Neutral Citation: **[2023] UKUT 00270 (TCC)**

Case Numbers: UT/2021/000137 & 000138

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: The Rolls Building
London EC4A 1NL

FINANCIAL SERVICES – costs - whether all or any part of costs claimed by successful applicants should be awarded – whether the referred decisions were unreasonable- whether the Authority conducted the proceedings unreasonably - Tribunal Procedure Upper Tribunal) Rules 2008 rule 10 (3) (d) and (e)

Heard on: 23 October 2023
Judgment date: 9 November 2023

Before

UPPER TRIBUNAL JUDGE TIMOTHY HERRINGTON
(Sitting in Retirement)

Between

THOMAS SEILER
LOUISE WHITESTONE

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For Mr Seiler: Ben Strong KC and Constantine Fraser, Counsel, instructed by Mishcon de Reya LLP

For Mrs Whitestone: Sarah Clarke KC, Counsel, instructed by Charles Douglas Solicitors LLP

For the Authority: Andrew George KC, Celia Rooney and Ava Mayer, Counsel, instructed by the Financial Conduct Authority

DECISION

Introduction

1. On 23 June 2021 the Financial Conduct Authority ("the Authority") through its Regulatory Decisions Committee ("RDC"), issued Decision Notices to each of Mr Thomas Seiler, Mrs Louise Whitestone and Mr Gustavo Raitzin (together "the Applicants").

2. In those Decision Notices the Authority decided to make orders prohibiting each of the Applicants from performing any function in relation to any regulated activities carried on by an authorised or exempt person, or exempt professional firm, pursuant to section 56 of the Financial Services and Markets Act 2000 ("FSMA").

3. Each of the Applicants referred their respective Decision Notices to the Tribunal. The subject matter of the references was the conduct of the Applicants in respect of arrangements entered into in July 2010 by Bank Julius Baer & Co. Ltd ("BJB") with Mr Dmitri Merinson, an individual connected with the Yukos group of companies ("Yukos Group"), pursuant to which it was contemplated that Mr Merinson would introduce companies within the Yukos Group to banks within the Julius Baer group of companies ("Julius Baer Group") and would receive remuneration for doing so.

4. The Authority alleges that Julius Baer's conduct in its relationship with the Yukos Group demonstrated a lack of integrity. They say that Julius Baer must have appreciated the clear risk that, by entering into the arrangements with Mr Merinson, it might be facilitating or participating in financial crime.

5. Each of the Applicants had roles within Julius Baer and was involved in the arrangements described above. However, on the Authority's case, each Applicant had very different levels of responsibility and knowledge. In short:

> (1) Mrs Whitestone was employed as a relationship manager by Julius Baer International Limited ("JBI"), Julius Baer's UK regulated subsidiary. Mrs Whitestone was the Relationship Manager for the Yukos accounts which are relevant to these references and the principal Julius Baer point of contact for both Mr Feldman, the sole director of the relevant Yukos entity, and Mr Merinson.
>
> (2) Mr Seiler was employed as the Sub-Regional (Market) Head for Russia and Central and Eastern Europe at BJB in Switzerland and was Mrs Whitestone's functional line manager. In that role, he had responsibility for considering, and providing approval of, certain aspects of the relevant arrangements and payments.
>
> (3) Mr Raitzin was employed as the Regional Head for Latin America, Spain, Russia, Central and Eastern Europe and Israel at BJB in Switzerland and was Mr Seiler's line manager. In that role, he was responsible under Julius Baer's written policies, for the final approval of the payments to Mr Merinson.

6. The Authority decided to make the prohibition orders referred to at [2] above because the Authority had concluded that each of the Applicants had acted recklessly and with a lack of integrity in respect of the events arising from the relationship between Julius Baer and Yukos and the dealings with Mr Merinson. In essence, the Authority's case against the Applicants was that they lacked integrity on the sole ground that they disregarded risks of which they were actually aware that Julius Baer might be facilitating or participating in financial crime by participating in the arrangements with Mr Merinson. The Authority decided that each of the Applicants lacked integrity on the basis of

recklessness, that is that they were actually aware of the relevant risks and it was unreasonable of them to take those risks.

7. The basis of the Applicants' challenge to the Authority's decision to make prohibition orders against them was that they did not act recklessly and therefore did not lack integrity because they were not aware of the relevant risks of financial crime relied on by the Authority.

8. Each of the references was a "non-disciplinary reference" with the result that the Tribunal's powers were limited as set out in section 133 (4) to (6A) of the Financial Services and Markets Act 2000 ("FSMA").

The Tribunal's decision on the references

9. In a decision ("the Decision") dated 13 June 2023 ([2023] UKUT 00133 (TCC)) the Tribunal determined the Applicants' references.[1] The reader is referred to the Decision for the detailed findings.

10. The Tribunal decided that the Authority had not made out its case that the Applicants acted recklessly and consequently with a lack of integrity in relation to the subject matter of the references. Accordingly, the Tribunal remitted the question of whether a prohibition order should be imposed on any of the Applicants to the Authority for it to reconsider its decisions in that regard.

11. The Tribunal rejected the Authority's case that the Applicants recklessly failed to have regard to what the Authority said were obvious risks of breach of duty on the part of Mr Merinson and Mr Feldman or other risks of financial crime inherent in the arrangements between Yukos Capital and Julius Baer, defined in the Decision as the "Relevant Risks" and set out at [806] of the Decision. That case was rejected on the basis of the Tribunal's factual findings that the Applicants were not aware of the Relevant Risks, contrary to the contentions of the Authority in that regard.

12. In relation to Mrs Whitestone, the Tribunal concluded that the Relevant Risks would have raised suspicions in the mind of a reasonably competent Relationship Manager, but they did not raise suspicions with Mrs Whitestone: see [809] (6). It said this at [836] to [838]:

> "836. It is undoubtedly the case that establishing all the relevant facts as to the nature of the relationship between Mr Merinson and Yukos and the role of Mr Feldman was something of a jigsaw puzzle because of the manner in which the relevant facts were recorded and were dealt with in a somewhat piecemeal fashion. Mrs Whitestone was not particularly careful in the manner in which she recorded the details she was given so that those reviewing the documents may not have fully appreciated the risks that the relationship involved, as it transpired to be the case. As we have found, even an experienced banker such as Mr Fellay was unable to appreciate the full picture immediately when he reviewed the file.
>
> 837. We have accepted Mrs Whitestone's own candid acceptance of her competence and capability at the relevant time. We accept that she was naïve, lacking in competence and experience, and that she made errors of judgment. She had inadequate support from her superiors and the management systems and controls in place were, as the Authority has subsequently found, completely inadequate to deal with the situation, particularly guidance as to who qualified as a Finder and how the arrangements were to be documented.
>
> 838. Mrs Whitestone also frankly admitted, with the benefit of hindsight and further wisdom and experience, that she was out of her depth, and could have done more to probe Mr Feldman's and Mr Merinson's explanations for various matters. At one stage she described herself as having

[1] Terms defined in the Decision and used in this decision bear the same meanings given in the Decision.

been a "bit of an idiot". This is a matter of great regret for her and one that she has reflected on considerably over the many intervening years. This, together with the strain of this investigation has caused her considerable anguish."

13. In relation to Mr Seiler, as in the case of Mrs Whitestone, the Tribunal made various findings to the effect that although he was not aware of the Relevant Risks, a more diligent approach on his part would have resulted in him becoming aware of them. For example, in relation to its findings as to Mr Seiler's involvement in the arrangements for the Second FX Transaction and the Second Commission Payment the Tribunal said at [854]:

> "Those findings indicate that Mr Seiler did not exercise due skill, care and diligence in considering the proposals before making his recommendation to Mr Raitzin that the arrangements be approved. However, in our view, the findings are not sufficient to support a conclusion that we should draw an inference that Mr Seiler was aware of the Relevant Risks at the time, as opposed to simply missing them. We accept that those risks would have been obvious to a person of Mr Seiler's experience had he given the proposals more detailed consideration and asked for more information regarding the relationship between Mr Feldman and Mr Merinson. However, he did not and in those circumstances, we accept that the Relevant Risks simply did not occur to him. In the absence of any awareness of the Relevant Risks, Mr Seiler was not aware of a reason for objecting to Mr Raitzin's commercial decision to approve the arrangements."

14. In its overall conclusions as to Mr Seiler's integrity the Tribunal said this at [874] to [878]:

> "874. In our view, what emerges from the facts is that Mr Seiler overall was a weak manager. His failings in that regard were exacerbated by the failings in Julius Baer's matrix management structure. Mr Seiler failed to get to grips with a situation which, with the benefit of hindsight, resulted in the duping of an inexperienced Relationship Manager who Mr Seiler placed too much reliance on without further enquiry in circumstances where he did not ensure that her line manager managed her effectively.
>
> 875. This situation was combined with the fact that Mr Seiler placed complete reliance on other senior individuals within Julius Baer having considered the information provided to them by Mrs Whitestone, which as we have found, was incomplete but was the same as, or at various points more, than Mr Seiler himself was given.
>
> 876. It appears that this reliance was, as it turned out, misplaced, not because it was inappropriate to seek their advice but because those senior individuals also failed to pick up the Relevant Risks at all stages in the events that we have considered, up to the point at which Mr Campeanu sent his email on 30 November 2012. We think it is most unlikely that all of these individuals were aware of the Relevant Risks and ignored them, as has been alleged against Mr Seiler. If the risks did not occur to them, including a banker as experienced and diligent as Mr Fellay, this leads to the strong inference that they did not occur to Mr Seiler.
>
> 877. As we have found in a number of important respects, if there had been a better effort to put all the pieces in the jigsaw together it should have been apparent that the features of the transactions were suspicious and should have been investigated. Mr Seiler must take his share of the blame for this. As we have found, and as he candidly admitted in his evidence, he missed a number of what with hindsight were obvious signs of impropriety and he failed to act with due skill, care and diligence in a number of respects.
>
> 878. Mr Seiler also sought in his evidence to distance himself from a number of the decisions taken on the grounds that technically his approval of them was not required. However, the fact was, regardless of the formal position, that he was asked to look at various matters and, probably

due to his wide-ranging responsibilities and pressure of work, did not give them the attention they deserved."

15. In view of the fact that Mr Raitzin has not made an application for payment of his costs in this matter, we make no further reference to the findings against him in this decision.

16. The Tribunal observed at [911] that on the basis of its findings, it would be irrational of the Authority to make a prohibition order against any of the Applicants on the basis that they acted without integrity. However, the Tribunal said this at [912] to [916] in relation to the question as to whether it may be appropriate to make a prohibition order on the grounds of a lack of competence and capability:

> "912. However, the Authority's guidance makes it clear that it will in appropriate cases consider whether either a full or partial prohibition order should be made in circumstances where the individual concerned demonstrates a lack of competence or capability.
>
> 913. We do not consider that we should, on the basis of our findings, make a further finding at this stage that the imposition of a prohibition order of some kind would be disproportionate or irrational. As we have found, there are a number of instances in which each of the Applicants in this case have demonstrated varying degrees of a lack of competence and capability.
>
> 914. Nevertheless, there are a number of important factors that we consider that the Authority should take into account if it were to consider whether a prohibition order of any kind could be justified on the facts of this case.
>
> 915. Most importantly, a prohibition order should not be considered as a proxy for a disciplinary sanction in circumstances where, as in this case, the imposition of a disciplinary sanction against the Applicant concerned cannot be imposed either because he or she was not an approved person at the relevant time or, where he or she was an approved person, the relevant limitation period has since expired. The imposition of a prohibition order can only be justified where it is necessary to do so in order to protect consumers and the integrity of, or confidence in, the financial system.
>
> 916. In that regard, we direct that the Authority must take into account the following matters in reconsidering its decisions:
>
> (1) Neither Mr Seiler nor Mr Raitzin considered any of the transactions in question in the performance of any controlled function, or any function for which he required approval.
>
> (2) There was no allegation of wrongdoing undertaken in the UK on the part of Mr Seiler or Mr Raitzin.
>
> (3) The primary regulator with jurisdiction over Mr Raitzin and Mr Seiler was the Swiss regulator, FINMA, who reviewed the matter and decided to take no action.
>
> (4) Neither Mr Seiler nor Mr Raitzin had responsibility for day-to-day supervision of Mrs Whitestone.
>
> (5) The Authority has taken no action against any individual in the UK responsible for the systems and controls at JBI which it found to be severely deficient.
>
> (6) There have been serious delays in bringing the proceedings against the Applicants and these proceedings have become unduly prolonged. The events in question happened many years ago.
>
> (7) All three Applicants have expressed regret for what had happened and have admitted to a number of failings. Mrs Whitestone, in particular, was very candid about her lack of competence and capability at the time.

(8) The evidence shows that Mrs Whitestone, although expressing no interest in returning to the financial services industry, has sought to learn from her experiences and, with the effluxion of time, it is clear that any process of rehabilitation will have started some time ago."

17. In the event, shortly after the Decision was released the Authority discontinued the regulatory proceedings against the Applicants and accordingly did not seek to make a further decision prohibiting any of the Applicants on the grounds of lack of competence or capability.

18. In the Decision, the Tribunal made a number of very serious criticisms of the Authority, both in relation to the manner in which it conducted its investigation into the Applicants and the regulatory proceedings and also in relation to certain aspects of its conduct of the Tribunal proceedings.

19. As Mr Strong correctly summarised in his skeleton argument for the costs hearing:

(1) At [926] the Tribunal observed that the Authority should consider the appropriateness of conducting contested proceedings against individuals on the basis of its acceptance of a version of events put forward by the employer of those individuals who is keen to settle the separate proceedings taken against that firm without the Authority conducting its own rigorous investigation into the individuals concerned. The Tribunal went on to say that many of the difficulties in this case arose as a result of the Authority taking that course of action and relying primarily on the internal investigations commissioned by JBI into the events which are relevant to these references.

(2) This was a particularly serious problem in this case because the Authority failed to take into account the clear conflict of interest between JBI and Mr Seiler: see [141].

(3) At [928] the Tribunal observed that the Authority "swallowed hook, line and sinker" Mr Campeanu's email of 30 November 2012 notwithstanding that as found at [145] the Authority considered there was ample evidence that he was reckless as to the truth of what he said during his interview":

(4) The Tribunal found at [139] that Mr Neary, the Authority's witness regarding the conduct of the investigation accepted that "there was a failure to probe the evidence gathering and disclosure made by JBI".

(5) At [138] to [140] the Tribunal found that the Authority's investigation "failed to capture obviously relevant material" in six different categories, such that it was "highly likely" that relevant documents were never uncovered.

(6) At [127] to [134] the Tribunal found that the Authority's review of the documents it did gather was seriously deficient, at least partly as a result of frequent changes in personnel. It emerged after the hearing that a highly material document, which the Authority identified as relevant in both 2016 and 2018, was not taken into account because it had not been identified as relevant when the case was handed to a new case team in 2018 and was not identified as potentially undermining on a further review. The Tribunal found that it could not "be satisfied that there are no other relevant documents that should have been disclosed"

(7) The Authority's investigation into the individuals proceeded "at a glacial pace", with the "lengthy delay […] entirely attributable to the Authority": see [117]. Mr Seiler was not invited for interview until 5 June 2018, leaving little time for anything he might say to be properly assessed before the case was then expected to be submitted "for legal review": see [141].

20. The Tribunal found at [125] that in June 2020, during the course of the RDC proceedings, there was a late disclosure by the Authority of documents which included some highly material documents showing BJB Compliance involvement in August 2010, just after the implementation of the First FX Transaction, and their knowledge of Mr Merinson's position as the Finance Director for Yukos International. The Tribunal found that those documents demonstrate that Mr Seiler had no more information than BJB Compliance had regarding the relevant matters at that stage. In addition, the documents disclosed show that senior people in BJB other than Mr Seiler and Mr Raitzin were considering whether Mr Feldman had a conflict of interest in relation to the First FX Transaction.

21. In relation to the conduct of the Tribunal proceedings, the Tribunal observed that the Authority had failed to call a number of witnesses who it is likely had material evidence to give about a number of key issues. These individuals were referred to at [93] in the following terms:

> (1) Mr Jashmir Narrandes, a member of JBI Compliance who worked with Mrs Whitestone, particularly in the early days of her relationship with Yukos. Mrs Whitestone contended that Mr Narrandes had a role in relation to the creation of the so-called "veto letter" referred to at [318].
>
> (2) Ms Carolyn Thomson Bielmann, head of Anti-Money Laundering and Sensitive Clients for BJB and a member of BJB Compliance. Ms Thomson Bielmann had a significant role in relation to the scrutiny of the arrangements which are relevant to these proceedings by BJB Compliance and, it is contended by the Applicants, was aware of the detail of the arrangements, and in particular the matters which the Authority says raised suspicions and "red flags". Mr Seiler and Mr Raitzin contended, in particular, that Ms Thomson Bielmann was aware of information that was not made known to them.
>
> (3) Mr Sylvain Courrier, head of external asset managers and Finders for BJB and who was involved, among other things, in settling the revised arrangements for paying Finder's fees to Mr Merinson.
>
> (4) Mr Viorel Campeanu, Managing Director and Senior Adviser at JBI and line manager of Mrs Whitestone with a direct reporting line to Mr Seiler. It is clear that Mr Campeanu played a significant role in the matters which are the subject of these proceedings and Mr Neary in his evidence accepted that Mr Campeanu would have had relevant evidence to give about a number of key issues, including whether or not the First FX Transaction raised red flags at the time it was executed, whether the fees were unusual or surprising, what Mr Campeanu's responsibility was as line manager in relation to transactions in the substance of his discussions with Mrs Whitestone, what he told Mr Seiler and who actually came up with the fee structure.

22. At [94] the Tribunal observed that it was a striking feature of the case that those witnesses connected with JBI whom the Authority called in support of its case had only a peripheral involvement with the arrangements.

23. At [97] the Tribunal said that there may be a satisfactory explanation for the absence of particular potential witnesses. It said that there may have been practical difficulties in obtaining evidence from those who were resident in Switzerland, but the Tribunal observed that it had had no explanation from the Authority as to whether they did at any stage consider seeking assistance from these potential witnesses in any respect, observing that those witnesses would clearly have had highly relevant evidence to give. As we describe later, the Authority had in fact contacted both Ms Thomson Bielmann and Mr Courrier who both declined to provide witness statements on behalf of the

Authority. That was not a matter that was disclosed to the Tribunal and the Applicants until shortly before the hearing of the costs application.

24. The Tribunal said at [99] that it did not regard the absence of Mr Campeanu as being satisfactory. At [113] the Tribunal rejected the Authority's submissions that the Authority had sound and justifiable reasons for choosing not to call Mr Campeanu because it did not believe that he could be tendered as a witness of truth and the Authority was therefore not prepared to rely on his evidence. As a result, the Tribunal stated at [114] that it would, where appropriate, draw adverse inferences from the Authority's failure to call Mr Campeanu when considering particular matters where Mr Campeanu's evidence may have been relevant.

25. At [918] to [931] the Tribunal made some observations on the effect of these failings when considering whether or not to exercise its powers pursuant to section 133A (5) of FSMA.

26. At [921] the Tribunal expressed its exasperation that despite failings identified in previous cases that had been before the Tribunal, basic errors in the Authority's approach to disclosure were still occurring.

27. At [924] the Tribunal expressed its disapproval of the Authority as a tactical decision declining to call a witness who can assist the Tribunal with relevant information so as to benefit its own theory of the case.

28. At [925] the Tribunal encouraged the Authority to give serious consideration as to whether it is appropriate to continue with an investigation which it does not have the resources to complete within a reasonable period of time and where it has decided that its priorities for the use of its limited resources lie elsewhere. It went on to say the following at [929] and [930]:

> "929.It does not appear that at any point the Authority stepped back and considered whether it was more likely that the Applicants, with nothing in their background and life experiences to suggest that they would act without integrity over a prolonged period of time, were aware of the risk of fraud and did nothing about it, as opposed to it being more likely that, against a background of defective systems and controls, the Applicants in a number of respects failed to demonstrate the level of competence expected when faced with two individuals who were able to exploit the weaknesses concerned.
>
> 930.It appears that the Authority became anchored in its initial impressions of what happened, informed by Mr Campeanu's email, so that the subsequent disclosures late in the process simply gave rise to a mindset of confirmation bias."

The costs applications

Mr Seiler

29. On 11 July 2023 Mr Seiler made an application for an order for costs against the Authority pursuant to Rule 10(3)(d) and 10(3)(e) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules"). A schedule of costs was enclosed with this application.

30. The grounds for the application in respect of Rule 10(3)(e) of the Rules was that it was unreasonable for the Authority to issue the Decision Notice at all because it was unreasonable, in light of the multiple failings of the Authority in both its investigation of Mr Seiler and analysis of the evidence to conclude at the time of the Decision Notice, that Mr Seiler recklessly disregarded risks of which he was actually aware. Mr Seiler contends that it was therefore unreasonable to conclude

that Mr Seiler lacked integrity on that basis, and the Authority's decision to impose on him a prohibition order under section 56 of FSMA was unreasonable.

31. Mr Seiler relies on the Tribunal's observation at [929] set out at [28] above, in circumstances where numerous other individuals, with all or most of the information that Mr Seiler had, showed no signs of being aware of the risks of which the Authority concluded Mr Seiler was aware.

