., here, hours rather than days or weeks), the greater the risk of error. However, Dechert did not propose a different unit of calculation although it could have done. It seems to me that ENRC's method here in principle is unobjectionable. But to take account of Mr Millett KC's point, I would discount the ultimate sum found to be due as WMT by 10%. That is more than reasonable in a context where the overall sum claimed is very minor compared to that claim for Unnecessary Work and Unnecessary Costs.

855. As for Mr Zinger, the position is more straightforward, since there is evidence which I have accepted that almost all his time was spent on the investigation. See paragraphs 712 and 718 - 719 above. On that basis, it was reasonable for ENRC simply to take his *pro-rata* salary for the period in question (6 June-21 September 2012) and then discount it by 15% to represent work he did which could be regarded as Necessary or unrelated to the investigation.

856. The upshot of what I have concluded above is that most of the sums claimed for WMT are recoverable but the detail will have to be worked out or agreed between the parties.

CONTRIBUTION

Introduction

857. The particular claims made are as follows:

(1) Dechert and Mr Gerrard seek contribution from the SFO; this is limited to a contribution of 50% of their liability to ENRC in respect of Unnecessary Costs and WMT; no contribution claim is made in respect of their liability for Unnecessary Work;

(2) The SFO seeks a 100% contribution (i.e. an indemnity) from Dechert and Mr Gerrard in respect of all of its liability to ENRC in respect of Unnecessary Work, Unnecessary Costs, and WMT.

858. As I understand it, there is no claim for contribution as between Dechert on the one hand and Mr Gerrard on the other. Also, I am assuming that the contribution order sought by the SFO against both of them would hold them jointly and severally liable for such contribution they are ordered to make to the SFO.

859. In addition, and as I have noted above, the amounts claimed against the SFO on the one hand and Dechert and Mr Gerrard on the other, are slightly different because there is a claim arising out of Period 1 which is only made against the latter; see paragraphs 57 and 58 above. On that basis, and to the extent that it arises on the facts, any contribution which might be made by the SFO to Mr Gerrard and Dechert cannot be in respect of their liability for losses incurred in Period 1.

The Law

860. The Act provides as follows:

> "**1 Entitlement to contribution.**
> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> **2 Assessment of contribution.**
> (1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."

861. I did not understand the relevant principles underlying the just and equitable apportionment to be in issue. In any event, I consider that the following principles are relevant (and here agree with how the SFO puts it at paragraph 107 of its submissions):

(1) Although the court is required to have regard to one specific matter, namely the extent of each party's (causative) responsibility for the damage in question, it is just and

equitable to take into account both the seriousness of the respective parties' faults and their causative relevance. A more serious fault having less causative impact on the plaintiff's damage may represent an equivalent responsibility to a less serious fault which had a greater causative impact. See the judgment of Hobhouse LJ in *Downs v. Chappell* [1997] 1 WLR 426 at 445H;

(2) Indeed, other factors can be taken into account as well; see paragraph 51 of the judgment of Tuckey LJ in *Re-Source America v Platt Site* [2004] EWCA 665;

(3) One such other factor can be the financial consequences of the parties' wrongdoing where, for example, one party has ended up with a substantial sum whereas the other has not; see the judgment of Lord Nicholls in *Dubai Aluminium v Salaam* [2002] UKHL 48 at paragraphs 59-64;

(4) The exercise of apportionment undertaken by the trial judge is an assessment which will only be altered on appeal if it is clearly wrong; see, again, paragraph 51 of the judgment of Tuckey LJ in *Re-Source America*.

862. Of course, the apportionment can only take place as between parties who are liable in respect of "the same damage". I did not understand there to be any dispute between them that, given my findings above, they are all liable in respect of the same damage. The fact that there is not a complete overlap between types of breach of duty committed by them does not alter this conclusion. The only qualification is the amount awarded in respect of Period 1 - see paragraph 859 above.