32. Further, Mr Seiler contends that it was unreasonable for the Authority to issue the Decision Notice imposing a prohibition order on him on the basis that he posed a serious risk to confidence in the UK financial system in light of the matters found by the Tribunal as to the delays in the investigation and the late disclosure of documents referred to at [19] and [20] above, as well as the factors referred to at [916] of the Decision as set out at [16] above.

33. Further or alternatively, Mr Seiler contends that it was in any event unreasonable for the Authority to base any decision on the allegations in the Decision Notice concerning the Third FX Transaction. In addition to the multiple failings of the Authority referred to above, contrary to section 387 of FSMA, the Authority did not issue to Mr Seiler a Warning Notice including reasons concerning the Third FX Transaction referred to in the Decision Notice.

34. Mr Seiler contended that a variety of different allegations had been put to Mr Seiler concerning various transactions labelled "the Third FX Transaction", but not the allegations in the Decision Notice.

35. Further or alternatively, in light of the multiple failings of the Authority referred to above, Mr Seiler contends that in any event the decision made regarding his response to Mr Campeanu's 30 November 2012 email was unreasonable. In this regard, Mr Seiler relies on the Tribunal's findings at [104]-[105] and [785]-[799] of the Tribunal's Decision, which are referred to below.

36. The grounds for the application in respect of Rule 10(3)(d) of the Rules are:

> (1) That it was unreasonable for the Authority to defend the reference and pursue before the Tribunal the allegations in its Statement of Case that Mr Seiler was actually aware of the Relevant Risks. Mr Seiler contends that it was unreasonable to do so in the light of the multiple failings in the Authority's investigation referred to above, which it did not remedy in the course of the Tribunal proceedings.
>
> (2) That it was further unreasonable of the Authority to decline to advance any case on the matters raised in Mr Seiler's Request for Clarification, to decline to answer the requests for details regarding its investigation made in the letters from Mishcon de Reya dated 8 April, 23 May and 9 June 2022 respectively, and to fail to obtain relevant evidence for the Tribunal hearing including from witnesses who would have had evidence to give which was highly relevant to the Authority's case against Mr Seiler.
>
> (3) Further or alternatively, Mr Seiler contends that it was in any event unreasonable, for the Authority to include the Third FX Transaction in its Statement of Case and pursue the allegations made therein in relation to the Third FX Transaction before the Tribunal. As the Tribunal found, the Authority was not entitled to pursue the allegations in its Statement of Case in relation to the Third FX Transaction, having failed to comply with section 387 of FSMA.
>
> (4) Further or alternatively, Mr Seiler contends that it was in any event unreasonable for the Authority, to include in its Statement of Case and pursue the allegations made therein regarding Mr Seiler's response to Mr Campeanu's 30 November 2012 email.

Mrs Whitestone

37. On 10 July 2023 Mrs Whitestone made an application for an order for costs against the Authority, also pursuant to Rule 10(3)(d) and 10(3)(e) of the Rules. A schedule of costs was enclosed with this application.

38. The grounds for the application in respect of Rule 10(3)(e) of the Rules was that it was unreasonable for the Authority to issue the Decision Notice at all because it was unreasonable, in light of the multiple failings of the Authority in both its investigation of Mrs Whitestone and its analysis of the evidence to conclude at the time of the Decision Notice, that Mrs Whitestone recklessly disregarded risks of which she was actually aware. It was therefore unreasonable to conclude that she lacked integrity on that basis, and the Authority's decision to impose a prohibition order under section 56 FSMA was therefore unreasonable.

39. Further, Mrs Whitestone contends that it was unreasonable for the Authority to issue the Decision Notice imposing a prohibition on her on the basis that she posed a serious risk to confidence in the UK financial system, particularly in light of the matters considered at [911], [914] and [916(5)-(8)] of the Decision.

40. Further or alternatively, Mrs Whitestone contends that the Authority's decision in respect of the Third FX Transaction was unreasonable, given the Tribunal's ruling at [782-784] and [932-1023] of the ision, declining to exercise its discretion to permit this matter to be pleaded.

41. The grounds for the application in relation to Rule 10(3)(d) are:

> (1) That the Authority acted unreasonably in bringing, defending or conducting the Tribunal proceedings and pursue before the Tribunal the allegations in its Statement of Case that Mrs Whitestone was actually aware of the Relevant Risks. It was unreasonable to do so in the light of the multiple failings in the Authority's investigation referred to above, which it did not remedy in the course of the Tribunal proceedings.
>
> (2) Further or alternatively, Mrs Whitestone contends that it was in any event unreasonable, in light of the matters referred to above, for the Authority to include the Third FX Transaction in its Statement of Case and pursue the allegations made therein in relation to the Third FX Transaction before the Tribunal. As the Tribunal found, the Authority was not entitled to pursue the allegations in its Statement of Case in relation to the Third FX Transaction, having failed to comply with section 387 of FSMA.

Relevant Law

42. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"), so far as relevant, provides that:

> "(1) The costs of and incidental to –
>
> (a)….
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

43. This provision makes it clear that whether or not costs are to be awarded in any particular case and, if so, of what amount, is a matter of discretion for the Tribunal. Like all judicial discretions, it must be exercised having taken account of all relevant circumstances and ignoring all irrelevant factors.

44. Section 29 (3) TCEA makes it clear that the power to award costs is also subject to Tribunal Procedure Rules. The relevant rules in this case are Rules 10(3)(d) and 10(3)(e) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") which provide so far as relevant as follows:

"(3) …. the Upper Tribunal may not make an order in respect of costs or expenses except—

…

(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;

(e) if, in a financial services case … the Upper Tribunal considers that the decision in respect of which the reference was made was unreasonable."

45. These particular provisions, or provisions in the same form in other jurisdictions, have been considered in a number of recent cases, in particular *HMRC v Jackson Grundy* [2017] UKUT 0180 (TCC) ("*Jackson Grundy*"), *Alistair Rae Burns v FCA* [2019] UKUT 0019 (TCC) ("*Alistair Burns*"), *Financial Solutions (Euro) Limited v FCA* [2020] UKUT 243 (TCC) ("*FSE*") and *Markos Markou v The Financial Conduct Authority* (Costs Decision, UT-2021-00025, 16 June 2023) ("*Markou*").

46. The principles to be derived from these decisions were summarised at [13] to [16] of *Markou* as follows:

"13. In [*Alistair Burns*] the Tribunal confirmed (at [15]) that Rule 10(3)(d) focusses on conduct during the Tribunal proceedings. Rule 10(3)(e) focusses on the nature of the decision that is the subject of the reference. The Authority accepts that there is some overlap between the provisions.

14. In [*Alistair Burns*] the Tribunal made reference to the principles set out in the decision of the Upper Tribunal in [*Jackson Grundy*] a case in which the Upper Tribunal considered the equivalent provision to 10(3)(d) in the rules for the Tax Chamber. It summarised those principles as follows:

"(1) The rule is a threshold condition. It is only if the tribunal concludes that a party has acted unreasonably in the relevant respect that the question of the exercise of a discretion to award costs can arise. A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of a discretion, but a matter of value judgment;

(2) The phrase "bringing, defending or conducting the proceedings" is an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side;

(3) HMRC would be acting unreasonably in defending an appeal if they ought to have known that their view of the case had no reasonable prospect of success but not otherwise; it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable;

(4) The restriction in s.29 Tribunals, Courts and Enforcement Act 2007 to the recovery of costs "of and incidental to" the proceedings means that there is no power to make an order in respect of anything else and, particularly, in respect of any investigation or decision made which preceded the institution of the proceedings or the preparation of those proceedings before the tribunal; and

(5) Nevertheless, although it is not possible for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, nor can costs incurred before that period be ordered, behaviour of a party prior to the commencement of proceedings might well inform actions taken during proceedings." …

15. The principles were summarised by the UT in [*FSE*] namely that the Upper Tribunal may only award the Applicant its costs pursuant to Rule 10(3)(d) or (e) if it considers that either:

a. The Authority has acted unreasonably in the course of the proceedings under the Reference, for example, by persistently failing to comply with the rules and directions to the prejudice of the other side; or

b. The RDC's decision as recorded in the Decision Notice was "unreasonable".

16. At [28]-[37], the FSE Tribunal said:

> 28. In *Jackson Grundy*, the Tribunal elaborated on how the question of whether a decision could reasonably be defended could be assessed. It said at [85] that this could be done by considering whether
>
> "…it should have been apparent to [the Respondent], considering the matter dispassionately, and by reference to the information available to them when the notice of appeal was served on them, that the review decision was so flawed that it could not properly be defended."
>
> 29. It seems to me, as the Applicant submitted, that this formulation is correct and should be applied when the Tribunal has to consider the question as to whether it was reasonable of a party to have taken a decision on receipt of the other party's case to defend the proceedings. I also consider that another example of where a party could be held to have acted unreasonably is where it fails to produce evidence to support its case.
>
> 30. At [18] and [19] of *Alistair Burns* the Tribunal referred to two points of importance to be considered in the context of an application made under Rule 10 (3) (e) of the Rules by reference to the decision of the Financial Services and Markets Tribunal, this Tribunal's predecessor, in *Baldwin v FSA* (5 April 2006). The applicable rule at that time was in broadly identical terms to Rule 10(3)(e). The points concerned can be summarised as follows:
>
> (1) Judging whether something is reasonable or unreasonable is wholly distinct from judging whether it is right or wrong: a decision may be wrong without being in the slightest degree unreasonable.
>
> (2) The Tribunal needs to take account of the fact that proceedings before the RDC are administrative rather than judicial. The Tribunal is required to focus on the decision itself. The right approach is to ask whether the Authority's decision was unreasonable, given the facts and circumstances which were known or ought to have been known to the Authority at the time when the decision was made. The Tribunal needs to remind itself that the process leading to the Authority's decision is not a full judicial hearing of the kind conducted by the Tribunal but is conducted informally and speedily so that the Authority is not expected or compelled to follow procedures or express its conclusions, as required of a court.

> 31. As the Authority observed in its submissions, the language of unreasonableness in the cost rules overlaps of the test for whether, on determining a reference, the Tribunal should remit the matter to the Authority, as articulated in the Tribunal's case law and referred to at [21] and [22] above. In this case, the Tribunal concluded that the decision set out in the Decision Notice was not within the range of reasonable decisions open to the Authority and accordingly remitted the decision to the Authority for reconsideration.
>
> …
>
> 34.In the light of those submissions, the Authority summarised the test to be applied in considering whether a decision was unreasonable for the purposes of Rule 10 (3)(e) was whether the Decision was not simply wrong, but so obviously wrong that the Authority is to be criticised for seeking to defend it on the reference at all.
>
> 35. Again, in my view the Authority has sought to place a gloss on the ordinary meaning of the Rule which is not justified. The question as to whether a particular decision was a was not "reasonable" requires a multifactorial assessment to be undertaken by the Tribunal taking account of all the relevant circumstances. The question of whether or not a particular matter or decision was "reasonable" is not primarily a question of law. The Tribunal has an unfettered power, to be exercised judicially, as to whether it considers a decision to have been "reasonable".
>
> 36. The Tribunal rejected in *Baldwin* the proposition that the question of "reasonableness" should be assessed by reference to the *Wednesbury* principles. The formulation suggested by the Authority in my view comes very close to a "Wednesbury" test and is too narrow. Likewise, it would be too simplistic to proceed on the basis that where the Tribunal has decided to remit the matter to the Authority for further jurisdiction, that in itself leads to the inevitable conclusion that the decision concerned was "unreasonable". As the Authority correctly submitted, the test for the purposes of the costs rules has not been changed following the enactment of s 133 (6) (a) FSMA and the formulation of the test by the Tribunal in its case law as to the circumstances in which a matter should be remitted to the Authority for further consideration.
>
> 37. It seems to me that there is a degree of overlap between Rule 10 (3)(d) and Rule 10 (3)(e). Therefore, for example, if the Authority seeks to defend on a reference a decision which it ought to have known was seriously flawed, there would be jurisdiction to consider an award of costs under either rule. On the other hand, at the time the decision was made it may well have been reasonable but in the light of a change of circumstances or new evidence that the Applicant seeks to adduce, it may be the case that the Authority should have considered whether it should continue to defend the proceedings and, if it failed to do so, there may be a case for a costs order under Rule 10 (3)(d). Obviously, if the Tribunal finds that both the decision itself was unreasonable and the conduct of the Authority during the proceedings was also unreasonable, the case for the Tribunal to award costs is strengthened."

47. An issue which did not arise for consideration in the cases referred to above was the relevance of a causal nexus between the alleged unreasonable conduct and the costs incurred. In that context, Mr George drew my attention to the following two authorities.

48. In *McPherson v BNP Paribas* [2004] 4 Costs LR 596, the Court of Appeal considered the approach which the Employment Tribunal ought to adopt to an application for costs pursuant to Rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, which permits the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably. Mummery LJ explained at [40] that, whilst there

was no obligation on the party seeking costs to "prove that specific unreasonable conduct by the applicant caused particular costs to be incurred", the "principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion."

49. In *Willow Court Management Co (1985) Ltd v Alexander* [2016] L. & T.R. 34, the Upper Tribunal (Lands Chamber) considered the similar power under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (to award costs as a result of a party's alleged unreasonable behaviour in bringing, defending or conducting proceedings). In line with the approach endorsed in *McPherson*, whilst causation was not a pre-requisite to the award of costs, the Tribunal said at [42] that "the unreasonable conduct, its nature, extent and consequences are relevant factors to be taken into account in deciding whether to make an order for costs and the form of the order".

50. Bearing in mind the similarity of the provisions considered in *McPherson* and *Willow Court* to the provisions of Rule 10 (3) (d) and (e) of the Rules in this case, in my view this Tribunal should adopt a similar approach. Accordingly, as submitted by Mr George:

> (1) The Tribunal's power to award costs in the present case is not constrained by the need to prove that specific unreasonable conduct by the Authority caused particular costs to be incurred by the Applicants.
>
> (2) However, in exercising its discretion to award costs, the Tribunal must have regard to the consequences of any conduct that is found to have surpassed the threshold of unreasonableness.
>
> (3) Accordingly, the existence and extent of any causal connection between the behaviour to be sanctioned and the costs sought is a relevant factor which must be taken into account by the Tribunal when deciding whether to award costs.

51. As Mr George observed, consistent with this approach, in *Angela Burns v FCA* [2015] UKUT 601 the Tribunal refused to award costs pursuant to Rule 10(3) where unreasonable conduct did not in fact have any material impact on the legal costs incurred (at [42] and [64]-[65]). It was only in respect of unreasonable conduct which the Tribunal considered had actually increased Ms Burns' legal costs that an award of costs was made (at [57]). Whilst the Tribunal was highly critical of the Authority's approach to the case as a whole, and "deplore[d] the Authority's… failure to retain a sense of proportion in its approach" (at [67]), the Tribunal did not consider it appropriate to make any costs order beyond recovery of the costs caused by unreasonable conduct.

52. In these proceedings, the primary case of both Mr Seiler and Mrs Whitestone is that the Authority's decision to prohibit them on the basis of a lack of integrity as a consequence of the Authority's allegation that they were actually aware of the Relevant Risks and ignored them was unreasonable, and that it was unreasonable of the Authority to defend the references in the Tribunal proceedings on the basis of those allegations of actual knowledge of the Relevant Risks.

53. It seems to me that if either or both of Mr Seiler and Mrs Whitestone were able to satisfy me that those actions of the Authority were unreasonable then it should follow that the starting point is that they should be entitled to recover the whole of the costs that they had incurred in respect of the proceedings in the Tribunal. If the threshold of unreasonableness has been crossed by virtue of it having been unreasonable for the Authority to defend the references, for example because it should have been obvious to the Authority that its case could not succeed, then the starting point is that the successful party should have all of their costs. That indeed was the approach taken by this Tribunal in *Jackson Grundy*, where it found that HMRC ought to have realised that there was no realistic

prospect of them defending the appeal in that case and awarded the appellant the whole of its costs incurred in respect of its appeal. Consequently, the approach taken was that once the threshold had been passed, the normal approach in cases where cost shifting applies should be followed. Consequently in that situation, subject to the exercise of the Tribunal's discretion taking account of all relevant circumstances, the appellant should expect to be awarded the whole of their costs. The question of causation has been satisfactorily dealt with by following that approach.

54. The question of causation requires a more nuanced approach in cases where the applicant for costs alleges unreasonableness in respect of only some of the conduct of the other party in the proceedings or in respect of only certain aspects of a decision. That is the position, for example, in relation to Mrs Whitestone's and Mr Seiler's case in relation to the Third FX Transaction and their allegations in respect of the Authority's failure to call relevant witnesses. It seems to me that in that situation the question of causation is a highly relevant factor which the Tribunal will need to take fully into account in determining the extent to which it should award costs based on the unreasonable conduct in question.

55. Mr George submitted by reference to cases determined under the Civil Procedure Rules, that the courts had recognised that the status of an unsuccessful party as a regulatory body may be relevant to whether costs should be awarded, and the amount of any award. Mr George referred to a number of cases where the courts had held that if a regulatory body were to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful that might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage: see for example *Competition and Markets Authority v Flynn Pharma Ltd* [2022] 1 W.L.R. 2972 at [97] (per Lady Rose JSC).

56. In my view this principle, while clearly relevant to jurisdictions where the starting point is that the successful party should expect to recover their costs, has no relevance to this Tribunal's cost jurisdiction under Rule 10 (3). The protection for the regulatory body against the "chilling effect" of a costs award is clearly already catered for by the fact that an award can only be made in cases where the decision in question was unreasonable or the regulatory body has acted unreasonably in conducting or defending the proceedings. None of the cases cited to me by Mr George indicated that this was a relevant factor in jurisdictions where the defendant is typically a regulatory or other governmental body and where the jurisdiction to award costs is similar to that contained in Rule 10 (3) of the Rules.

Discussion

57. It is clear from the discussion of the relevant law set out above that in this decision I need to decide first whether there is jurisdiction to make a costs order in favour of either or both of Mr Seiler and Mrs Whitestone. That will be the case if I find either or both of the following contentions by each of them to be made out:

(1) The RDC's decision as recorded in the Decision Notice was "unreasonable";

(2) The Authority has "acted unreasonably" in bringing, defending or conducting the proceedings on the relevant reference.

58. If I accept all or some of the Applicants' contentions, I must then consider whether, as a matter of judicial discretion, I should make a costs order in favour of either or both Applicants and, if so, whether such order should extend to the whole or a specified part of the costs claimed by them. If I determine that a costs order is appropriate, I will then consider whether I can undertake a summary

assessment of the costs concerned myself or whether to direct that the application be made the subject of a detailed assessment.

59. I shall therefore proceed to deal with each of these issues in turn.

Issue 1: Whether the RDC's decision was unreasonable

60. I shall consider the contentions made in that regard by Mr Seiler and Mrs Whitestone separately, although to a large extent they rely on the same matters. I shall deal first with the primary case advanced by each of them, before considering the alternative case, as described at [30] to [41] above.

Mr Seiler

Primary case

61. Mr Strong's primary submission was that it was unreasonable for the RDC to have made findings of such seriousness as it did without a fuller investigation having been carried out. Consequently, the RDC's decision was unreasonable because of the flawed nature of the Authority's investigation. Mr Strong submitted that the Authority should have known that the investigation was flawed so that it was unreasonable to have made a decision to prohibit Mr Seiler on the basis of lacking integrity without remedying the problems that had occurred during the investigation. Mr Strong submitted that the Authority should have known that the documentary evidence was incomplete and that should have been taken into account when making its decision. In particular, the Authority did not seek any proper account of relevant matters from Compliance, or from Mr Courrier, all of whom played important roles in key events.

62. Mr Strong also submits that given the passage of time, the only proper way to deal with the matter was to undertake a close examination of the documents. He submitted that it was clear that Mr Seiler did not remember much of the events concerned and that should have been taken into account.

63. As regards the late disclosure, Mr Strong submitted that when the Authority did receive the further documentation in June 2020 it failed to see the implications of those documents which demonstrated knowledge of the arrangements which was shared by many others and that in some cases others within Julius Baer had more knowledge of the matters concerned than Mr Seiler did. Mr Strong submitted that at that stage, the Authority, and in particular the RDC, in giving its decision, should have stepped back and considered whether in the light of the new material and the inherent unlikelihood of a person of Mr Seiler's background and experience having ignored the Relevant Risks, its failure to do so rendered the RDC's decision unreasonable.

64. Mr Strong submitted that in the absence of direct evidence of Mr Seiler's actual knowledge of the Relevant Risks, the Decision Notice relied on inference. The Tribunal noted at [67] of the Decision that the safety of such inferences depended on the completeness of the evidence, the integrity of the investigation and the inherent unlikelihood of the allegations. The evidence should have been approached with an open mind.

65. It is clear from the Tribunal's findings in the Decision that there were serious failings in the Authority's investigation. These failings were exacerbated by the delays that occurred in pursuing the investigation, as described in the Decision. It is also clear that the documentation disclosed in June 2020, which provided more evidence as to the knowledge of others at BJB in the arrangements, meant that it was necessary for the RDC to take account of that evidence and weigh its significance in the light of the Authority's case theory at the time that evidence was received.

66. The new evidence did not cause the Authority to change its stance and consider, perhaps, whether if it was to continue to pursue the proceedings, it should do so on the basis of a lack of competence rather than a lack of integrity on the part of the Applicants.

67. The key question at the time was whether it was unreasonable for the RDC to issue a Decision Notice on the basis of a lack of integrity on the part of Mr Seiler in the light of the developments that had occurred.

68. On balance, whilst the Tribunal's Decision has demonstrated that it was wrong of the RDC to take the course it did, in my view it was not unreasonable on its part to have done so. In my view, the decision to prohibit Mr Seiler on the basis that he was actually aware of the Relevant Risks and failed to address them was a finding that was within the range of reasonable decisions open to the RDC.

69. As this Tribunal has observed in the case law referred to above, RDC proceedings are different to judicial proceedings. Witness evidence plays no part and the nature of the proceedings necessitates the RDC drawing inferences from the documentary evidence. Although the documentation was incomplete, the key documents which were available to the RDC give a clear picture of the essential elements of the transactions concerned and the communications that took place in relation to them. There is no question that these documents were open to a number of different interpretations and each of the Applicants had different views on what the documents demonstrated. They each from time to time in their representations to the RDC urged the RDC not to accept the explanation of the other Applicants. Both Mr Seiler and Mr Raitzin in particular urged the RDC not to accept that the explanations of Mrs Whitestone were credible. Mr Raitzin went so far as to describe Mrs Whitestone as having gone "rogue", a position which he resiled from in the Tribunal proceedings.

70. Mr Seiler did not advance a case before the RDC that he failed to spot the Relevant Risks because of a failure to act with due skill, care and diligence. Before the Tribunal he accepted he had so failed in a number of important respects, as recorded in the Decision.

71. Accordingly, the documentary evidence that the RDC was faced with, which was essentially the same as that before the Tribunal, was that a highly experienced senior manager failed to notice obvious signs of suspicious activity on the part of Mr Merinson and Mr Feldman. The Tribunal, having heard Mr Seiler, accepted his explanation but it did so against a background where Mr Seiler was prepared to accept that he should have done better in carrying out his duties.

72. It is, as Mr George submitted, most unusual for a person of Mr Seiler's experience and seniority to have failed in that way. In those circumstances, it was not unreasonable for the RDC to take the position, as it clearly stated in the Decision Notice, that Mr Seiler must have been aware of the Relevant Risks.

73. It is also clear from the Decision Notice that the RDC did take account of the material from the late disclosure and explained why that material did not affect its conclusion on the key point as to Mr Seiler's knowledge of the Relevant Risks. It is clear from the Tribunal's findings that the Authority should have stepped back and considered what was the more likely explanation for what had happened and it is surprising that in all the circumstances, bearing in mind the delays and inadequacy of the investigation, it did not do so.

74. However, in the light of the strong indications of suspicious activity over a considerable period of time and the lack of a full explanation from Mr Seiler at the relevant time as to why he did not pick up the Relevant Risks and probe matters further, it cannot be said that it was unreasonable for the RDC to draw the inference that Mr Seiler must have been aware of the Relevant Risks.

75. Neither in my view was it unreasonable of the Authority, as explained in the Decision Notice, to take the position that the time taken to conclude the investigation did not diminish the seriousness of the misconduct and therefore the need to address it if the evidence was sufficient to justify proceeding with the action proposed. Although it is clear from the Tribunal's observations about the effect of delay on investigations and the need to consider whether to proceed with an investigation that cannot be properly resourced within a reasonable period of time, that the Tribunal would have taken a different view if put in the shoes of the Authority at the time, I do not consider that in the circumstances of this case and the nature of the allegations made it was unreasonable of the Authority to proceed with the action proposed.

76. Accordingly, I conclude that on Mr Seiler's primary case I have no jurisdiction to make an order for costs under Rule 10(3)(e).

77. In the light of the seriousness of the allegations against Mr Seiler, I do not consider that any failure on the part of the Authority to take into account the matters set out at [916] of the Decision, as set out at [16] above, affects my decision on this issue.

Alternative case

78. As summarised at [33] to [35] above, Mr Seiler contends that it was unreasonable for the Authority to base any decision on the allegations in the Decision Notice concerning the Third FX Transaction or Mr Seiler's response to Mr Campeanu's 30 November 2012 email.

79. In relation to the latter point, Mr Strong submits that all of the matters identified by the Tribunal at [796] to [798] of the Decision should have been apparent to the Authority at the time of the Decision Notice and it was unreasonable to disregard them. Mr Strong submits that it was particularly unreasonable given the inadequacies of the Authority's investigation to draw a conclusion on the basis of a lack of documentary evidence that JBI Compliance had not approved the retrocession arrangement, as set out at paragraph 117 of Annex B to the Decision Notice.

80. The Tribunal said this at [796] to [798]:

> "796. As regards the first statement relied on by the Authority regarding the approval of the First Commission Payment, as set out at [792 (1)] above, in our view, there was nothing misleading in Mr Seiler failing to disclose that none of the transactions had been pre-approved. Mr Baumgartner was copied to Mr Raitzin's "fait accompli" email referred to at [489] above and therefore was fully aware of how the transaction and payment to Mr Merinson had come to be approved. Compliance were therefore not misled; they were aware that the payment had been approved after the event.
>
> 797. As regards the second statement with which the Authority takes issue, regarding the approval of the retrocession agreement and the disclosure regarding Mr Merinson's employment status:
>
> (1) As explained at [208] above, arrangements with new Finders for JBI had to be vetted by JBI Compliance before being passed for approval to the CEO or other senior managers in London. In the absence of evidence as to whether this in fact occurred, we are prepared to accept Mr Seiler's evidence that this was required and that he believed at the time that JBI Compliance would have reviewed the arrangements.
>
> (2) Mr Seiler's understanding is consistent with the evidence of Mr Bates, who confirmed that, irrespective of whether someone in JBI actually looked at the arrangements with Mr Merinson,those arrangements should have been approved by JBI Compliance and local management, and in particular, that "any commissions that were outside the norm should have been discussed at local level".

(3) As we have found, it was at the time the invariable practice at Julius Baer for one-off retrocessions not to be recorded in a written agreement and accordingly there was nothing misleading about Mr Seiler saying that the arrangements had been agreed. As Mr Strong observed, an agreement of this kind does not have to be in writing.

(4) As we found at [430] above, Mr Seiler recalls that he personally asked Mr Gerber whether the arrangements with Mr Merinson were in order and Mr Gerber assured him they were. It is also notable that Mr Baumgartner received Mr Seiler's email stating that "[t]he Retro agreement was approved by Compliance" and did not object or say that this was incorrect.

(5) We have found that when he received the 7 February Memorandum, that was the first time Mr Seiler became aware that Mr Merinson was employed in the Yukos Group. Mr Seiler's evidence and cross-examination was that he believed that he was told something different during the conference call with Mrs Whitestone and others following the 7 February Memorandum and Mr Schwarz's subsequent email muddied the waters with reference to Mr Merinson being an "external employee", that is akin to a consultant. In those circumstances, we do not consider Mr Seiler was making a statement which he believed to be inaccurate. In any event, by this time BJB Compliance knew as much about Mr Merinson's employment status as Mr Seiler did, so it could not reasonably be said that Mr Baumgartner would reasonably have been misled by Mr Seiler's statement.

798. As regards the final statement with which the Authority takes issue, namely that regarding the second signature, as set out at [792 (3)] above, again we accept Mr Strong's submissions on this point as follows:

(1) It is clear that the "additional signature" to which Mr Seiler was referring here was Mr Feldman's signature on the letters, which was what BJB Compliance had sought and was content with, and which had been received on 24 February 2011. What Mr Seiler meant was that the signature of Mr Feldman on those letters was additional to whatever signature(s) had already been obtained in respect of the execution of the first transaction itself. Mr Seiler was aware that Mr Feldman had previously approved the rates at which the transaction had been effected.

(2) Mr Feldman was the sole director of Yukos Capital and a director of Fair Oaks and, as such, had full authority to consent to payments to third parties on behalf of those companies. Mr Seiler knew that BJB Compliance was satisfied with his signature on both letters. In the circumstances, we accept that Mr Seiler did not focus when writing his email on whether the signature which BJB Compliance had requested was from the same person as had confirmed the execution of the transaction or was from another person.

(3) In any event, Ms Thomson Bielmann had not requested written confirmation from Mr Misamore, as Mr Campeanu incorrectly asserted."

81. I accept that on the basis of the documentation available to the RDC at the time of the Decision Notice it should have been apparent to the Authority that it was more likely than not that the retrocession arrangements had been approved by Compliance. However, in my view that does not in itself make the findings that the RDC made as regards Mr Seiler's response to Mr Campeanu's email unreasonable. I have found that it was not unreasonable on the balance of probabilities for the RDC to find that Mr Seiler was actually aware of the Relevant Risks, given the contemporaneous documentation which indicated that various matters had been brought to his attention. It was not, therefore, unreasonable for the Authority to allege that Mr Seiler's response to Mr Campeanu's 30 November 2012 email contained inaccurate or misleading statements which contradicted the factual matters of which the Authority contended he was aware.

82. The different findings that the Tribunal made were clearly informed by the other findings that the Tribunal made as regards Mr Seiler's awareness of the Relevant Risks and therefore, contrary to Mr Strong's submissions, were informed by Mr Seiler's oral evidence at the hearing. I therefore do not

accept that the matters referred to at [796] to [798] of the Decision would have been apparent to the Authority at the time of the RDC's decision.

83. Accordingly, I conclude that I have no jurisdiction to make an order for costs on the basis that this aspect of the RDC's decision was unreasonable.

84. I do, however, have a different view in relation to the RDC's decision in relation to the Third FX Transaction.

85. Whether or not, as Mr George submitted, the Authority advanced a properly arguable factual and legal case in respect of the Third FX Transaction, in my view it was unreasonable of the RDC to have considered the revised case that the Authority advanced before the RDC following the issue of the Warning Notice.

86. As the Tribunal found at [935] of the Decision, the reason that the Authority changed its case on the Third FX Transaction was that it did not properly investigate the transactions which occurred in 2011 prior to the issue of Mr Seiler's Warning Notice. At [938] the Tribunal found that the allegations made in the Tribunal proceedings in relation to this transaction were not made at any stage before the issue of the Decision Notice, notwithstanding, as found by the Tribunal [938], that Enforcement indicated that the Warning Notice needed to be changed.

87. Regardless of whether there was a legal argument to be had as to the jurisdiction of the RDC to consider the revised allegations, in the absence of an amendment to the Warning Notice, it is clear that it was not appropriate to include the revised allegations, whether as a matter of jurisdiction or fairness. In circumstances where, as the Authority accepts and the Tribunal found, the findings in relation to the Third FX Transaction would not have made any material difference to the outcome of the case, the RDC should not have made findings in relation to the Transaction. As the Tribunal found at [144], as a result of its failings in relation to the investigation, the Authority found itself in an embarrassing situation when it transpired that it was putting forward a case based on entirely the wrong transaction. It was at that point that the only reasonable course of action for the Authority to take was to discontinue any proceedings in relation to the Third FX Transaction.

88. I therefore conclude that I have jurisdiction to make an order for costs incurred by Mr Seiler in the Tribunal proceedings in respect of the Third FX Transaction.

Mrs Whitestone

Primary case

89. The RDC in Mrs Whitestone's Decision Notice found that Mrs Whitestone had acted recklessly on the basis of subjective awareness of the Relevant Risks. It decided that Mrs Whitestone must have been aware of the obvious risks arising from Julius Baer's relationship with Mr Merinson and Yukos, and that she failed to have regard to those risks and failed to take appropriate action in light of them. On that basis, the Authority decided that Mrs Whitestone acted recklessly and without integrity.

90. Ms Clarke submits that it was unreasonable for the Authority to issue a Decision Notice on this basis because:

> (1) There were failings by the Authority in terms of its (i) wholly inadequate approach to disclosure, missing documents and failure to gather relevant documents (ii) over reliance on the JBI/BJB investigation and findings (iii) insufficient resourcing of the investigation

and unacceptable delay and (iv) failure to properly consider the likelihood of Mrs Whitestone behaving with a lack of integrity given her background and life experience.

(2) At no point did the Authority step back and consider whether these fundamental flaws meant that it was unreasonable to decide to prohibit Mrs Whitestone on the basis of reckless lack of integrity. Instead, the Authority approached the case from the outset with a closed mind and confirmation bias.

91. As I said at [65] above there were serious failings in the Authority's investigation. I repeat what I said in that paragraph and at [66] above.

92. However, my conclusion on the key question as to whether it was unreasonable for the RDC to issue a decision notice on the basis of a lack of integrity on the part of Mrs Whitestone in the light of the developments that occurred during the RDC proceedings is the same as that in relation to Mr Seiler.

93. On balance, in my view whilst the Tribunal's Decision has demonstrated that it was wrong of the RDC to take the course it did, in my view it was not unreasonable on its part to have done so. In my view, the decision to prohibit Mrs Whitestone on the basis that she was actually aware of the Relevant Risks and failed to address them was a finding that was within the range of reasonable decisions open to the RDC. I also repeat my observations at [69] above and observe in addition that Mrs Whitestone from time to time in the course of the RDC proceedings urged the RDC not to accept the credibility of the explanations given by both Mr Raitzin and Mr Seiler.

94. Unlike Mr Seiler, however, Mrs Whitestone did accept that she had behaved in a number of respects without competence and capability, and demonstrated a degree of naïveté based on her life experiences. Against that, it was clearly the case that Mrs Whitestone was closer to the events concerning Mr Merinson's and Mr Feldman's interactions with Julius Baer and therefore was in a better position to assess whether the circumstances of their interactions with Julius Baer were suspicious.

95. Against Mrs Whitestone's representations that her naïveté and life experiences made her ill-equipped to notice the Relevant Risks, there was also ample evidence of Mrs Whitestone's intelligence and forceful and confident manner. Those are matters that the RDC had to weigh, in the same way as the Tribunal had to, in assessing whether or not there was a plausible explanation for Mrs Whitestone having failed to notice the Relevant Risks, particularly her recording of the fact that Mr Merinson's commission was to be shared with Mr Feldman. In our view, notwithstanding Mrs Whitestone's inexperience, that on the face of it is particularly surprising, even for a relatively inexperienced Relationship Manager. The Tribunal explained in the Decision that the issue was a difficult one for Mrs Whitestone but having considered all the evidence and circumstances in the round it concluded that she was not aware of the risk of fraud at that point.

96. In those circumstances, it was not unreasonable for the RDC to take the position, as it clearly stated in the Decision Notice, that Mrs Whitestone must have been aware of the Relevant Risks.

97. The Authority's response to Mrs Whitestone's representations, as set out in the Decision Notice, shows that they did not ignore what she said about her naïveté and lack of experience. The RDC gave adequate reasons as to why notwithstanding the testimonials they received and the representations she made about the working environment at JBI they considered that the evidence regarding the Relevant Risks supported the conclusion that those risks must have been obvious to her.

98. Therefore, although as I said in relation to Mr Seiler, the Authority may be criticised for not standing back and considering an alternative explanation as to why Mrs Whitestone might not have been aware of the Relevant Risks, in the light of the strong indications of suspicious activity over a considerable period of time and in respect of which Mrs Whitestone was directly involved, it cannot be said that it was unreasonable for the RDC to draw the inference that Mrs Whitestone must have been aware of the Relevant Risks.

99. I also repeat what I said at [75] above as regards the delays in concluding the investigation. Those observations are equally applicable to Mrs Whitestone's position.

100. Accordingly, I conclude that on Mrs Whitestone's primary case I have no jurisdiction to make an order for costs under Rule 10(3)(e).

101. As with Mr Seiler, in the light of the seriousness of the allegations against Mrs Whitestone, I do not consider that any failure on the part of the Authority to take into account the matters set out at [916] of the Decision, as set out at [16] above affects my decision on this issue.

Alternative case

102. For the reasons I gave in relation to Mr Seiler's application, I conclude that I have jurisdiction to make an order for the costs incurred by Mrs Whitestone in the Tribunal proceedings in respect of the Third FX Transaction.

Issue 2: Whether the Authority has acted unreasonably in bringing, defending or conducting the proceedings

Mr Seiler

Primary case

103. Mr Strong submitted that the decision of the Authority to repeat in its defence of the reference the allegation that Mr Seiler was actually aware of the risks referred to in the Decision Notice was unreasonable. He submits that in the light of the multiple failings with the investigation the Authority ought to have known that that contention was flawed for the reasons given in relation to Issue 1 above.

104. Mr Strong also submits that the Authority failed to undertake a rigorous review of the position when pleading its case, and simply repeated (almost verbatim) the Decision Notice. The Authority made no attempt to remedy the flaws in its investigation or the gaps in its document gathering exercise, nor did it review the case as a whole with a fresh eye. In fact, the Authority appears to be blind to its own failings: the preparation of Mr Neary's witness statement, which explained features of the investigation, should have alerted the Authority to the problems. In the circumstances, Mr Strong submits that it was unreasonable to plead the allegation that Mr Seiler was actually aware of the Relevant Risks and to defend and conduct the Tribunal proceedings on that basis which underpinned both the Decision Notice and the subsequent Tribunal proceedings.

105. For the reasons given in relation to Issue 1 above, notwithstanding the obvious failings on the part of Authority which Mr Strong refers to, I do not consider that the conduct of the Authority in defending Mr Seiler's reference and conducting the proceedings in the Tribunal, except as identified below in relation to Mr Seiler's alternative case, was unreasonable.

106. In the light of my findings as to the reasonableness of the RDC's decision on the key question of whether Mr Seiler was aware of the Relevant Risks, it is clearly the case that the Authority had an

arguable case on that point. It cannot be said that it was obvious that this allegation would fail or that the Authority should have known that it would have done so.

107. As the authorities demonstrate, the fact that the Tribunal rejected the Authority's case on this point does not make the allegation unreasonable in itself. As Mr George observed, the Tribunal made numerous criticisms of Mr Seiler's conduct as part of its reasoning to demonstrate why, although culpable to a degree, the appropriate inference to be drawn from all the evidence, including Mr Seiler's oral evidence, was that he was not aware of the Relevant Risks, despite the Tribunal's finding that they would have been obvious to a reasonably competent manager in Mr Seiler's position.

108. The Authority failed to establish its case on the balance of probabilities. However, as indicated by the length of the decision and numerous comments throughout the Decision the matter was not determined without some difficulty on the Tribunal's part. Whilst it was undoubtedly the case that the Tribunal's task was made more difficult as a result of the defects in the investigation and, as mentioned in more detail below, the absence of potentially key witnesses, Mr Seiler's evidence was not satisfactory in every respect and because of the differing explanations of the three Applicants, the Tribunal had a number of difficult conflicts of evidence to resolve. The following examples from the Decision mentioned at [109] to [113] below support these observations.

109. At [77] the Tribunal had this to say about Mr Seiler's credibility:

> "Although we do not consider that Mr Seiler sought deliberately to mislead the Tribunal or that he was reckless in that regard, we found that some of his evidence lacked credibility. In many instances his evidence was to the effect that in relation to matters that were sent to him for his approval he could not remember reading the communications and attached documents. In relation to conversations with him that were alleged to have taken place often his evidence was either that he could not remember the conversation taking place or, if it did, what was said during the conversation."

110. Immediately after this observation, at [78] the Tribunal said:

> "There were other instances, however, where he purported to remember clearly the details of conversations that took place in circumstances where it was in his interest to give an account of the conversation that supported his case."

111. And then at [79]:

> "These examples show a lack of care on Mr Seiler's part, either in preparing his witness statement or, more likely, in reviewing what was written for him in that statement."

112. At [85] the Tribunal explained the key reason for it being able to accept that Mr Seiler was not aware of the Relevant Risks:

> "Nevertheless, the clear impression given from Mr Seiler's evidence overall was that in relation to the events which are the subject of these proceedings he paid insufficient attention to the matters which passed by his desk having taken the position that he was entitled to rely on the judgment and approval of others, particularly in circumstances where he asserted that he had no formal responsibility to approve the matters in question."

113. At [874] to [878] in its conclusions on the integrity issue the Tribunal said:

> "874. In our view, what emerges from the facts is that Mr Seiler overall was a weak manager. His failings in that regard were exacerbated by the failings in Julius Baer's matrix management

structure. Mr Seiler failed to get to grips with a situation which, with the benefit of hindsight, resulted in the duping of an inexperienced Relationship Manager who Mr Seiler placed too much reliance on without further enquiry in circumstances where he did not ensure that her line manager managed her effectively.

875. This situation was combined with the fact that Mr Seiler placed complete reliance on other senior individuals within Julius Baer having considered the information provided to them by Mrs Whitestone, which as we have found, was incomplete but was the same as, or at various points more, than Mr Seiler himself was given.

876. It appears that this reliance was, as it turned out, misplaced, not because it was inappropriate to seek their advice but because those senior individuals also failed to pick up the Relevant Risks at all stages in the events that we have considered, up to the point at which Mr Campeanu sent his email on 30 November 2012. We think it is most unlikely that all of these individuals were aware of the Relevant Risks and ignored them, as has been alleged against Mr Seiler. If the risks did not occur to them, including a banker as experienced and diligent as Mr Fellay, this leads to the strong inference that they did not occur to Mr Seiler.