Apportionment

863. In my judgment, the following factors are significant here and they arise in the light of the findings I made in the Phase 1 Judgment, as well as those made in this judgment:

(1) First, quite apart from the IDCs, there were the very substantial breaches committed by Dechert alone and which I listed at paragraph 72(1)(b) - 72(8); that is relevant, even though I have held that from a causation point of view, all the breaches of duty committed by Dechert and the SFO had causative potency, all were intertwined and all contributed to the overall cumulative case;

(2) It was Dechert which took the initiative, both with ENRC in terms of seeking to expand the investigation (which in fact started before the SFO was involved) and with the SFO; further, it was generally Mr Gerrad who instigated each of the IDCs;

(3) Dechert has pointed to the various IDCs where I found that the SFO knew or was reckless as to the lack of authority on the part of Mr Gerrard; that is of course correct but that is really a constituent part of its liability for inducement;

(4) Nonetheless, the SFO was a vital participant in the overall wrongdoing as I explained in paragraphs 172 - 231 and 252 - 374 above; put shortly, Mr Gerrard needed a "willing audience" and the SFO actively encouraged his wrongdoing;

(5) Dechert (and ENRC) are right to point out that, had the SFO acted properly when it first encountered Mr Gerrard, there would have been no further DCs; equally, of course, he took the initiative, as it were, by making the August Leak and approaching Mr Alderman;

(6) Mr Gerrard expanded the investigation in order to earn more fees by acting in gross breach of duty towards his own client; I found that the SFO did not deliberately assist him to do that, but nonetheless, it was guilty of "bad faith opportunism" which took place over an extended period of time;

(7) The SFO is, of course, a public body and its then Director, Mr Alderman, was initially involved in the IDCs; I do not think that this is entirely irrelevant, as Mr Colton KC would suggest; it is not simply about undermining confidence, as to which it is said that on that basis, a countervailing factor is that Mr Gerrard's conduct was all the more serious because it would undermine confidence in the solicitor's profession; it is about the seriousness of the breaches committed by the SFO, in a broader sense;

(8) A further point made by Mr Colton KC is that if Mr Gerrard had been asked about his authority, he would have lied and said he was authorised; however, I have rejected that point in paragraphs 178 - 180 above;

(9) Dechert, has earned about £13m worth of fees from the investigation, albeit that it is has now paid back nearly £9m; for its part, the SFO has not received any sums as a result of its breach of duty, but given its role, it could not have done so, unlike a commercial party;

(10) Looked at overall, Dechert was the principal driver for the wrongdoing and must bear the lion's share of responsibility; on the other hand, the SFO patently played a real part in this and cannot possibly be described as blameless, and with no responsibility at all.

864. In those circumstances I apportion liability for the relevant damage as being 75% to Dechert and Mr Gerrard, jointly and severally, and 25% to the SFO in respect of the Unnecessary Costs and WMT damages. In addition, so that there can be no doubt about it, Dechert and Mr Gerrard are 100% liable in respect of the Unnecessary Work damages.

EXEMPLARY DAMAGES

865. These are claimed by ENRC against the SFO. If I found that ENRC was in principle entitled to such damages, quantum would be dealt with at the next hearing.

866. As for the law, I can take this simply from the judgment of Lord Dyson in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, where he said this:

> "150 The relevant principles are not in doubt. Exemplary damages may be awarded in three categories of case: see per Lord Devlin in *Rookes v Barnard* [1964] AC 1129. The category which is relevant for present purposes is that there has been "an arbitrary and outrageous use of executive power" (p1223) and "oppressive, arbitrary or unconstitutional action by servants of the government" (p1226). In this category of case, the purpose of exemplary damages is to restrain the gross misuse of power: see *AB v South West Water Services Ltd* [1993] QB 507, 529F, per Sir Thomas Bingham MR. It must be shown that the "conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more [than compensatory damages] is needed to show that the law will not tolerate such behaviour "as a remedy of last resort" see *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, para 63, per Lord Nicholls…
>
> 166 Whether the high threshold for the award of exemplary damages has been crossed in any particular case is ultimately a matter of judgment. Opinions can reasonably differ on whether a defendant's conduct has been so outrageous and so unconstitutional, oppressive or arbitrary as to justify the imposition of the penalty of exemplary damages. An appellate court should not interfere with the judgment of the court below unless that judgment is plainly wrong."