877. As we have found in a number of important respects, if there had been a better effort to put all the pieces in the jigsaw together it should have been apparent that the features of the transactions were suspicious and should have been investigated. Mr Seiler must take his share of the blame for this. As we have found, and as he candidly admitted in his evidence, he missed a number of what with hindsight were obvious signs of impropriety and he failed to act with due skill, care and diligence in a number of respects.

878. Mr Seiler also sought in his evidence to distance himself from a number of the decisions taken on the grounds that technically his approval of them was not required. However, the fact was, regardless of the formal position, that he was asked to look at various matters and, probably due to his wide-ranging responsibilities and pressure of work, did not give them the attention they deserved."

114. It is clear that the Tribunal was only able to make this assessment having considered all the evidence in the round, including Mr Seiler's oral evidence. Contrary to Mr Strong's submissions, the Tribunal's assessment of the oral evidence did play a significant part in its overall assessment. Where the Tribunal formed the impression that the Relevant Risks would have been obvious to a reasonably competent manager in Mr Seiler's position, a highly detailed and careful review of the evidence is necessary in order to explain why the Relevant Risks were not obvious to Mr Seiler. Accordingly, it was not obvious to the Tribunal that the Authority's allegation that Mr Seiler must have been aware of the Relevant Risks was bound to fail.

115. Accordingly, I conclude that it was not unreasonable of the Authority to defend Mr Seiler's reference on the basis that he must have known of the Relevant Risks and accordingly acted recklessly and without integrity. I therefore have no jurisdiction to make a costs order on the basis that the Authority acted unreasonably in that regard.

Alternative case

116. Mr Seiler submitted that there were also specific aspects of the Authority's conduct in the course of the proceedings which were unreasonable as follows:

(1) The Authority unreasonably failed to call material witnesses:

(a) The Tribunal noted at [93(4)] that the Authority's own witness accepted that Mr Campeanu would have had relevant evidence to give about a number of key issues. His evidence would have been relevant in Mr Seiler's case to what Mr Campeanu's responsibilities were, what Mr Seiler believed he was

doing and what he told Mr Seiler: [109]. The Authority should have called him in the public interest: [112].

(b) The Authority interviewed, but did not call Mr Narrandes, although he could have given evidence of Compliance procedures in London. This was directly relevant to Mr Seiler's understanding of what reviews would have been carried out in London by the time the arrangements came to him, and to the allegation concerning Mr Campeanu's email of 30 November 2012.

(d) The Authority provided no explanation of whether it even considered seeking assistance from Ms Thomson Bielmann or Mr Courrier, although they would clearly have had highly relevant evidence to give: [97].

(2) The Authority refused to answer Mr Seiler's request for clarification about what it said multiple other individuals knew about the transactions and relationship between Mr Merinson and Mr Feldman. The Authority said that it did not advance a positive case on those individuals' knowledge. Yet, as Mr Neary accepted and the Tribunal found, "in assessing whether a person's reaction showed a lack of integrity, it is relevant to look at how other people reacted at the time": [153]. The Authority simply refused to engage with this seriously undermining aspect of the evidence. That failure was unreasonable, and rendered its entire case, and the way it was brought before the Tribunal, highly unsatisfactory.

(3) The Authority unreasonably declined to respond to Mr Seiler's repeated requests for details of its investigation. By letters dated 8 April and 23 May 2022, Mr Seiler asked the Authority to provide details of requests for information and documents made in the course of its investigations. The Authority's response was that it had complied with its disclosure obligations and the request was disproportionate. Aside from the fact that such confidence was misplaced, the Authority considered its document gathering processes sufficiently relevant that it decided to call Mr Neary to explain them in detail. His witness statement revealed significant gaps and flaws in the investigation. Had the Authority answered Mr Seiler's questions in April or May 2022, attention could have been drawn to these gaps and the Authority could have reconsidered whether to discontinue the proceedings, or to seek to remedy its investigative failings.

(4) The Authority's decision to continue to rely on the Third FX Transaction.

117. I can deal very briefly with the Third FX Transaction. For the same reasons given as to why it was unreasonable for the RDC to have relied on that transaction in the Decision Notice, it was clearly unreasonable of the Authority to persist with the allegation in the Tribunal proceedings. Accordingly, I have jurisdiction to consider the making of a costs order in relation to that matter.

118. As far as the absence of material witnesses is concerned, there is no question that the Tribunal would have been assisted by evidence from Mr Campeanu, Mr Courrier, Ms Thomson Bielmann and Mr Narrandes.

119. I accept that the fact that the Authority was of the view that Mr Campeanu could not be tendered as a witness of truth created some difficulty. I also accept that the Authority did not seek to rely in these references primarily on what Mr Campeanu said in his 30 November 2012 email, as opposed to the position it took in the JBI Final Notice. Nevertheless, the Authority was clearly influenced by Mr Campeanu's account of events and he was subject only to a less than challenging interview. In the circumstances, the Authority should have sought directions from the Tribunal as to whether Mr Campeanu should be called as a witness and, if so, how that should be managed. However, the Authority gave no consideration to that issue.

120. In relation to the other potential witnesses the Tribunal said this is at [97] and [98] of the Decision:

> "97. Of course, there may be a satisfactory explanation for the absence of particular potential witnesses. There may have been practical difficulties in obtaining evidence from Ms Thomson Bielmann and Mr Courrier, who we understand to be resident in Switzerland, but we had no explanation from the Authority as to whether they did at any stage consider seeking assistance from these potential witnesses in any respect. They would clearly have had highly relevant evidence to give.
>
> 98.However, that does not appear to be the case as regards Mr Narrandes and it is clear from the transcript of his interview with the Authority, which was in the trial bundle, that he had some recollection of dealing with Mrs Whitestone as regards issues arising out of the proposed arrangements with Mr Merinson."

121. I do not accept Mr George's submission that the Tribunal's comments at [98] were not sufficient to justify a finding that the Authority acted unreasonably in failing to call Mr Narrandes. The Authority appears to have given no consideration as to whether he should be called and it was clear from what the Tribunal said at [99] as well as [98] that the Tribunal regarded his absence as unsatisfactory.

122. As regards Ms Thomson Bielmann and Mr Courrier, at [97] the Tribunal made it clear that it had not been told whether or not attempts had been made to seek the attendance of these potential witnesses. At the time of the hearing of the references the Authority knew that attempts had been made. That the Authority chose not to disclose that fact to the Tribunal during the hearing or at the time of receiving the draft decision which contained what was said at [98] is totally unacceptable. It was only shortly before the hearing of the costs application that the correspondence the Authority had had with those potential witnesses in June and July 2022 was disclosed to the Tribunal and the Applicants.

123. The correspondence demonstrates that the efforts the Authority took to obtain the assistance of Ms Thomson Bielmann and Mr Courrier, initially through FINMA, were utterly feeble. The steps that the Authority took cannot be regarded as reasonable efforts in that regard. It was quite clear from the tone of the correspondence that the Authority was in effect encouraging a negative answer to its request and that it was in effect only going through the motions to give the pretence that it was serious about obtaining the assistance of these individuals. This is apparent from paragraph 16 of Mr Neary's letter of 16 June 2022 to FINMA where he said:

> "We think it is quite likely that many, if not all, of the individuals will decide not to participate in the UK proceedings, but it is important for the FCA to demonstrate to the Upper Tribunal that we tried to obtain all relevant evidence for the Tribunal's consideration."

124. As is apparent from what I have said above, the Authority took no steps to demonstrate to the Tribunal that it had tried to obtain all relevant evidence.

125. As Mr Strong submitted, it is not the case that further steps could not have been taken to obtain assistance from those potential witnesses notwithstanding the fact that they were outside the jurisdiction. The Tribunal has by virtue of s 25 of the Tribunals, Courts and Enforcement Act 2007 the same powers as the High Court as regards the attendance and examination of witnesses, so that the issue of Letters of Request was one possible course of action.

126. It does not appear that any consideration was given by the Authority to this possibility. In these days of global financial institutions, matrix management and cross-border business it is inevitably the

case that in complex investigations, evidence from witnesses based overseas is frequently going to be highly relevant. It is no good for the Authority simply to wring its hands and say there is nothing we can do to secure the attendance of a witness, who if he or she is asked only on the basis that it is up to him or her whether they wish to assist or not, will inevitably politely decline to assist, as happened in this case.

127. In any event the gentle requests that were made came impossibly late, only a few months before the fixed date of the substantive hearing.

128. I therefore conclude that the Authority acted unreasonably in the conduct of the proceedings in relation to its approach to potential witnesses referred to above.

129. As regards the Authority's failure to engage with Mr Seiler's request for clarification about the knowledge of others within Julius Baer and details of the investigation, I find the Authority's response to these requests to be unreasonable. I accept Mr Seiler's submissions that the Tribunal would have been assisted had the Authority given a more positive response, because, as Mr Neary accepted in his evidence, it is relevant to look at how other people reacted at the time. However, for the reasons I have given, this failure has not affected my conclusion that the Authority's decision to defend the references was not unreasonable.

Mrs Whitestone

Primary case

130. In essence Ms Clarke relied on the same matters that she relied on in relation to her submissions that the RDC's decision was unreasonable, as summarised at [90] above.

131. For the reasons given in relation to Issue 1 above, notwithstanding the obvious failings on the part of the Authority which Ms Clarke refers to, I do not consider that the conduct of the Authority in defending Mrs Whitestone's reference and conducting the proceedings in the Tribunal, except as identified below in relation to Mrs Whitestone's alternative case, was unreasonable.

132. The observations that I made at [106], [107] and [108] above in relation to Mr Seiler, are equally applicable to Mrs Whitestone. Despite the Tribunal's generally positive assessment of Mrs Whitestone, as set out at [70] to [76] of the Decision, the Tribunal found that much of her evidence involved a mistaken reconstruction of events and in common with the other Applicants the Tribunal treated her evidence with caution when it was not clearly corroborated by the underlying documents. The Tribunal stated at [72] that it had no predisposition to prefer Mrs Whitestone's evidence over either Mr Seiler or Mr Raitzin.

133. The Tribunal accepted at [70] that Mrs Whitestone was naïve and inexperienced when the events in question took place and at [837] that she was lacking in competence and experience, and that she made errors of judgment. At [838] the Tribunal acknowledged that Mrs Whitestone admitted, with the benefit of hindsight and further wisdom and experience, that she was out of her depth and could have done more to probe Mr Feldman's and Mr Merinson's explanations for various matters.

134. That assessment had to be considered in context and with the findings of fact that the Tribunal made as to the extent of Mrs Whitestone's actual knowledge of the Relevant Risks, as detailed in the examples set out at [134] to [140] below.

135. With respect to the size of the retrocession payment to be made to Mr Merinson and the rationale for it, the Tribunal accepted at [558] that if all of these pieces of information were put together and

considered as a whole by a reasonably competent and experienced Relationship Manager they would have raised suspicions that the Relationship Manager concerned should have probed further. However the Tribunal found that the relevant information did not raise suspicions with Mrs Whitestone.

136. As to the information regarding the commission sharing between Mr Merinson and Mr Feldman recorded in Mrs Whitestone's contact note, the Tribunal concluded at [526] that it would have been obvious to a reasonably competent Relationship Manager that there was a clear conflict of interest in the arrangements but that Mrs Whitestone did not recognise the significance of that information at the time that it was recorded on the contact note: see [828].

137. At [809(1)] the Tribunal said:

> "Despite Mrs Whitestone's knowledge of the connection between Mr Merinson and Yukos and her recording of the proposal by Mr Merinson to share his commission with Mr Feldman, it did not occur to Mrs Whitestone there was a risk of conflict between Yukos on the one hand and Mr Merinson and Mr Feldman on the other. Due to her naïveté and inexperience and the apparent strong credentials of Mr Feldman she did not consider that there was anything suspicious about the arrangements."

138. At [809(2)] the Tribunal said:

> "She took Mr Feldman on trust and considered, naïvely as its transpired, that his approval as the sole director of Yukos was sufficient in the circumstances. Neither did Mrs Whitestone appreciate the significance of what she was told about the commission sharing arrangements."

139. Then at [809(6)]:

> "If all of the pieces of information known to Mrs Whitestone were put together and considered as a whole by a reasonably competent and experienced Relationship Manager they would have raised suspicions that the Relationship Manager concerned should have probed further. However, they did not raise suspicions with Mrs Whitestone. As she readily accepts, she was out of her depth and had inadequate management support."

140. As Mr George observed, the findings on commission sharing had significant ramifications for the remainder of the Tribunal's other findings, and its assessment of her awareness of other Relevant Risks.

141. There were plenty of other instances where the Tribunal referred to Mrs Whitestone failing to spot obvious signs of potential fraud due to her naiveity and inexperience: see [572], [632], [606], [726] and [747].

142. The frequency of these occurrences over a prolonged period of time obviously calls into question whether in the light of the Tribunal's assessment of Mrs Whitestone as an intelligent, thoughtful and confident person, she was in fact aware of the Relevant Risks but decided not to raise them, rather than her having failed to notice them. As Mr George submitted, in order to resolve that issue, the Tribunal had to draw inferences in the context of the Tribunal's overall assessment of her as a witness and her oral evidence played a significant part.

143. As was the case with Mr Seiler, where the Tribunal formed the impression that the Relevant Risks would have been obvious to a reasonably competent Relationship Manager in Mrs Whitestone's position, a highly detailed and careful review of the evidence is necessary in order to come to a conclusion as to why the Relevant Risks were not obvious to Mrs Whitestone. Accordingly, it was not obvious to the Tribunal that the Authority's allegation that Mrs Whitestone was aware of the Relevant Risks was bound to fail.

144.Accordingly, I conclude that it was not unreasonable of the Authority to defend Mrs Whitestone's reference on the basis that she must have known of the Relevant Risks and accordingly acted recklessly and without integrity. I therefore have no jurisdiction to make a costs order on the basis that the Authority acted unreasonably in that regard.

Alternative case

145. Ms Clarke made essentially the same submissions on this case as Mr Strong. Accordingly, for the reasons given in relation to Mr Seiler, I conclude that I have jurisdiction to make an order for costs in favour of Mrs Whitestone in relation to the matters referred to at [116] above.

Issue 3: Whether and to what extent a costs order should be made

146. As a result of my conclusions on the Applicants' primary case, I only have jurisdiction to make a costs order in respect of the Third FX Transaction and the other matters referred to at [116] above.

147. In relation to the Third FX Transaction, it is clear that the appropriate order to be made is that each of Mr Seiler and Mrs Whitestone should have the costs which have been incurred by them in dealing with that issue in the Tribunal proceedings. It is clearly the case, as a result of my decision that the Authority acted unreasonably in defending the proceedings in the Tribunal on the basis of the allegations relating to that transaction, that each of those parties have incurred extra costs.

148. In relation to the other matters, it seems to me that it cannot be established that either party has incurred any cost in the Tribunal proceedings that can clearly be said to have been caused by the failures on the part of the Authority that I have identified. However, as the authorities demonstrate, causation is only one of the factors that I must take into account in deciding whether to exercise my discretion to make a costs order. It may well be the case that the issues which the Tribunal had determined would have been easier to determine had, for example, the other potential witnesses referred to been available to give evidence. I accept, as Mr George submitted, that it may have been the case that extra costs were incurred as a result of there being additional witnesses to cross-examine. Likewise, it may well be the case that had the Authority responded more appropriately to the request for clarification the issues would have been easier to determine.

149. In my view the failings of the Authority in relation to its approach to potential witnesses were serious. The Tribunal has in previous cases criticised the Authority for its failure to call appropriate witnesses. Mr Neary's letter to FINMA referred to above indicates that the Authority is aware of those criticisms bur did not take them sufficiently seriously in this case.

150. Likewise, I consider, informed by the background of the Authority's failings in its investigation, that the failure to engage with Mr Seiler regarding the request for clarification and details of the investigation were serious matters.

151. Therefore, I consider that it would be appropriate to make a limited costs order. I therefore direct that the Authority pay to each of Mr Seiler and Mrs Whitestone 5% of the costs incurred by each of them in relation to the proceedings in the Tribunal, other than in respect of the Third FX Transaction which I have dealt with separately above.

Issue 4: Quantum

152. In view of the complexity and length of the proceedings, it would not be appropriate for me to attempt a summary assessment of the relevant costs. I therefore direct that the costs concerned be

subject to detailed assessment by a costs judge unless the amount of the costs concerned can be agreed by the parties.

Postscript

153. Although the Authority has been largely successful in relation to these costs applications, it should not take any great comfort from its conduct in relation to these references.

154. Had it not been for the restrictive nature of the costs regime which Parliament has decided is appropriate for proceedings in the Upper Tribunal, there is no doubt that Mr Seiler and Mrs Whitestone would have been entitled to the whole of their costs in relation to this matter, as would have been the case in comparable commercial litigation. I have considerable sympathy for the fact that the Applicants have had to bear the vast majority of the costs that they have incurred in a case where the Authority has been rightly criticised for the manner in which it conducted its investigation and certain aspects of the Tribunal proceedings.

155. Others may wish to consider whether there is a case for the modification of the costs regime in relation to complex matters in the Tribunal's financial services jurisdiction. This has been recognised in relation to tax cases where in the First-tier Tribunal cost shifting applies in relation to cases which are categorised as complex, by reference to the length of hearing, difficulty of the issues and the amount at stake. The appellant can opt out of this costs regime, but it does give an appellant who believes that they have a strong case the opportunity of being awarded their costs if the case is successful.

156. I also cannot finish without making reference to the highly inappropriate statement that the Authority made following the issue of the Decision. It was referred to by the Applicants as evidence that the Authority had not perhaps learned the lessons that it should have as a result of the Tribunal's criticisms of its conduct in the Decision. The statement, published on 13 June 2023 shortly after the release of the Decision started with the statement:

> "We have already had a successful outcome in this case…"

157. This was highly misleading, because the outcome being referred to was the settled decision between the Authority and JBI, as set out in the JBI Final Notice. Emphasis was put on the fact that the Tribunal had been critical of aspects of the conduct of the Applicants and there was no link to the Tribunal's decision, as is usual in statements that the Authority makes after the conclusion of Tribunal proceedings. No mention was made that the Authority was going to discontinue its proceedings against the Applicants. The statement also sought to downplay the criticisms that the Tribunal had made of the Authority's investigation, giving the impression that only one document of limited significance was not disclosed and that was because of human error.

158. In short, the statement was nothing short of disgraceful and should never have been made. It was also very disappointing, to say the least, that it took the Authority almost a month and after detailed discussions with the Applicants to agree to take the statement down from the Authority's website.

159. If it was the case that this statement was issued by a member of the communications team and that Enforcement had no responsibility for it then that is a clear failure of systems and controls within the Authority. If Enforcement had approved the statement, then there was clearly a serious error of judgment on its part.

160. I trust that never again will the Authority seek to give such a misleading impression of the result of a Tribunal decision and that it will act fairly, as it usually does, in summarising the results of a decision and providing an appropriate link to the decision.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 09 November 2023

Neutral Citation: **[2023] UKUT 00133 (TCC)**

Case Numbers: UT/2021/000137,000138 & 000140

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: The Rolls Building
London EC4A 1NL

FINANCIAL SERVICES - whether executives of a private bank acted without integrity in relation to Finder's arrangements entered into between the bank and a person connected with the bank's client

Fitness and properness of the executives concerned - prohibition order in relation to all functions in relation to regulated activities- s56 FSMA

Heard on: 28-30 November,1,2,5,6,8,9,12-15 December 2022, 5-6 & 23-27 January 2023

Judgment date: 12 June 2023

Before

JUDGE TIMOTHY HERRINGTON
MEMBER GARY BOTTRIELL
MEMBER MARK WHITE

Between

THOMAS SEILER
LOUISE WHITESTONE
GUSTAVO RAITZIN

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For Mr Seiler:	Ben Strong KC and Jade Fowler, Counsel, instructed by Mishcon de Reya LLP
For Mrs Whitestone:	Sarah Clarke KC and Hannah Hinton, Counsel, instructed by Charles Douglas Solicitors LLP
For Mr Raitzin:	Ben Jaffey KC and Tom Lowenthal, Counsel, instructed by Stephenson Harwood LLP
For the Authority:	Andrew George KC, Celia Rooney and Ava Mayer, Counsel, instructed by the Financial Conduct Authority

GLOSSARY

Terms

Applicant	any of Mrs Whitestone, Mr Seiler and Mr Raitzin
Authority	the body corporate previously known as the Financial Services Authority and renamed on 1 April 2013 as the Financial Conduct Authority
BJB	Bank Julius Baer & Co Limited, a private bank incorporated and regulated in Switzerland
BJB Bahamas	Julius Baer Bank & Trust (Bahamas) Limited, a subsidiary of BJB incorporated and regulated in the Bahamas
BJB Compliance	BJB's compliance department and collectively members of that department, based in Switzerland
BJB Legal	means BJB's legal department and collectively members of that department, based in Switzerland
BJB Singapore	means BJB's Singapore branch
BJB Switzerland	BJB's office in Zürich
Commission Payments	payments made to Mr Merinson by Julius Baer following the execution of the First FX Transaction, the Second FX Transaction and the Third FX Transaction
CoY	a derivative instrument combining an FX linked deposit with a currency option, with the aim of providing a higher yield return than that available for a standard deposit but also carrying a higher risk than a standard deposit due to the exposure to FX rate movements
Compliance	means BJB Compliance and/or JBI Compliance as the context requires
Enforcement	the Authority's Enforcement and Market Oversight Division
Fair Oaks	Fair Oaks Trade and Investment Limited, a company within the Yukos Group
Finder	an external third party engaged by Julius Baer with the sole task of introducing potential clients to Julius Baer in return for commission
Finder's Policy	BJB's policy document titled "Cooperation with Finders" which was effective from 11 June 2010

First Commission Payment	the Commission Payment made to Mr Merinson on or around 1 September 2010
First FX Transaction	collectively the series of FX transactions conducted by Julius Baer for Yukos between 11 and 13 August 2010
FSMA	Financial Services and Markets Act 2000 (as amended)
FX	forex or foreign exchange
FX Transactions	the First FX Transaction, the Second FX Transaction and the Third FX Transaction
JBI	Julius Baer International Limited, a subsidiary of BJB incorporated in the UK and regulated by the Authority
JBI Compliance	JBI's compliance department and collectively members of that department, based in London
JBI Final Notice	the Final Notice issued by the Authority to JBI on 10 February 2022 pursuant to which the Authority imposed a financial penalty on JBI for among other things, failings in JBI's systems and controls
Julius Baer	BJB and/or those of its subsidiaries as the context requires
Julius Baer Group	means the Julius Baer group of companies which includes BJB, BJB Bahamas, BJB Singapore, BJP Guernsey, BJB Switzerland and JBI
MyCRM	the client relationship management system established and operated by JBI for the purpose of recording information relating to clients, including account opening documents, client contact reports and relevant correspondence with clients
PEPs	politically exposed persons
Relevant Period	in relation to Mrs Whitestone is the period between July 2010 and December 2011, in relation to Mr Seiler is the period between July 2010 and December 2012 and in relation to Mr Raitzin is the period between August and December 2010
Relevant Risks	the risks arising out of the relationship between Julius Baer and Yukos and with Mr Merinson as the Finder associated with Yukos as summarised at [12] of this Decision and which the Authority contends the Applicants recklessly failed to have regard to in their dealings with those relationships
RDC	the Regulatory Decisions Committee of the Authority

Second Commission Payment	the Commission Payment made to Mr Merinson on or around 31 December 2010
Second FX Transaction	means collectively the series of FX transactions conducted by Julius Baer for Fair Oaks on 23 November 2010
Third Commission Payment	the Commission Payment made to Mr Merinson on or around 1 February 2012
Third FX Transaction	the FX transaction converting €7 million into US dollars conducted by Julius Baer for Fair Oaks pursuant to an order placed on 15 August 2011
Yukos or Yukos Group	the Yukos group of companies which includes Yukos Capital, Yukos International, Yukos Hydrocarbons and Fair Oaks
Yukos Capital	Yukos Capital S.a.R.L
Yukos Hydrocarbons	Yukos Hydrocarbons Investments Limited
Yukos International	Yukos International UK BV

People[1]

Julius Baer

Mr Bates	Stuart Bates, who was an approved person holding the CF 1 (Director) function at JBI
Mr Baumgartner	Roman Baumgartner, Head of BJB Compliance
Mr Benischke	Eric Benischke, chief of staff to Mr Seiler
Ms Bohn	Nicole Bohn, private banking legal team, BJB Zurich
Mr Campeanu	Viorel Campeanu, Managing Director and Senior Advisor at JBI and line manager of Mrs Whitestone
Mr Courrier	Sylvain Courrier, head of external asset managers and Finders, Market Head and Board Member, BJB Bahamas
Ms Denman	Melanie Denman, assistant to Mrs Whitestone
Mr Fellay	Jean-Marc Fellay, Chief Operating Officer and Deputy Chief Executive Officer, BJB Bahamas
Mr Gerber	Daniel Gerber, Chief Executive Officer, JBI
Mr Narrandes	Jashmir Narrandes, member of JBI Compliance
Mr Nikolov	Peter Nikolov, head of administrative support for Mr Raitzin
Mr Porter	Darren Porter, Executive Director, Head of Private Clients Advisory, JBI
Mr Raitzin	Gustavo Raitzin, Applicant in these references, member of the BJB Executive Board, Head of BJB's International Business and Regional Head for Latin America, Spain, Russia, Central and Eastern Europe and Israel
Ms Rolle	Rochelle Rolle, Director and Head of Compliance BJB Bahamas
Mr Seiler	Thomas Seiler, Applicant in these references, Managing Director at BJB and Sub-Regional (Market) Head for Russia and Central and Eastern

[1] References to a position held by an individual are references to the relevant position held at the time of the events that are relevant to these proceedings

	Europe, also from 30 March 2011Director at JBI holding the CF 2 (Non-Executive Director) function
Ms Senn-Sutter	Sonja Senn-Sutter, member of BJB's Business and Operational Risk Department
Mr Schwarz	Oliver Schwarz, head of administrative support for Mr Seiler in succession to Mr Benischke
Mr Spadaro	Salvatore Spadaro, member of BJB's Finders Support and Payables
Mr Taylor	Matthew Taylor, investment dealer at JBI and approved person holding the CF 30 (Investment Adviser) function
Ms Thomson Bielmann	Carolyn Thomson Bielmann, Head of Anti-Money Laundering and Sensitive Clients for BJB and member of BJB Compliance
Mr Weidmann	Tobias Weidmann, member of BJB Zurich's Finder's Desk
Mrs Whitestone	Louise Whitestone, Applicant in these references, Relationship Manager at JBI and approved person holding the CF 30 (Investment Adviser) function
Yukos	
Mr Feldman	Daniel Feldman, sole director of Yukos Capital and director of Fair Oaks and Yukos Hydrocarbons
Mr Ketcha	Sergei Ketcha, a director of Fair Oaks
Mr Malter	Harlan Malter, a director of Fair Oaks
Mr Merinson	Dmitri Merinson, Finder to BJB, also Financial Controller of Yukos International and Chief Financial Officer of Yukos Capital and Yukos International
The Authority	
Mr Neary	Rory Neary, Acting Manager in the Authority's Enforcement and Market Oversight Division

TABLE OF CONTENTS

DECISION

INTRODUCTION

Background

1. On 23 June 2021 the Financial Conduct Authority ("the Authority") through its Regulatory Decisions Committee ("RDC"), issued Decision Notices to each of Mr Thomas Seiler, Mrs Louise Whitestone and Mr Gustavo Raitzin (together "the Applicants").

2. In those Decision Notices the Authority decided to make orders prohibiting each of the Applicants from performing any function in relation to any regulated activities carried on by an authorised or exempt person, or exempt professional firm, pursuant to s 56 of the Financial Services and Markets Act 2000 ("FSMA").

3. Each of the Applicants referred their respective Decision Notices to the Tribunal. This decision concerns the subject matter of those references. Because there are overlapping issues in the references the Tribunal directed that the references be heard together.

4. The subject matter of the references is the conduct of the Applicants in respect of arrangements entered into in July 2010 by Bank Julius Baer & Co. Ltd ("BJB") with Mr Dmitri Merinson, an individual connected with the Yukos group of companies ("Yukos Group"), pursuant to which it was contemplated that Mr Merinson would introduce companies within the Yukos Group to banks within the Julius Baer group of companies ("Julius Baer Group") and would receive remuneration for doing so.

5. The Authority alleges that Julius Baer's conduct in its relationship with the Yukos Group demonstrated a lack of integrity. They say that Julius Baer must have appreciated the clear risk that by entering into the arrangements with Mr Merinson, on the terms described later, it might be facilitating or participating in financial crime.

6. In short, the Authority says that the arrangements involved money held in accounts of various entities in the Yukos Group at banks within the Julius Baer Group being debited from those accounts and paid to a Yukos employee, Mr Merinson, purportedly as "Finders' fees". The Authority contends:

(1) These fees were paid through the vehicle of vastly inflated foreign exchange transaction charges levied to Yukos by Julius Baer, the majority of which were then paid to Mr Merinson.

(2) In the first of these transactions (the "First FX Transaction"), the charges were purportedly authorised by the sole director of the relevant Yukos entity, Yukos Capital SARL ("Yukos Capital"), Mr Daniel Feldman, in breach of his duties to Yukos Capital. Mr Feldman was paid substantial sums by Mr Merinson from the sums Mr Merinson received from Julius Baer.

(3) In the second and third of these transactions (the "Second FX Transaction" and the "Third FX Transaction"), the charges were again purportedly authorised by Mr Feldman alone even though the relevant Yukos entity, Fair Oaks Trade and Investment Limited ("Fair Oaks"), had another co-signatory director on the relevant bank accounts, and two other directors, none of whom were informed by Julius Baer of the payments in question or asked by Julius Baer to authorise them.

(4) Throughout the period in which these transactions took place, Julius Baer was made aware of repeated "red flags" in relation to the relevant transactions and payments. These included (i) continued insistence by Mr Merinson that Julius Baer inform no-one within Yukos of the relevant arrangements and payments other than Mr Feldman; (ii) requests

by Mr Merinson for the payments to be described by Julius Baer in untrue terms; (iii) a trading and reporting methodology which operated so as to conceal the size of Julius Baer's transaction charges; and (iv) the fact that the vast majority of payments made by Julius Baer to Mr Merinson were not set out in the written contract governing Mr Merinson's entitlement to Finder's fees despite the fact that such written contractual agreements were required under the relevant Julius Baer policies before any such payments could permissibly be made to Mr Merinson.

7. Each of the Applicants had roles within Julius Baer and were involved in the arrangements described above. However, on the Authority's case each Applicant had very different levels of responsibility and knowledge. In short:

(1) Mrs Whitestone was employed as a relationship manager by Julius Baer International Limited ("JBI"), Julius Baer's UK regulated subsidiary. Mrs Whitestone was the Relationship Manager for the Yukos accounts which are relevant to these references and the principal Julius Baer point of contact for both Mr Feldman and Mr Merinson.

(2) Mr Seiler was employed as the Sub-Regional (Market) Head for Russia and Central and Eastern Europe at BJB in Switzerland and was Mrs Whitestone's functional line manager. In that role, he had responsibility for considering, and providing approval of, certain aspects of the relevant arrangements and payments.

(3) Mr Raitzin was employed as the Regional Head for Latin America, Spain, Russia, Central and Eastern Europe and Israel at BJB in Switzerland and was Mr Seiler's line manager. In that role, he was responsible under Julius Baer's written policies, for the final approval of the payments to Mr Merinson.

8. The Authority decided to make the prohibition orders referred to at [2] above because the Authority had concluded that each of the Applicants had acted recklessly and with a lack of integrity in respect of the events arising from the relationship between Julius Baer and Yukos and the dealings with Mr Merinson.

Alleged misconduct and the Applicants' position

9. As helpfully summarised by Mr George in his skeleton argument, the Authority makes the following principal contentions as regards the arrangements summarised above:

(1) The Finder's arrangements were approved (in July 2010) notwithstanding : (i) the material terms regarding the one-off commission payment to Mr Merinson were not reflected in the written terms of his Finder's agreement; (ii) the absence of any proper commercial rationale for a payment to Mr Merinson; and (iii) the likely breaches of Mr Merinson and Mr Feldman's duties to which it gave rise. These arrangements were approved in circumstances where it was anticipated that Mr Feldman would ensure that the Yukos Group placed large cash sums with Julius Baer, from which it would then be able to generate revenues.

(2) Unusually high commission rates were achieved on the First FX Transaction, where the trading took place at rates 11 times Julius Baer's standard commission rate and resulted in commission payments to Mr Merinson and fees to Julius Baer that were far in excess of the standard rates. There was an absence of any commercial rationale for those arrangements, in particular the payment to Mr Merinson, and there was an obvious risk that those arrangements failed to comply with Mr Merinson's and Mr Feldman's duties to Yukos Capital, were not in the best of interests of that company and were put in place to facilitate the improper diversion of funds from Yukos Capital to Mr Merinson and/or Mr Feldman.

(3) In October 2010 amendments proposed by Mr Merinson and Mr Feldman in respect of the original Finder's arrangements were approved whereby Mr Merinson's Finder's fee was increased from 25% to 35% of net income generated by Julius Baer, and under which he was permitted to receive four additional "one off" payments, calculated at 70% of Julius Baer's commission on four large transactions to take place between October 2010 and October 2011. These four "one off" payments were not documented in the Finder's agreement, there was a benefit to Julius Baer in that Yukos's funds were to remain with Julius Baer for at least three years and there was an obvious risk that the arrangements gave rise to breaches of Mr Merinson's and Mr Feldman's duties to the relevant Yukos Group entities and the improper payment of monies to Mr Merinson and Mr Feldman.

(4) There were obvious risks that the Second FX Transaction (approved in November 2010) formed part of an improper scheme to divert funds to Mr Merinson and/or Mr Feldman, in breach of their duties, in particular given:

(1) The absence of any commercial rationale for the trading approach adopted, where the trading with Fair Oaks' funds was conducted just above the worst rates available in the market on the days in question, so that the spread between that and the rate at which Julius Baer transacted would cover both the commission required by Julius Baer and a further commission payment to Mr Merinson as Finder.

(2) The resulting commission rates, which were approximately 30 times higher than Julius Baer's standard commission rate for transactions of that size, and resulted in commission in excess of USD 1 million being charged to Fair Oaks. USD 320,000 of that sum was retained by Julius Baer, resulting in a return of 0.47% - far in excess of Julius Baer's standard commission.

(5) The renegotiation (in January 2011) of the Finder's arrangements with Mr Merinson, pursuant to which Mr Merinson would be entitled to receive 70% of the commission earned on transactions in respect of new inflows of funds had no commercial rationale and the resulting arrangements formed part of an improper scheme to divert funds to Mr Merinson and/or Mr Feldman in breach of their duties to Yukos.

10. Against that backdrop, the Authority makes the following, specific, allegations against each of the Applicants.

Mrs Whitestone

11. The Authority contends that, between July 2010 and December 2011, during which time she was approved to perform the CF30 (Customer) controlled function at JBI, Mrs Whitestone acted recklessly and with a lack of integrity in relation to the overall conduct of the relationship of Julius Baer and Yukos, and the relationship with Mr Merinson, as Finder associated with Yukos. In particular, the Authority relies on:

(1) Mrs Whitestone's role (in July 2010) in negotiating the Finder's arrangements with Mr Merinson.

(2) Mrs Whitestone's facilitation (between 11 and 13 August 2010) of the First FX Transaction.

(3) Mrs Whitestone's willingness to proceed with the First Commission, notwithstanding her knowledge that Mr Merinson intended to transfer a proportion of the commission payable to him in respect of it to Mr Feldman, and her failure to inform anyone else in Julius Baer about this.

(4) Mrs Whitestone's negotiation (in October 2010) with Mr Feldman and Mr Merinson of the amended Finder's arrangements.

(5) Mrs Whitestone's facilitation (in November 2010) of the Second FX Transaction.

(6) Mrs Whitestone's request (in November 2010) for payment of commission to Mr Merinson in respect of the Second FX Transaction.

(7) Mrs Whitestone's role (in April 2011) in arranging for the payment of commission to Mr Feldman and her failure to inform anyone else in Yukos about this.

(8) Mrs Whitestone's facilitation of the Third FX Transaction.

12. In relation to these matters the Authority contends that Mrs Whitestone recklessly failed to have regard to the following obvious risks of which she was aware (alternatively of which a reasonable person in Mrs Whitestone's position would have been aware) (collectively "the Relevant Risks"):

(1) The risk that the Finder's arrangements involved a breach of Mr Merinson's and/or Mr Feldman's duties to the relevant Yukos Group companies, and in particular conflicted with their duties to give disinterested advice to those companies in relation to their choice of which banks to use.

(2) The risk that the Finder's arrangements were made in order to facilitate the improper diversion of funds from Yukos Capital or other companies in the Yukos Group to Mr Merinson and, because of the involvement of Mr Feldman, the sole director of Yukos Capital, in approving the Finder's arrangements, potentially to Mr Feldman.

(3) The risk that the Finder's arrangements were not in the interests of those companies (and therefore Mr Feldman's purported approval of those arrangements on those companies' behalf constituted a breach of Mr Feldman's duties to those companies) particularly as the assets of the Yukos Group were to be managed for the surviving corporate structure of Yukos for the benefit of all original shareholders of the Yukos Group.

(4) The risk that there was no proper commercial rationale for any payment to Mr Merinson or for a Finder's agreement with Mr Merinson, which related to the introduction of Yukos Capital or other Yukos Group Companies to Julius Baer.

Mr Seiler

13. The Authority contends that, between July 2010 and August 2011, Mr Seiler acted recklessly and with a lack of integrity in respect of his management and oversight of the relationship of Julius Baer and Yukos, and the relationship with Mr Merinson, as Finder associated with Yukos. The Authority also contends that Mr Seiler made inaccurate and misleading comments regarding the relationship in December 2012. In particular, the Authority relies on:

(1) Mr Seiler's approval (in July 2010) of the Finder's arrangements entered into between Mr Merinson and Julius Baer.

(2) Mr Seiler's approval (in August 2010) of the First FX Transaction.

(3) Mr Seiler's approval (in October 2010) of the amendments proposed by Mr Merinson and Mr Feldman to the original Finder's arrangements.

(4) Mr Seiler's approval (in November 2010) of the Second FX Transaction.

(5) Mr Seiler's failure to take any steps to prevent the Second FX Transaction, after concerns had been raised in respect of that transaction and after he was asked to put in

place an acceptable framework for Mrs Whitestone and Julius Baer to operate in, after concerns were raised regarding the Second FX Transaction.

(6) Mr Seiler's agreement (in January 2011) that Mrs Whitestone should negotiate new Finder's arrangements with Mr Merinson.

(7) What is said to have been Mr Seiler's failure, in August 2011, to take any steps to prevent, or even identify the circumstances surrounding, the Third Commission Payment made to Mr Merinson despite having been tasked with responsibility for the new "framework" within which Mrs Whitestone was supposed to operate.

(8) What were said to be inaccurate and/or misleading statements made by Mr Seiler (in December 2012), in response to the questions raised by BJB Compliance about the arrangements with Mr Merinson and Mr Feldman's involvement therein.

14. In relation to these matters the Authority contends that Mr Seiler recklessly failed to have regard to the Relevant Risks. The Authority contends that Mr Seiler was aware of those risks or alternatively that a reasonable person in Mr Seiler's position would have been aware of them.

Mr Raitzin

15. The Authority contends that, between August and December 2010, Mr Raitzin acted recklessly and with a lack of integrity in respect of his management and oversight of the relationship between Julius Baer and Yukos, and with Mr Merinson as the Finder associated with Yukos. In particular, the Authority relies on:

(1) Mr Raitzin's approval (in August 2010) of the payment of commission to Mr Merinson in respect of the First FX Transaction, as well as the Finder's arrangements with Mr Merinson.

(2) Mr Raitzin's approval (in October 2010) of the amendments proposed by Mr Merinson and Mr Feldman to the original Finder's arrangements.

(3) Mr Raitzin's approval (in November 2010) of the payment of commission to Mr Merinson and the arrangements by which it was generated via the Second FX Transaction.

(4) Mr Raitzin's confirmation of his approval of the commission in respect of the Second FX Transaction, notwithstanding, the Authority says, the concerns that had been raised in respect of the Second FX Transaction, and where there had been no further enquiry as to whether Mr Seiler had put in place an "acceptable framework" to regularise the concerns that had been raised in respect of those arrangements.

16. In relation to these matters the Authority contends that Mr Raitzin recklessly failed to have regard to the Relevant Risks. The Authority contends that Mr Raitzin was aware of those risks or alternatively that a reasonable person in Mr Raitzin's position would have been aware of them.

17. The Authority also contends that there were obvious "red flags" arising from each of the following:

(1) Mrs Whitestone's request, in August 2010, for approval of Mr Merinson's request that the first payment of commission made to him be referred to as "Investment Capital Gain", where that request should have given rise to concerns that Mr Merinson was attempting to disguise the true nature of the payment.

(2) Mrs Whitestone's request, in January 2011, for approval of Mr Merinson's request that the Finder's agreement should not be disclosed to any person other than Mr Feldman,

where that request should have given rise to concerns that Mr Merinson was seeking to conceal his commission payments.

(3) Mr Feldman's request, in February 2011, that the draft letters, by which he was asked to confirm his approval to the arrangements, include a commitment to confidentiality – again, an attempt by Mr Feldman to conceal the commissions.

(4) In Mr Seiler's case, the email from Mr Viorel Campeanu, Mrs Whitestone's line manager, to Mr Seiler, in July 2011, which questioned the basis of the payments to Mr Merinson in response to which, Mr Seiler took no action, and instead proceeded to approve the opening of a new account for Yukos Hydrocarbons with Julius Baer's Guernsey subsidiary.

18. The Applicants all deny the allegations of recklessness and acting without integrity. The position of each of the Applicants in relation to the allegations is as follows.