867. I should add that it is clear from cases like *Thompson v Commissioner of Police for the Metropolis* [1998] QB 498 at page 516H-517D that the fact and size of any compensatory award of damages is a relevant factor.

868. It seems to me that the relevant factors here are these:

(1) There is going to be a very substantial award of damages in favour of ENRC and against the SFO in any event; the fact that as between it and Dechert, the present award will be apportioned 25:75 does not detract from this fact;

(2) My findings against the SFO here are obviously very serious, not least because it must be very unusual for a public body in the position of the SFO to be found liable for the tort of inducement at all; ENRC is also right to point out the sustained nature of the SFO's breaches of duty and also the involvement of its then Director, Mr Alderman, at the outset, together with the involvement of Mr Thompson and Mr Gould who were senior officers; it is further correct that I rejected their evidence in respect of a number of matters and on one occasion found that they were lying;

(3) There was then the specific incident of the SFO agreeing to deliver a pre-agreed message through the 18 June letter;

(4) On the other hand, from the SFO's own perspective, this was a case of bad faith opportunism rather than conspiring with Mr Gerrard to enable him to procure increased fees. This is not, in my view, a classic case of abuse of power; while the SFO was a willing audience for Mr Gerrard and encouraged him in terms of private meetings, he was not pressurised or threatened in any way by the SFO using its position as a prosecuting authority;

(5) Nor do I think that a deterrent is required here; I have no doubt at all that the very fact that the SFO has been brought into these proceedings and found liable for substantial sums (as well as being liable for damages yet to be assessed because of my findings in relation to the commencement of the CI) will be more than sufficient as a deterrent if one were needed. (In that regard, I do not consider that the contact which the recent former Director of the SFO had with David Tinsley, referred to as a "fixer" in *R v Akle & Bond* [2021] EWCA Crim 1879, now creates a case for deterrence.)

869. Overall, I am quite clear that the SFO was not guilty of the kind of outrageous behaviour which would enable ENRC to surmount the high hurdle so as to obtain an award of exemplary damages. Accordingly, they will not be awarded.

CONCLUSIONS

870. Stated briefly, and in the light of the foregoing, my conclusions are as follows:

(1) The SFO's wrongdoing was an effective cause of the losses claimed by ENRC in respect of Unnecessary Work, Unnecessary Costs and WMT;

(2) But for the SFO's wrongdoing, it would not have commenced the Criminal Investigation; the separate losses claimed by ENRC in this respect will have to be assessed at a yet further trial;

(3) The effect of my assessment of Quantum in relation to Unnecessary Work, Unnecessary Costs and WMT is that ENRC is entitled to significantly more by way of damages than Dechert and the SFO have contended, though not as much as ENRC has sought; the detailed implications of my findings will have to be worked out by the parties;

(4) SFO's claimed defences on the basis of remoteness as to reasonable foreseeability or *novus actus*, and failure to mitigate, are rejected;

(5) So far as contribution is concerned:

(a) In respect of liability for Unnecessary Work, Dechert and Mr Gerrard are 100% responsible and must indemnify the SFO accordingly on a joint and several basis;

(b) In respect of liability for Unnecessary Costs and WMT, where Dechert and Mr Gerrard sought a 50% contribution from the SFO, the just and equitable contribution from the SFO to the Dechert Defendants is 25%; the Dechert Defendants are therefore liable to contribute to the SFO, 75% of the Unnecessary Costs and WMT damages awarded, on a joint and several basis;

(6) This is not a case appropriate for an award of exemplary damages against the SFO;

(7) There is no basis for re-opening the Phase 1 Trial in relation to the March 2013 leak.

871. As ever, I am greatly indebted to Counsel for their written and oral submissions and assistance generally.