Mrs Whitestone

19. Mrs Whitestone says that when she went to work at JBI in 2009 she felt lacking in experience and training and now realises that she was out of her depth in trying to meet the expectations of what was a significant promotion for her. The various reports and investigations into JBI's business following the events which are the subject of this reference found that:

(1) Inappropriate Finder's relationships were the norm rather than the exception and JBI was frequently in breach of fiduciary duties to clients.

(2) Relying on Finders in questionable circumstances (including where the Finder was an officer, employee or in some other fiduciary relationship with a client) was commonplace at JBI.

(3) There were other cases where there were suspicions of fraud. A very large number of clients were entirely unaware of the Finder's arrangements and of these, a large number actually objected to them.

20. Consequently Mrs Whitestone says:

(1) There was a lack of coherent or adequate policies, procedures and documentation on the relevant issues. Julius Baer's Co-operation with Finders Policy which was supposedly effective appeared to apply only to BJB in Switzerland and there is no evidence that it was ever disseminated to employees at JBI in London or that its terms were complied with institutionally.

(2) There was no relevant or adequate training. Such training as there was, was largely formulaic and did not cover Finder's arrangements.

(3) There was no clear management guidance. Few of the issues raised in relation to the Yukos relationship were actually discussed with Mrs Whitestone, who complied with the instructions given to her.

21. In addition, Mrs Whitestone says that there was a toxic culture fostered by her line manager, Mr Campeanu, who engaged in bullying and inappropriate behaviour which escalated when he unsuccessfully tried to persuade Mrs Whitestone to give him part of her bonus. Mrs Whitestone had to work very long hours and sacrifice sleep in order to try to keep up with the demands of her employer, in which the focus was on revenue for Julius Baer rather than fostering a healthy compliance and management culture.

22. Mrs Whitestone says that the matrix management structure contributed to this unsatisfactory state of affairs. JBI's employees, including Mrs Whitestone, had a reporting line to local line management at JBI as well as a functional reporting line to a regional head at BJB.

The matrix management system had the potential to (and did) create confusion and uncertainty (including in Mrs Whitestone's mind) as regards who had ultimate responsibility for decision making and who Mrs Whitestone was meant to be reporting to at any given time. Nor, it appeared, was there any one part of Julius Baer which provided consistent advice and oversight on Compliance related matters.

23. Furthermore, as time went on, Mrs Whitestone says that her line manager, Mr Campeanu became increasingly jealous and difficult to work with, such that reporting to him became correspondingly difficult.

24. Against that background, Mrs Whitestone's response to the allegations of recklessness made against her can be summarised as follows:

(1) She acknowledges that she made mistakes in her handling of the Yukos relationship. She regrets that she was (as it now appears), taken in and used by Mr Feldman and Mr Merinson and that she failed to recognise that Mr Feldman and Mr Merinson were not acting in the interests of the Yukos entities with which this case is concerned, but were instead perpetrating what now, with the benefit of hindsight, appears to have been a fraud. In this she accepts that she was naïve and that she made mistakes in accepting their explanations without sufficiently questioning the underlying rationale for the arrangements which are the subject of this case. She denies however that she was reckless in this regard. At no stage during her dealings with Mr Merinson and Mr Feldman did she believe that there was a risk that the arrangements were not legitimate, and nor did she turn a "blind eye" to such a risk. Such behaviour would be totally inconsistent with her upbringing and personality.

(2) In 2009-2012, Mrs Whitestone simply did not have the professional or life experience to recognise the warning signs which, with the benefit of hindsight were there. In this, she accepts that she was naïve. This led her to rely heavily on the experience of, and approvals from, Mr Seiler, Mr Raitzin and others within JBI and BJB who were involved in the matters with which this case is concerned. In hindsight, she recognises that she derived too much comfort from these, and also from the assurances she was given by Mr Feldman and Mr Merinson, as well as the image of honesty and integrity that both these men consistently portrayed to her. She also recognises that she was out of her depth in respect of this client and the various transactions under consideration. She did not have the professional or life experience to deal with a case which involved such large sums of money and such complexities. Steps should have been taken to provide her with hands on support and oversight. This manifestly did not happen. Given that JBI was itself institutionally unaware of the relevant legal and regulatory issues that arose, it was unable to provide a stable control environment to support its employees. For someone in Mrs Whitestone's position at the relevant time, given all these factors, to characterise her conduct as a reckless lack of integrity is unfair and wrong.

(3) As regards the risk that Mr Merinson and Mr Feldman were in breach of their duties to the relevant Yukos entities, the arrangements were approved by Mr Feldman as the sole Director of the client, Yukos Capital. Mr Merinson and Mr Feldman assured her that other senior members of the Yukos Group were aware of the arrangement and supported it. She had not been asked by them not to disclose the arrangement to others higher up the Yukos structure. She considered the potential conflict of interest risk in Mr Merinson giving instructions in relation to the Yukos accounts, but she ensured that this never happened as far as she was aware. When other potential conflicts of interest were raised with her by BJB Compliance or others, she reacted appropriately to these.

(4) The agreement that Mrs Whitestone negotiated with Mr Feldman and Mr Merinson was based on an explanation provided by them which, when set in the context of previous discussions, appeared at the time to be plausible to Mrs Whitestone. It also appeared to be consistent with previous discussions concerning the fact that Yukos officers were incentivised in respect of their role in the success of the Yukos litigation and the personal risk inherent in being associated with Yukos. Mrs Whitestone appropriately escalated the issue of Mr Merinson becoming a Finder to Compliance and to Mr Campeanu and Mr Seiler. None of these raised any concerns regarding the commercial rationale of the arrangement, whether the arrangement was in Yukos' best interests, conflict of interest or any other matters. As a junior Relationship Manager and largely inexperienced in terms of a relationship of this size and in terms of Finder's arrangements generally, Mrs Whitestone relied heavily on their considerable experience and their advice.

(5) It was Mr Seiler who had first raised the issue of Mr Merinson being remunerated on the basis of one-off retrocessions on specific transactions and the figures agreed were in line with his suggestions and it was he who suggested a figure.

(6) Mrs Whitestone made a full written record of her meetings with Mr Feldman and Mr Merinson and these were stored on JBI's client relationship management system ("MyCRM") which was accessible to everyone in her team and to Compliance and JBI senior management. Indeed, she understood that senior management including her line manager, Mr Campeanu, were required to look at these documents as part of their management responsibilities.

(7) The signing of the Finder's agreement with Mr Merinson and the fact that no written agreement appears to have been obtained regarding the one-off retrocession all occurred while Mrs Whitestone was on wedding leave and was being dealt with by Mr Campeanu.

(8) Mrs Whitestone had no experience of conducting FX trades and no one at Julius Baer expressed any concerns at the rate that was negotiated in respect of the First FX Transaction. The overall fees agreed included significant discounts on ongoing custody, advisory and transaction fees.

(9) Mrs Whitestone has no recollection of being informed that Mr Merinson was intending to pay part of his commission to Mr Feldman but with the benefit of hindsight regrets that she did not question the significance of this information at the time and escalate it accordingly. She did not actively conceal this information, nor did she proceed with the relationship in the conscious knowledge of it.

(10) As regards the proposed new arrangements with Mr Feldman and Mr Merinson negotiated in October 2010, Mrs Whitestone explored the detail of the arrangements with Mr Feldman and Mr Merinson and there was nothing about the demeanour of either Mr Feldman or Mr Merinson that caused Mrs Whitestone to have any concern about their commitment to the best interests of the relevant Yukos companies. She escalated the matter appropriately to all relevant senior management and obtained approvals. No concerns were raised with her by any of these senior managers about the proposals or the commercial rationale behind them. Had such concerns been raised, Mrs Whitestone would have reacted appropriately. Again, with the benefit of hindsight it appears that these arrangements facilitated the diversion of funds from the Yukos companies to Mr Merinson, however given all the above factors, this was not a risk that was apparent to Mrs Whitestone at the time and nor it appears to any of the significantly more experienced and senior persons to whom she appropriately referred the matter for approval.

(11) As regards the Second FX Transaction, there was what appeared to Mrs Whitestone to be a plausible commercial rationale for the transaction. It did not seem to Mrs Whitestone at the time that Mr Feldman wanted the Second FX Transaction to take place in order to generate further commission for Mr Merinson. Mrs Whitestone understood that the Yukos Group wanted to incentivise Mr Merinson so their interests were aligned. The conversion rate for the transaction must be considered in the context of the overall reduction in other rates which affected the entire portfolio and also in the context of Mr Seiler's view as regards the overall revenues that Julius Baer would need to achieve. It is clear that senior management accepted the trading strategy that had been used and the amount of commission generated. Mrs Whitestone did not consider that the effect of the transaction was to obscure the commission generated. She discussed the proposed transaction with Compliance and Mr Campeanu in advance. She also obtained approvals from senior management for the payment of the commission to Mr Merinson, in which she set out the total commission that had been achieved. Her senior managers did not raise with her any concern regarding any of these arrangements.

(12) As regards the sharing by Mr Merinson of his commission on the Second FX Transaction with Mr Feldman, Mrs Whitestone has no recollection of these payments to Mr Feldman or any prior discussion that payments were to be made to him. She had no involvement in the transactions given that she was abroad at the time. Mr Campeanu approved the transfers and raised no concerns about them.

(13) The Authority's case in respect of the Third FX Transaction was not properly formulated during the regulatory proceedings and important aspects of the factual matrix are not clear. She cannot now recall the circumstances of the transaction and the commercial rationale for it.

(14) As regards the "red flags" set out at [17] above:

> (1) Mrs Whitestone was provided with an explanation for the request that the First Commission Payment be described as "investment capital gain". She escalated the issue appropriately and she relied upon the advice and guidance of her superiors.
>
> (2) The non-disclosure term requested by Mr Merinson was appropriately escalated by Mrs Whitestone to her superiors and no concerns were expressed.
>
> (3) The commitment to confidentiality requested by Mr Feldman in February 2011 was also appropriately escalated by Mrs Whitestone and the response did not raise any concerns.

Mr Seiler

25. Mr Seiler says he did not recklessly disregard the risks of which the Authority alleges he was aware. In relation to the specific allegations made by the Authority his position can be summarised as follows:

(1) He understood that Mr Merinson was acting as a Finder for Julius Baer under arrangements known about and agreed by a director of the client and numerous people within Julius Baer. Mr Seiler had no reason to think that Mr Feldman might benefit personally from the arrangements with Mr Merinson. If he had known of the payment to Mr Feldman he would have raised it as a very significant red flag. The risks Mr Seiler is alleged to have been aware of did not occur to him and he is not to be criticised.

(2) The possibility of Mr Merinson receiving a Finder's fee in relation to Yukos first came to Mr Seiler's attention in July 2010. He did not think at that time or subsequently that Mr Merinson was an employee of Yukos, and he was told that a director of the client, Mr Feldman, knew of and agreed Julius Baer's charges and the arrangements for the payment of commissions to Mr Merinson. It did not occur to Mr Seiler that there was any scheme to misappropriate Yukos' money, and he would have said so if he had suspected that.

(3) Mr Seiler's role was a marketing one, rather than one involving the execution or supervision of specific transactions or negotiating the terms of specific client relationships. Notwithstanding that, because the Finder's arrangements were unusual, when he was told about the First FX Transaction and the related proposed payment to Mr Merinson, Mr Seiler checked with Mrs Whitestone's superiors that everything was in order and he was assured that it was. Mr Seiler had no suspicion of any wrongdoing in relation to these matters.

(4) Details of particular transactions and arrangements with Finders were operational matters that Mr Seiler understood would be known about and overseen by JBI and booking centre staff and Compliance. Mr Seiler was entitled to believe that any suspicious features would be identified and addressed by those whose job it was to look at Finder's arrangements and client transactions. He knew that numerous people within Julius Baer were sent details of the First FX Transaction and the Finder's arrangements with Mr Merinson, and that they did not object to, or positively approved, these. Notwithstanding that, if Mr Seiler had suspected wrongdoing, he would have questioned it, as he did when he considered there were unusual features of the facts of this case.

(5) After the First FX Transaction, Mr Seiler did not agree in October 2010 to Mr Merinson receiving four one-off 70% retrocessions. On the contrary, he wanted further discussion of the business case before any transaction was carried out. When Mrs Whitestone carried out the Second FX Transaction, she had agreed to a 70% retrocession without further reference to Mr Seiler. Mr Seiler discussed the transaction with her and Mr Raitzin. Mr Seiler understood that the client's director agreed to the retrocession. Again, it did not occur to Mr Seiler that there was any scheme to misappropriate Yukos' money, and he would have said so if he had suspected that. Mr Raitzin took responsibility for approving the Second Commission Payment. That was on the information then known to him and Mr Seiler and provided by Mrs Whitestone.

(6) Mr Seiler was not informed of concerns which had been raised about the Second FX Transaction, and the alleged Relevant Risks were not specifically drawn to Mr Seiler's attention.

(7) Mr Seiler arranged for a discussion with BJB Compliance and Mrs Whitestone in February 2011 to seek to ensure that he and BJB Compliance had all the same information and could be sure that the arrangements with Mr Merinson were appropriate. The outcome of that was that Mr Feldman signed letters to confirm his approval of the arrangements with Mr Merinson, following which BJB Compliance told Mr Seiler that they were satisfied with the arrangements. Mr Seiler knew no more than the compliance staff did and had no reason to question their views.

(8) Mr Seiler was not aware of any relevant features of the Third FX Transaction.

(9) Mr Seiler did not respond recklessly to concerns raised by BJB Compliance about the arrangements with Mr Merinson and Mr Feldman's involvement therein. Mr Seiler's response was correct and not misleading.

Mr Raitzin

26. Mr Raitzin says the Authority's allegations that that he acted recklessly and without integrity in his involvement with the First and Second FX Transactions are wrong. He says he was a diligent and honest professional, working with integrity in a busy and challenging environment. He says he properly put faith in those he worked with to bring material matters to his attention and then act on his instructions. When concerns were identified, he was robust in insisting they were acted on. In relation to the specific allegations made by the Authority, his position can be summarised as follows:

(1) Critical information was withheld from him, in particular:

(1) that Mr Merinson was a Yukos Group employee not an independent adviser and that he was in reality in control of Yukos Capital's funds and was therefore operating as a shadow director of Yukos Capital; and

(2) that Mr Feldman would receive a financial kickback from Mr Merinson of a proportion of the finder's payments.

(2) Mr Raitzin was also not informed of key information by Mrs Whitestone's manager, Mr Campeanu. Mr Campeanu personally approved the transfer of funds from Mr Merinson to Mr Feldman and appears to have been aware of many of the other events as they occurred. Had he known of the relevant facts, Mr Raitzin would not have permitted the arrangements to proceed.

(3) Mr Raitzin had a senior role and was exceptionally busy. His expertise was in Latin America, and he was an interim Region Head for Russia, Central and Eastern Europe, pending a permanent appointment being made. He was therefore carrying out far more than his ordinary responsibilities. His role was to review and give high-level approval to proposals which had been reviewed and approved by specialists in the relevant market and/or field, and pre-approved by senior Compliance officers who specialised in the review of transactions involving politically exposed customers and complex transactions.

(4) Mr Raitzin relied on, and was entitled to rely on, the honesty, integrity and competence of his staff. He properly relied on those working under him to escalate matters that were relevant to the exercise of his authority. He was not a lawyer or a compliance officer. He did not have the luxury of being able to perform a detailed analysis of the documentation. Mr Raitzin had 340 people working for him across a multitude of jurisdictions. That was why he insisted upon being provided with reasoned recommendations by those working beneath him, including those working in Compliance. Other senior officers of Julius Baer were aware that Mr Merinson was an employee of the Yukos Group, including senior Compliance officers. However, Mr Raitzin was not informed.

(5) Mr Raitzin accepts that risks did arise from the Yukos relationship and Mr Merinson's role as Finder. Those included the need to ensure that Yukos Capital approved the remuneration of the Finder and that it was properly disclosed to its director. Mr Raitzin directed that these issues be addressed and resolved and asked appropriate questions about Mr Merinson's status to satisfy himself that the arrangements were proper.

(6) The commission levels for the First and Second FX Transactions (and the other fees charged) were not unusually high. The banking relationship with the Yukos Group was politically exposed and complex. It required taking a position contrary to the interests of the Russian Federation. Substantial fees would therefore ordinarily be charged by a

private bank taking on such a client. The fees charged reflected the overall levels of remuneration for servicing an exceptionally complex private banking relationship (which included the payment of remuneration to a Finder), not the cost of executing a simple foreign exchange transaction. There was a proper commercial rationale for the First and Second FX Transactions and for the payment arrangements which were proper and ordinary commercial practice in the Swiss banking market in 2010. The fees charged for the First and Second FX Transactions reflected the cost of the overall private banking service, not the cost of executing a currency sale and purchase. Julius Baer provided a valuable private banking service to the Yukos Group, including the implementation of the Yukos Group's investment policy over assets of several hundred million pounds by the purchase and management of a range of assets in the immediate aftermath of the credit crunch.

(7) The use of Finders was ordinary commercial practice in the Swiss private banking market in 2010 and the level of retrocession payments approved to be paid to Mr Merinson were at an ordinary commercial level in the market and were less than could have been paid under Julius Baer's standard pre-approved remuneration rates paid to Finders at the time. The fees agreed with Mr Merinson were less than what Julius Baer would have paid to a Finder under its standard terms.

(8) The First FX Transaction had a legitimate commercial purpose so far as Mr Raitzin understood at the time. The client needed to hold its assets predominantly in dollars (it was an oil company). Its investment policy required this. It also needed private banking services. Mr Raitzin also correctly understood that Julius Baer was contractually bound to make a retrocession payment to the Finder. He was not aware of any proper reason to refuse payment. It was, as he put it at the time, on the knowledge he had, a "fait accompli".

(9) The request made by Mr Merinson that the First Commission Payment be referred to as an "Investment Capital Gain" was handled properly by Julius Baer. Before Mr Raitzin had an opportunity to consider the issue, the issue was referred for BJB Legal and Compliance review who approved the payment with an appropriate reference. Prior to the Second Commission Payment, Mr Raitzin asked Mr Seiler by email to make a recommendation to him about whether to approve the transaction, exercising his jurisdiction and judgement as the relevant Market Head and senior manager responsible. Mr Feldman had already given his approval to the transaction. Mr Seiler recommended approval and did not raise any concerns. Mr Raitzin therefore did not object.

(10) When, prior to the Second Commission Payment, Mr Raitzin was informed about concerns raised by another senior manager about the Second FX Transaction he immediately instructed his staff to regularise the pending issues and to put in place an acceptable framework. Mr Raitzin's staff identified a series of steps that needed to be taken to regularise the transactions and ensure they were proper, put those steps in writing and directed the relevant senior staff to implement them. Compliance (through two of the bank's most senior global Compliance officers) did not object to the Second Commission Payment.

Structure of this decision

27. We have decided that the Authority has not made out its case that the Applicants acted recklessly and consequently with a lack of integrity in relation to the subject matter of these references. Accordingly, we have remitted the question of whether a prohibition order should be imposed on any of the Applicants to the Authority for it to reconsider their decisions in that regard.

28. We now set out the facts and matters we have relied on in making our decision in respect of these references and the reasons for our decision.

29. For ease of reference, we have prefaced this decision with a Table of Contents showing how we have organised this decision as well as a non-exhaustive Glossary of Terms and a dramatis personae.

APPLICABLE LAW AND REGULATORY PROVISIONS

General

30. The Authority's regulatory objectives are set out in s 1B FSMA and include securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system.

31. The "integrity objective" is particularly relevant in this case. Section 1D FSMA defines the "integrity objective" as "protecting and enhancing the integrity of the UK financial system", where "integrity of the UK financial system" includes that it is not being used for a purpose connected with financial crime. In this case, it was common ground that, regardless of the awareness of the knowledge of the Applicants at the relevant time, the effect of the arrangements was to result in a misappropriation of Yukos's funds as a result of the behaviour of Mr Merinson in concert with Mr Feldman.

Prohibition

32. Section 56 FSMA confers upon the Authority the power to make a prohibition order against an individual prohibiting that individual from performing a specified function, any function falling within a specified description, or any function, if it appears to the Authority that the individual is not a fit and proper person to perform functions in relation to a regulated activity by an authorised person.

33. The Authority's Enforcement Guide ("EG") sets out guidance on the Authority's approach to prohibition orders.

34. EG 9.3.2 makes it clear that the Authority will consider all the relevant circumstances of the case which may include, but are not limited to, certain identified factors. Those factors include:

(1) The criteria for assessing fitness and propriety, that is honesty, integrity and reputation; competence and capability; and financial soundness.

(2) To what extent the person has failed to comply with rules applicable to him, has been knowingly concerned in contravention by the relevant firm of a requirement imposed on the firm under FSMA.

(3) The nature of the particular controlled function which the person is (or was) performing, the nature and activities of the firm concerned, and the markets in which the person operates.

(4) The severity of the risk which the person poses to consumers and confidence in the financial system.

(5) The person's previous disciplinary record and general compliance history.

Fitness and propriety

35. The section of the Authority's Handbook entitled FIT sets out the fit and proper test for approved persons. FIT 1.3 provides that the Authority will have regard to a number of factors when assessing the fitness and propriety of a person. The most important considerations will

be the person's honesty, integrity and reputation, competence and capability, and financial soundness.

36. In these references, because of the way in which the Authority presents its case, the relevant consideration is the Applicants' integrity.

37. In that context, the guidance given by the Authority in relation to Principle 1 of the Authority's Statements of Principle for Approved Persons (APER) made under the authority of s 64 FSMA is relevant. It is to be noted that although they are not currently approved by the Authority to perform regulated activities at a firm, both Mrs Whitestone and Mr Seiler were approved persons at the time that certain of the events which are subject to these references took place. Statement of Principle 1 at the relevant time provided that "an approved person must act with integrity in carrying out his controlled function."

38. At the relevant time, APER 3.1.4G provided that an approved person will only be in breach of a Statement of Principle where he is personally culpable. Personal culpability arises where an approved person's conduct was deliberate or where the approved person's standard of conduct was below that which would be reasonable in all the circumstances.

39. APER 4.1 lists conduct which in the opinion of the Authority does not comply with Statement of Principle 1. The examples given in the code are not exhaustive. This includes an approved person:

> (1) Deliberately misleading (or attempting to mislead) by act or omission: a client, his firm (or its auditors), or the Authority. Such behaviour includes, but is not limited to, deliberately: falsifying documents; misleading a client about the risks of an investment; providing false or inaccurate information to the Authority; and destroying documents relevant to misleading or attempting to mislead the Authority.
>
> (2) Deliberately recommending an investment to a customer where the approved person knows that he is unable to justify its suitability for that customer.
>
> (3) Deliberately failing to inform, without reasonable cause, a customer or the Authority of the fact that their understanding of a material issue is incorrect despite being aware of their misunderstanding.
>
> (4) Deliberately failing to disclose the existence of a conflict of interest in connection with dealings with a client.
>
> (5) Deliberately not paying due regard to the interests of a customer. Deliberate acts, omissions or business practices which could be reasonably expected to cause consumer detriment.

40. In our view, the examples set out at [39] above, are all examples of a person failing to act with integrity. As Mr Strong submitted, turning a blind eye to known risks can amount to deliberate behaviour and thus amount to acting without integrity, but inadvertently failing to address risks which were not known to the person concerned cannot do so. We now turn to consider the law relating to integrity in the financial services regulatory context in further detail.

Law relating to integrity

41. The Tribunal recently summarised the correct legal approach to the concept of "integrity" in the financial services regulatory context in *Andrew Page and others v FCA* [2022] UKUT 124 (TCC) *("Page")* at [56] to [59], adopting the summary of the relevant case law in *Tinney v Financial Conduct Authority* [2018] UKUT 0345, at [10] and [11] and *Forsyth v FCA and PRA* [2021] UKUT 0162(TCC) at [40] to [44].

42. We need not set out that summary in full, but for the purposes of this decision the following points are relevant:

(1) There is no strict definition of what constitutes acting with integrity. It is a fact specific exercise.

(2) Even though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity.

(3) Acting recklessly is another example of a lack of integrity not involving dishonesty. A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.

(4) To turn a blind eye to the obvious and to fail to follow up obviously suspicious signs is a lack of integrity.

(5) There are both subjective and objective elements to the test of what constitutes a lack of integrity. The test is essentially objective but nevertheless involves having regard to the state of mind of the actor as well as the facts which the person concerned knew.

43. In these proceedings, the Authority's case is that the Applicants acted without integrity because they recklessly failed to have regard to the Relevant Risks, being aware of those risks. It was common ground that if an Applicant was aware of the Relevant Risks and, viewed objectively, it was unreasonable for the Applicant concerned to take those risks having regard to the circumstances as the relevant Applicant knew or believed them to be, then that would be sufficient to make a finding of recklessness against the Applicant concerned.

44. However, the Authority pleaded in the alternative that recklessness could be established if a reasonable person in the relevant Applicant's position would have been aware of the risk in question, regardless of the Applicant's actual knowledge of the risk concerned. In that regard, the Authority relies on the following passage (at [22]) in *Ford and Owen v FCA* [2018] UKUT 0358 (TCC):

> "Reckless behaviour is capable of being characterised as a lack of integrity, and in determining whether behaviour is reckless regard must be had to what would reasonably have been appreciated or understood by persons in the same position as the individual in question. The standard to be applied is an objective one and does not depend on the particular knowledge the individual may, or may not have, of the risk in question. In the regulatory context with which we are concerned, a reckless failure to consider whether something is a risk may equally be found to amount to lack of integrity, as could be a reckless disregard of a known risk."

45. The Authority relies on this passage for the proposition that subjective awareness of the relevant risk is not a prerequisite of a finding of recklessness. We do not agree with that proposition.

46. As the authorities demonstrate, recklessness has both subjective and objective elements. The subjective element focuses on the state of knowledge of the individual concerned as to the risks concerned. The objective element focuses on the question as to whether it was reasonable for the person concerned to have ignored the risk. Clearly, in considering a person's state of awareness in relation to a risk, it is appropriate to have regard to what would reasonably have been appreciated or understood by persons in the same position as the individual in question, as the passage in *Ford and Owen* set out above clearly states. As Mr Jaffey submitted, the fact that the first element of the test of recklessness is subjective does not mean that the Tribunal cannot have regard to the inherent probabilities and, in particular, how a reasonable professional would respond in the relevant situation. By having regard to those factors, the

Tribunal may conclude that the risks concerned would have been obvious to the person concerned and therefore can draw the inference that he or she was aware of the risks in question.

47. In our view, in his closing submissions Mr Strong illustrated the application of the relevant principles correctly with the following examples:

> (1) A person who recognises a risk of morally objectionable action which is unreasonable to take and ignores it lacks integrity precisely because they consciously take a risk, which is in fact unreasonable, of unethical conduct occurring. It does not matter whether the person appreciates that the action is morally wrong: if they do not appreciate the moral character of the action, their ethical compass is defective.
>
> (2) On the other hand, a person who does not appreciate that there is a risk of action being taken which would objectively be considered wrong is not reckless and does not lack integrity. They are not aware of a risk that the action in question may happen. Their ethical compass is not defective. That is the case whether or not someone else might have identified a risk of the relevant action occurring. That, as Ms Clarke submitted, could arise because of a lack of experience, competence or training on the part of the individual concerned.
>
> (3) An example of the former would be a person who recognises that they are being asked to disguise a payment in order that the owner of the money might never discover its money has been misapplied. Such a person is reckless and lacks integrity if they do as asked, even if they regard the action as justified because they think that the true owner of the money would not miss it because they are rich. The person who disguises the payment has a deficient ethical compass in those circumstances. But it is a very different situation if the person does not realise that there is a risk of disguise and thinks that the true owner is fully aware of the payment: there is no scope for moral criticism of such a person.

48. A person who turns a blind eye to a risk can also be said to be acting without integrity. As Mr Strong submitted, that is because they have chosen not to think about the risk that a particular activity might be occurring, or they have chosen not to ask questions for fear of what they might discover. Such a person knows or suspects facts which cause them to conclude that they would be better off not knowing more: not asking questions in that situation shows a lack of integrity because the person acts notwithstanding a suspicion of impropriety. A person who has no suspicion in their mind at all, however, does not turn a blind eye. A person who does not ask questions because it does not occur to them that there is a risk of wrongdoing (whether or not they would recognise it as such) does not turn a blind eye. Turning a "blind eye" is therefore a higher level of culpability than acting recklessly. It involves an element of deliberate behaviour, namely allegations that the person concerned had suspicions and deliberately failed to find out facts he suspected to be true, in order to avoid knowing them: see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1 at [116] per Lord Scott of Foscote on this point.

49. In our view, in this case the Authority in its alternative case had sought to extend the concept of a lack of integrity beyond its proper bounds. As the authorities demonstrate, a finding that a person lacks integrity denotes a failing of their ethical compass. As Mr Jaffey submitted, even serious errors can be made by a person whose ethical compass is sound. In those circumstances, the person concerned may have acted negligently but he or she could not be said to have acted without integrity. The Authority's alternative case is based on the allegation that a reasonable person in the position of the relevant Applicant would have deduced from the facts that he or she knew that there was a possibility of activity which he or

she regarded as wrongful. That, as Mr Strong submitted, is an allegation of a lack of imagination, or negligence at worst, not a lack of integrity.

50. Therefore, in relation to the allegations of recklessness that are made in these proceedings, we need to determine (i) what facts in relation to each of the transactions or other matters on which the Authority relies each Applicant was aware of (ii) whether in the light of those facts the Applicant was aware that if the Applicant proceeded to deal with the matter in question then one or more of the Relevant Risks would occur and (iii) whether it was unreasonable in the light of the circumstances as the relevant Applicant knew or believed them to be to take the risk in question.

ISSUES TO BE DETERMINED AND THE ROLE OF THE TRIBUNAL

Role of the Tribunal

51. Section 133(4) FSMA provides that, on a reference, the Tribunal may consider any evidence relating to the subject matter of the reference whether or not it was available to the decision-maker at the material time. This is not an appeal against the Authority's decision on each of the references but a complete rehearing of the issues which gave rise to the decision. Section 133(5) to (7) FSMA, following amendments made by the Financial Services Act 2012, now provides as follows:

> "(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination. (6) In any other case, the Tribunal must determine the reference or appeal by either-
>
> (a) dismissing it; or
>
> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6)(b) are limited to findings as to-
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision.
>
> (7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal."

52. The "decision-maker" in relation to these references is the Authority.

53. It can be seen that there is a distinction between the powers of the Tribunal on what is described as a "disciplinary reference" and other references. Pursuant to s 133(7A) FSMA "disciplinary reference" includes a decision to take action under s 66 FSMA, that is to impose a financial penalty on a person. The term does not include a reference to impose a prohibition order under s 56. Thus, these references are not disciplinary references. In relation to such references, which we shall refer to as "non-disciplinary references", the powers of the Tribunal as set out in s 133(6) are more limited. The jurisdiction may be characterised as a supervisory rather than a full jurisdiction. That means that, unless the Tribunal believes the references to have no merit and therefore dismisses them, its powers are limited to remitting the matter to

the Authority with a direction to reconsider their decisions in accordance with the findings of the Tribunal.

54. The Tribunal explained the extent of its powers on a non-disciplinary reference in *Carrimjee v FCA* [2016] UKUT 0447 (TCC) at [39] and [40] as follows:

> "39. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.
>
> 40. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority, and which formed the basis of its decision. That course would also be necessary had there been a change of circumstance regarding the applicant which indicated that the original findings made on which the decision was based, for example as to his competence to undertake particular activities, had been overtaken by further developments, such as new evidence which clearly demonstrated the applicant's proficiency in relation to the relevant matters. Such a course would not usurp the Authority's role in making the overall assessment as to fitness and propriety but would ensure that it reconsidered its decision on a fully informed basis. In our view such a course is consistent with the policy referred to at [31] and [32] above as it leaves it to the Authority to make a judgment as to whether a prohibition order is appropriate."

55. Even in the case where the Tribunal has not accepted all of the factors that led the Authority to conclude that a prohibition order was appropriate and it might therefore be said that the Authority has taken into account irrelevant considerations in deciding whether to impose a prohibition order, it would not be appropriate to remit the decision to the Authority for further consideration where the seriousness of the matters which the Tribunal has found would lead inevitably to the Authority reaching the same decision were that course to be followed: see *Charles Palmer v FCA* [2017] UKUT 0358 (TCC) at [270].

Issues to be determined

56. The only issue that we need to determine in relation to each of these references is whether the Authority can make out its case that the relevant Applicant has failed to act with integrity in relation to the subject matter of these references. Should we determine that the Authority has made out its case on that issue, the only course open to us is to dismiss the references. If we are not satisfied that the Authority has made out its case on the integrity issue, we will have to consider whether or not to remit the matter to the Authority for it to reconsider its decision.

Standard and burden of proof

57. As is well established in references of this kind, the burden of proving that the Applicants failed to act with integrity to the required standard rests with the Authority judged to the ordinary civil standard: see *Tariq Carrimjee v Financial Conduct Authority* [2015] UKUT 79 (TCC), 20 at [47]. In *Ford and Owen v FCA* [2018] UKUT 0358 (TCC) at [42], the Tribunal observed:

> "It is nonetheless the case that regard must be had to the quality of the evidence. As the Court said in *In re S-B*, if an event is inherently improbable, it may take better quality evidence to persuade a court or tribunal that it has happened than would be required if

> the event were commonplace. There is, however, as Lord Hoffman in *In re B* had pointed out, at [15], no necessary connection between seriousness and inherent probability."

58. We are asked to make findings of fact as to events which took place many years ago, many of which are undocumented. The documentary evidence that we have seen largely takes the form of email correspondence. We cannot know what actually happened in relation to all the events concerned. The burden is on the Authority to satisfy us as to what was more likely than not to have happened on the basis of the evidence before us.

EVIDENCE

Approach to witness evidence and contemporary documents

59. Not unusually, in this case much of the oral evidence was directed to memories of matters that occurred some years ago. In this case, however, the lapse of time between the events in question and the hearing of these references is longer than any other comparable proceedings in the experience of this Tribunal. This is obviously unsatisfactory and we refer later to the delays and problems that arose in relation to the conduct of the Authority's investigation which have contributed to this situation. Often, the witnesses would say that they could not remember particular events or when they occurred, and in most cases that was fully understandable and accepted by the Tribunal.

60. It is also the case that the key individuals were not interviewed by the Authority until many years after the events in question and in some cases not interviewed at all. There was therefore no opportunity for the individuals concerned to refresh their memories by reference to documents relied on when preparing for such interviews. Mrs Whitestone was not put under investigation until 7 September 2016 and was not interviewed until 20 October 2016. Mr Seiler and Mr Raitzin were not interviewed at all by the Authority, although they were the subjects of short interviews by the Swiss regulator, FINMA, in June and April 2016 respectively.

61. As the Tribunal has observed in previous cases, in relation to interview evidence generally, the Tribunal appreciates that subjects of interviews by the Authority will find them a daunting experience. They will probably never have found themselves in a similar situation before and they may find the atmosphere intimidating, outnumbered as they will be by the Authority's representatives, even if the subject is accompanied by a legal representative, which is their right. It is understandable that in that situation answers may be given which, on reflection, are not as accurate as they might have been. The Tribunal takes those factors into account when assessing the weight to be given to interview evidence. That is particularly so in the present case as regards Mrs Whitestone who, as we have observed, was interviewed many years after the events in question had occurred. There were also long delays before the matter was put before the RDC in November 2019, Warning Notices were not issued until April 2020, the representations phase before the RDC was not completed until December 2020 and it was nearly seven months later before the RDC issued the Decision Notices in June 2021. Whilst this process was going on, naturally memories would continue to fade.

62. Consequently, in this situation it is important for the Tribunal to have regard to the contemporaneous documents and the overall probabilities. As has often been said, the contemporaneous documents are usually more reliable than the content of witness statements, prepared with the assistance of a legal team after the event and for the purpose of proving a case or meeting a case against them. The Tribunal recently addressed this situation in *Page* at [126] to [130] by reference to a number of helpful observations in the case law as follows:

“126. In *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413, Males LJ stated the following at [48] to [49}:

> "48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:
>
> > "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."
>
> 49. It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations."

127. Whilst *The Ocean Frost* and *Simetra* were cases concerning fraud, in our view the principles are equally applicable to proceedings in this Tribunal, particularly where, as in the current case, questions of dishonesty and integrity are in issue.

128. In *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Rep 207 (Privy Council) Lord Goff said at p. 215:

> “It is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities.”

129. In *Gestmin SGPS S.A. v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) Leggatt J (as he then was) said this at [22]:

> "…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events."

130. However, that is not to say that all the evidence including the oral evidence should not be taken into account. The Court of Appeal in *Kogan v Martin* [2020] EMLR 4 said this at [88] :

> "88. …First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

63. However, although the contemporaneous documents in this case assist us to a degree the documentary evidence is by no means complete and in a number of instances we have had to make findings based purely on the accounts of the witnesses as to what may or may not have been said in conversations that are alleged to have taken place. The Court of Appeal referred to this type of situation in its recent decision in *NatWest Markets PLC and others v Bilta (UK) Limited (In Liquidation) and others* [2021] EWCA Civ 680. The court said this at [50] and [51] of its judgment:

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

> dinner, there are no notes of the discussions and no memoranda or emails sent afterwards which appear on their face to record or report what was said on that occasion.
>
> 51. Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment."

64. It is also important, as Mr Strong submitted, that caution is needed in relation to the documents themselves. First, as Mr Strong said, the trial process inevitably involves a far closer and more detailed examination of documents and their possible implications than would ever have been undertaken at the time by those who had considered them, particularly busy senior executives with limited time to consider them in circumstances where the possibility of fraud would not be uppermost in their minds. In addition, as Mr Jaffey submitted, we need to recognise that the documents do not always tell the full story and need to be understood in the context of the work patterns and motivations of those involved.

65. The following observation of the Tribunal in *Roberts and Wilkins* v FCA [2015] UKUT 408 (TCC) at [36] is particularly pertinent in this case:

> "We bear in mind the dangers of hindsight, which include analysing each conversation or note line by line, and attributing greater significance to such matters in the light of subsequent events, instead of considering matters as participants saw them as they occurred, or assuming that what happened subsequently was bound to happen."

66. As we refer to later in our assessment of the various witnesses, it is clear that Mrs Whitestone and Mr Raitzin in particular tended from time to time in their evidence to give honest but mistaken reconstruction of events rather than a genuine recollection of events. That is particularly so in relation to various conversations that did or are alleged to have taken place between the Applicants and which are relevant to the key questions before us as to whether Mrs Whitestone obtained prior approval from either or both of Mr Seiler and Mr Raitzin in relation to certain transactions or whether certain information was communicated during those conversations. Consequently, much of the evidence the witnesses gave was credible although not always reliable. In particular, when asked whether particular information was imparted during a conversation, the evidence given may be prompted by reading the documents rather than any independent recollection of what was said. Although Mrs Whitestone, in particular, contended that she had a very good memory, almost everybody's memory is fallible. Memory is necessarily reconstructive in nature. Accordingly, the timing of events can be conflated with the timing of other events.

67. Consequently, it has not always been easy to resolve the conflicts of evidence that have arisen in this case. In carrying out our fact-finding, we remind ourselves that, as referred to at [58] above, the burden is on the Authority to satisfy us as to what was more likely than not to have happened in relation to any particular event. An allegation of acting without integrity is a very serious matter for a financial services professional with serious consequences for such a person's future career. Therefore, we have also had regard to the inherent likelihood of the allegations that the Authority has made against the Applicants. Mr Strong reminded us of the

following statement of Lord Nicholls in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, at pages 586-7:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence…"

Furthermore, as Mr Jaffey correctly submitted, caution is required whenever a party builds their case on indirect evidence because to do so introduces "fallibility of inference" as a source of error. We are asked to infer the state of mind of the Applicants in relation to the information that was available to them in this case. Facts may exist which are not known and which may have a bearing on the safety of any inference and there may be several reasonable explanations for such facts as have been proven. As Mr Jaffey observed, such caution is particularly salutary here where the Authority asked us to draw inferences from documents in circumstances where due to the deficiencies in the investigation the documentary picture is likely to be incomplete.

Witnesses for the Authority

68. The Authority provided witness statements from a number of witnesses of fact in support of its case, all of whom were cross-examined on behalf of each of the Applicants. The witnesses were:

Rory Neary - Mr Neary is employed as a lead associate (Acting Manager) in the Authority's Enforcement and Market Oversight Division ("Enforcement"). Mr Neary is part of, and since June 2021, has managed a team responsible for the Authority's investigation into the Applicants. Mr Neary's evidence dealt with how the investigation had been conducted. Many of the matters addressed in his witness statement predated his involvement with the investigation which started in May 2018 and accordingly his evidence was based on his own review of the Authority's files and other relevant documentation. Although Mr Neary appeared to be doing his best to assist the Tribunal, it was apparent from his cross examination by Counsel for each of the Applicants that his detailed knowledge of the documentation and how the investigation had been conducted prior to his involvement was limited. It was, however, apparent from his evidence that there had been a number of significant deficiencies in the way that documentation had been gathered during the course of the investigation and how the Authority had complied with its disclosure obligations. We refer to those matters where relevant later in this decision.

Stuart Bates - Mr Bates was employed at JBI from 2008 to May 2015, first as Chief Operating Officer, and then around September 2010 he joined the board of directors and held the CF 1 (Director) controlled function. Between January 2012 and July 2013, he was the interim Chief Executive Officer and held the CF 3 (Chief Executive) controlled function. Mr Bates's responsibilities included ensuring that the right platforms, systems and other controls were in place so that JBI could grow in a compliant fashion and provide good client service. Mr Bates's evidence covered:

(1) the use of finders by Julius Baer, the introduction of conflicts of interest, anti-fraud, anti-bribery and corruption policies and staff training for those policies;

(2) the annual reviews of know your customer information;

(3) his responsibility for the introduction of MyCRM, JBI's client relationship management system and the operation of the system;

(4) the difficulties in managing the JBI Russia and Central and Eastern Europe Desk;

(5) his interaction with the Applicants;

(6) and events following Mr Campeanu having raised concerns about Mrs Whitestone's behaviour on 30 November 2012.

Although Mr Bates did his best to assist the Tribunal, he was unable to recall key events accurately either due to the lapse of time or because he was not involved in them. His evidence did, however, give the clear impression that there was a lack of discipline at JBI as regards compliance with reporting lines and systems and controls during the period that is relevant to these references, particularly regarding the relationship between JBI and other Julius Baer entities.

Darren Porter - Mr Porter has been employed at Julius Baer since 1991. During the Relevant Period he was responsible for the Private Clients Advisory Team at JBI and for managing his client relationships as an Executive Director within the Relationship Management function. During that period, Mr Porter and his team assisted with providing investment advisory services to clients for Relationship Managers of JBI. Mr Porter's evidence covered:

(1) his experience of working with Finders and their remuneration arrangements;

(2) the role of private banks and the manner in which their fees were determined and charged;

(3) the specific advice he gave to Yukos on the investment of the funds placed with Julius Baer, and in particular his participation in or around meetings that took place on investment issues in July, August and November 2010;

(4) his observations on the First FX Transaction, in particular the margin and the amount of the commission paid to Mr Merinson; and

(5) his assessment of Mrs Whitestone and her abilities.

We found Mr Porter to be an honest witness who did his best to assist the Tribunal. In common with Mr Bates, he struggled to recall in accurate detail many of the matters on which he was cross examined due to the lapse of time and the lack of documentary records in some respects.That was illustrated by the fact that in his original witness statement he had forgotten that he had used four Finders at JBI rather than the two that he mentioned in his witness statement, a mistake that was corrected in his second witness statement after he had been shown documents relating to the other two Finders.

The Applicants' Evidence

69. Each of the Applicants filed a witness statement on which they were cross-examined at length by Mr George. Each of the Applicants were also cross-examined on behalf of the others. In addition, Mr Jean-Marc Fellay, formerly Deputy Chief Executive officer, BJB Bahamas, filed a witness statement in support of Mr Raitzin's case on which he was cross-examined by Mr George and on behalf of the other Applicants. We set out below our assessment of these witnesses:

Mrs Whitestone

70. We have accepted Mrs Whitestone's assessment of herself as being naïve and inexperienced when the events which are the subject of these proceedings took place and that

she was operating within an unsupportive environment without the benefit of significant training or mentoring. There were, however, clearly times when she came across as being confrontational with her superiors in her desire born out of ambition to achieve what she felt necessary to develop the relationship with Yukos although, as Mr George observed, the documentary record in many respects shows her genuinely seeking the input of her superiors and actively courting their attention. As Mr Fellay shrewdly observed in his evidence, she would have benefited from more sympathetic management than was given by her line manager, Mr Campeanu , and nobody else in the management hierarchy, whether in JBI in London or BJB in Switzerland took a firm line with her when it appeared that she was disregarding the proper reporting lines. She was candid in admitting that she made mistakes in accepting the explanations of Mr Feldman and Mr Merinson without sufficiently questioning the underlying rationale for the relevant arrangements. These proceedings have clearly had a serious effect on Mrs Whitestone's well-being and re-living the relevant events through a gruelling cross-examination must have been very difficult for her, but she was successful in putting her case clearly and consistently.

71. Our assessment of Mrs Whitestone and her account of the events taken in the context of the circumstances in which she worked at the relevant time, the relevant documents and the explanations of the other witnesses, notably Mr Seiler and Mr Raitzin, have led us to conclude that she gave honest answers in her long cross examination even though, as we have found, from time to time she reconstructed events as a result of a detailed examination of the relevant documents and her rationalisation of what she believed happened at the time. There were discrepancies between what she said in an interview, in her difficult US deposition proceedings and later in her written representations to the RDC, for the reasons that we have previously explained, that can often be the case particularly where in interview the subject has not been given all the relevant documentation in advance of the interview.

72. As we have said, we have been alert to the dangers of honest but mistaken reconstruction of events, and this is particularly so in Mrs Whitestone's case due to the passage of time and the greater opportunity that she has had than some of the other witnesses to review the documentation in detail. It was put to Mrs Whitestone by Mr Strong that her evidence was an account of what she thought was likely based on the documents rather than an account of what she actually recalled happening at the time so that she could not really tell what was a genuine recollection and what was something that was part of the argument that she had developed for her defence. She responded that for her it was not a matter of developing arguments it was just a matter of presenting the truth as she knew it to be and that in order to do so she had to get to grips with the documents to show that what she was being accused of was not true and that what she says is the truth. We have no doubt that Mrs Whitestone genuinely believed that what she was saying at all times was the truth, but it is clearly the case that she has been mistaken in her evidence in a number of respects, in particular regarding the details of the conversations she says she had with both Mr Seiler and Mr Raitzin. In common with the other Applicants, we have therefore treated her evidence with caution when it is not clearly corroborated by the underlying documents. Accordingly, we have had no predisposition to prefer Mrs Whitestone's evidence over either Mr Seiler or Mr Raitzin or vice versa when we have had to assess what may have been said during the various conversations that took place.

73. As regards the contemporary documentation, our assessment is that Mrs Whitestone's communications and record of events at the relevant time were open and transparent in that their content was inconsistent with her trying to conceal any suspicion she may have had about the transactions concerned. She provided explanations to the Tribunal which we found to be clearly plausible, such as whether she knew Mr Merinson was to be a Finder for Yukos in 2009,

the reason the so-called "veto letter" referred to at [318] below was obtained and whether it was important to make file notes of significant telephone conversations.

74. Although Mrs Whitestone's memory of events appeared to be better than some of the other witnesses, which is not surprising because she was at the centre of all the relevant events concerned and, as we have said, she has clearly examined the documents in more detail than the other Applicants, as was to be expected after the many years that have elapsed since the events concerned, her memory was not infallible.

75. Mrs Whitestone did give very full answers to questions during her cross examination and would be prone to seeking to justify the course of action she took in relation to matters where it was sought to criticise her. For example, Mr George pressed Mrs Whitestone to confirm that there was no documentary record of her contention that initially it was contemplated that Mr Merinson would be acting as a Finder for two individuals rather than Yukos and rather than giving a simple yes or no answer to that question she sought to justify why no documentary record existed but, when pressed, she did answer the question. Therefore, although her style of answering questions may have given the impression of her being evasive, we do not consider that to be the case when looked at in the round.

76. In assessing Mrs Whitestone's credibility, we have had regard to the two character testimonials which were put forward to support her in the form of witness statements from two senior professionals who have known her well for many years and gave evidence to the effect that any allegation that she acted with reckless lack of integrity would be inconsistent with her character and what was known of her. That evidence was unchallenged.

Mr Seiler

77. Although we do not consider that Mr Seiler sought deliberately to mislead the Tribunal or that he was reckless in that regard, we found that some of his evidence lacked credibility. In many instances his evidence was to the effect that in relation to matters that were sent to him for his approval he could not remember reading the communications and attached documents. In relation to conversations with him that were alleged to have taken place often his evidence was either that he could not remember the conversation taking place or, if it did, what was said during the conversation.

78. There were other instances, however, where he purported to remember clearly the details of conversations that took place in circumstances where it was in his interest to give an account of the conversation that supported his case. An example is the statement he made in his first witness statement that he had a clear recollection of Mr Raitzin approving the payment of the Second Commission Payment during the course of a conference call which was made from Mr Raitzin's office in Mr Seiler's presence in November 2010. He had to retract that evidence in his second witness statement after reviewing Mr Raitzin's witness statement and realising that the call he referred to could not have taken place at that time because Mr Raitzin was in Kyiv.

79. These examples show a lack of care on Mr Seiler's part, either in preparing his witness statement or, more likely, in reviewing what was written for him in that statement. In contrast to the other Applicants, we do not consider that Mr Seiler sought to reconstruct what he thought and said from the documents.

80. We also accept, as Mr Strong submitted, that Mr Seiler's working life has been predominantly as a relationship manager and then as responsible for the development of Julius Baer's Russian market. Those roles involve forming and maintaining relationships and managing a team rather than forensic scrutiny of documents. He regarded his role as being primarily a marketing rather than an operational role, although, as we refer to later, Mr Raitzin did task him with what were essentially operational matters from time to time.

81. We also accept, in relation to relevant events which occurred between 10 and 12 years ago, that Mr Seiler's recollection has faded. As we also mentioned, he was never interviewed by the Authority and he was not put under formal investigation until very late in the process and therefore did not have the opportunity, in contrast to Mrs Whitestone, to put his case earlier in the process. That inevitably meant that there were points on which Mr Seiler was unable to provide an explanation and may be why he mis-remembered the timing of the call between him, Mr Raitzin and Mrs Whitestone in Mr Raitzin's office referred to above.

82. We have also taken into account that a sudden family bereavement meant that there was a four-week gap in his cross-examination during which he was unable to discuss his evidence with his legal team and it is likely that he would have had family matters at the forefront of his mind. Thus we accept that the fact that almost all of his evidence was given a month after he had prepared to do so may well have impacted adversely on the quality of his evidence, bearing in mind the detail involved in the case.

83. Furthermore, English is not Mr Seiler's native language. He gave his evidence in English although an interpreter was available and assisted occasionally when language difficulties arose. Although it was clear that Mr Seiler's English may have been sufficient for his working purposes, he did not give the precision in his answers that would have come from a native English speaker or someone who was more proficient and confident in the use of the English language. It was also apparent from the various communications that when Mr Seiler wrote in English he was not always precise in his use of language. He also did not always fully understand the questions put to him with the result that he appeared to give answers which were clearly contradicted by other evidence of the contemporaneous documentation.

84. In cases where Mr Seiler appeared to give answers that were clearly contradicted by documentary evidence, the position was sometimes more nuanced. For instance, on occasion he denied that he had responsibility to approve a particular matter, when BJB's written procedures would suggest otherwise. Mr Seiler sought to draw a distinction between formally approving the decision as opposed to supporting it, in circumstances where his view was that others were primarily responsible for formulating a view as to whether, for example, a particular account should be opened when the account was to be opened in a jurisdiction outside Switzerland. Therefore, when using the word "approved" in some of his communications, he could be referring to supporting a proposal (which may have been part of his role) and giving final approval (which may not have been). On other occasions where he denied that the procedures required his or another person's approval even though the written procedures clearly stated the contrary position, he would in essence be offering a view that in practice the written procedures were not followed.

85. Nevertheless, the clear impression given from Mr Seiler's evidence overall was that in relation to the events which are the subject of these proceedings he paid insufficient attention to the matters which passed by his desk having taken the position that he was entitled to rely on the judgment and approval of others, particularly in circumstances where he asserted that he had no formal responsibility to approve the matters in question. There was also an element of seeking to distance himself from the matters that gave rise to these proceedings, but that is also consistent with the fact that, as our findings show, he did not have line management responsibility for Mrs Whitestone. He did, however, to his credit admit that he made mistakes in not paying greater attention to some of the matters that were referred to him.

86. In the circumstances, we have treated some of Mr Seiler's evidence with caution, but we have been able to rely on much of it, particularly where it is reasonable to draw inferences from what he said when considered alongside the other evidence.

87. In assessing whether it was likely that Mr Seiler ignored obvious suspicions in this case, we have taken account of the examples of occasions where he refused to allow certain clients to be on boarded because he was concerned about possible bribery, fraud or other possible wrongdoing which he gave in his witness statement and which were unchallenged.

Mr Raitzin

88. Mr Raitzin was clear and confident in his answers and did his best to assist the Tribunal. In our view, he genuinely had a poor recollection of the detail of the matters that were referred to him in relation to the events which are the subject of these proceedings. Our impression is that in common with Mr Seiler he paid little attention to matters which were referred to him for his approval and read little of the detail of the documents that he received. It was his view that in relation to the matters that required his approval, his role was a strategic one and he was entitled to rely on Mr Seiler and others below him to have reviewed the more detailed operational matters and satisfied themselves as to the propriety of what was taking place. He candidly admitted that a number of the conversations during which it is alleged that he gave his approval of certain matters may have taken place but he cannot remember the detail of them.

89. As our findings of fact below indicate, we have generally accepted Mr Raitzin's explanations as to what he knew of the matters that are the subject of these proceedings at the relevant time, although there were times where his evidence was being reconstructed by reference to the documents. He also had difficulty from time to time in recalling events without reference back to what he said in his witness statement, rather than being able to provide a genuine recollection of events.

90. To his credit, Mr Raitzin accepted that Mrs Whitestone had been treated poorly at times during the course of her employment at JBI and apologised to her for that having occurred.

91. In assessing whether it was likely that Mr Raitzin ignored obvious suspicions in this case, we have taken account of the role that Mr Raitzin previously took in taking responsibility for a plan which included proactively providing voluntary disclosure to the US Department of Justice in relation to allegations of a conspiracy on the part of the bank and its US taxpayer clients to evade US taxes in the face of resistance from time to time from members of BJB's Executive Board.

Mr Fellay

92. Mr Fellay was an honest and credible witness doing his best to assist the Tribunal. He was a highly experienced and diligent senior banker who clearly felt it was important to ensure that reporting lines within the Julius Baer Group were properly followed. Having identified serious concerns regarding the Second FX Transaction and the payment of the Second Commission Payment he ensured that those concerns were escalated appropriately within the Julius Baer Group. He provided perceptive observations about the difficulties that Mrs Whitestone was experiencing at the time of the Second FX Transaction and her lack of a mentor. Mr Fellay's evidence was of assistance in supporting our assessment of Mrs Whitestone as naïve and lacking in experience on the basis of his direct experience of dealing with her.

Absence of potential witnesses

93. All three Applicants were highly critical of the Authority's failure to call a number of witnesses who they say could have given highly relevant and material evidence as to the events which are the subject of these proceedings. In that regard the following individuals, among others were mentioned:

(1) Mr Jashmir Narrandes, a member of JBI Compliance who worked with Mrs Whitestone, particularly in the early days of her relationship with Yukos. Mrs Whitestone contended that Mr Narrandes had a role in relation to the creation of the so-called "veto letter" referred to at [318] below.

(2) Ms Carolyn Thomson Bielmann, head of Anti-Money Laundering and Sensitive Clients for BJB and a member of BJB Compliance. Ms Thomson Bielmann had a significant role in relation to the scrutiny of the arrangements which are relevant to these proceedings by BJB Compliance and, it is contended by the Applicants, was aware of the detail of the arrangements, and in particular the matters which the Authority says raised suspicions and "red flags". Mr Seiler and Mr Raitzin contended, in particular, that Ms Thomson Bielmann was aware of information that was not made known to them.

(3) Mr Sylvain Courrier, head of external asset managers and Finders for BJB and who was involved, among other things, in settling the revised arrangements for paying Finder's fees to Mr Merinson.

(4) Mr Viorel Campeanu, Managing Director and Senior Adviser at JBI and line manager of Mrs Whitestone with a direct reporting line to Mr Seiler. It is clear that Mr Campeanu played a significant role in the matters which are the subject of these proceedings and Mr Neary in his evidence accepted that Mr Campeanu would have had relevant evidence to give about a number of key issues, including whether or not the First FX Transaction raised red flags at the time it was executed, whether the fees were unusual or surprising, what Mr Campeanu's responsibility was as line manager in relation to transactions in the substance of his discussions with Mrs Whitestone, what he told Mr Seiler and who actually came up with the fee structure.

94. It was a striking feature of this case that those witnesses connected with JBI who the Authority itself called to support its case, that is Mr Porter and Mr Bates, had only a peripheral involvement with the arrangements. The Tribunal has had cause to criticise the Authority before as to its to failure to call witnesses who may have given relevant evidence.

95. In *Forsyth v FCA* [2021] UKUT 0162 (TCC) the Tribunal said at [75] to [76]:

> "75. Furthermore, as Mr George submitted, the principle enunciated in *Wisniewski v Central Manchester Health Authority* [1998] 1 PIQR 324 is relevant in this regard. As was stated at page 340 of the judgment in that case, in certain circumstances the court may be entitled to draw adverse inferences from the absence of a witness who might be expected to have material evidence to give on an issue in action. In circumstances where the reason for the absence of the witness satisfies the court, then no such adverse inference may be drawn but in circumstances where it might have been expected that a party would call a particular witness then such an inference may be drawn. If the court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, produced by the party who might reasonably have been expected to call the witness.
>
> 76.We received no explanation as to why other witnesses who may have given relevant evidence as to the documents from which we were asked to draw inferences were not present, as mentioned at [65] above, and in those circumstances, we are entitled to draw adverse inferences from their absences. We have done so to the extent that we have given more weight to Mr Forsyth's evidence as regards the documents in question and less weight to the evidence that the Authority sought to rely on in that regard."

96. In *Frensham v FCA* [2021] UKUT 0222 (TCC) the Tribunal referred to the fact that regulatory proceedings, particularly those where, as in this case, the Tribunal exercises a supervisory rather than a full merits jurisdiction, have significant differences from civil litigation. The Tribunal said at [88] and [89]:

> "88.We understand that the proceedings in this Tribunal are largely based on the adversarial tradition and that it is normally a matter of choice on the part of a party as to which witnesses it will choose to call. However, regulatory proceedings of this kind do have important differences from the usual adversarial processes of civil litigation. Tribunal proceedings are designed to be more informal and flexible than traditional court proceedings. It will be sometimes necessary for the Tribunal to perform a more inquisitorial role. That follows from the fact that the Tribunal is part of the regulatory process and in many respects stands in the shoes of the Authority when considering the subject matter of references.
>
> 89.In relation to a non-disciplinary reference, the powers of the Tribunal are more limited, and, as envisaged by s133 (6A) (c) FSMA, the Tribunal needs to consider the procedural and other steps taken in connection with the making of the Authority's decision. Consequently, the Tribunal's proceedings in such cases are very similar in character to judicial review proceedings. It is well established in such proceedings that a duty of candour on the part of a public authority is expected, it having been recognised that in such circumstances a public authority is not engaged in ordinary litigation but in a common enterprise with the court to fulfil the public interest in upholding the rule of law. That means that the Authority should assist the Tribunal with full and accurate explanations of all the facts which are relevant to the issues which the Tribunal must decide."

97. Of course, there may be a satisfactory explanation for the absence of particular potential witnesses. There may have been practical difficulties in obtaining evidence from Ms Thomson Bielmann and Mr Courrier, who we understand to be resident in Switzerland, but we had no explanation from the Authority as to whether they did at any stage consider seeking assistance from these potential witnesses in any respect. They would clearly have had highly relevant evidence to give.

98. However, that does not appear to be the case as regards Mr Narrandes and it is clear from the transcript of his interview with the Authority, which was in the trial bundle, that he had some recollection of dealing with Mrs Whitestone as regards issues arising out of the proposed arrangements with Mr Merinson.

99. Neither do we regard the absence of Mr Campeanu as being satisfactory.

100. It was Mr Campeanu who in an email dated 30 November 2012 sent to JBI's Money Laundering Reporting Officer what he described as a suspicious transaction report regarding the arrangements with Yukos and Mr Merinson. It was that email that led to JBI undertaking an investigation as to the arrangements with the assistance of external advisers and which ultimately led to the matter being reported to the Authority and regulatory action being taken against JBI as well as the Applicants.

101. The email stated that Mrs Whitestone "proposed a non-standard [Finder's] agreement for [Mr Merinson] in order to bring this business to [Julius Baer] (approx. USD400 million)". The email explained that:

> (1) the agreement with Mr Merinson involved Julius Baer paying 80% of its revenues from profits on introduced accounts to Mr Merinson when "our and industry standard is 25%".
>
> (2) Mr Merinson had been paid around USD 2 million "on the back of a series of large, one-off FX transactions for which [Julius Baer] took non-standard commission".
>
> (3) Mr Feldman (as opposed to anyone else within Yukos) had signed letters requested by BJB Compliance confirming that Yukos had no objections to Mr Merinson receiving Finder's fees.

(4) Mr Feldman had subsequently received a USD 500,000 loan payment from Mr Merinson from his personal account at Julius Baer.

(5) Mr Merinson had alleged to Mr Campeanu "that inside his company there are suspicions that he received a retro payment from [Julius Baer] and that this is a serious problem."

102. Mr Campeanu went on to say in his email that he suspected that:

(1) The payments to Mr Merinson and his Finder's agreement with BJB were in conflict with "our, Yukos's rules and legal requirements in the UK and [Switzerland]".

(2) Mr Feldman had a conflict of interest in the matter and his authorisation of Julius Baer's arrangements with Mr Merinson was "invalid".

(3) The payment to Mr Merinson and his Finder's agreement with BJB were not known to Yukos and that Mr Merinson was taking steps to attempt to hide the arrangements.

The email concluded:

> "I suspect that once DM's deal with JB is found out, we could be open to legal action from Yukos and in breach of FSA and FINMA regulations and potentially the UK Bribery Act 2010 …"

103. Earlier in the email, Mr Campeanu said that he had refused to endorse the deal and "was actively circumvented on this subsequently by [Mrs Whitestone] and my line manager (records will show I had no communications whatsoever)." He also said that he was overruled, and the deal was authorised by Mr Seiler.

104. However, the contemporary documentation shows significant involvement by Mr Campeanu in the arrangements, as explored in more detail later. In particular:

(1) In July 2010, in Mrs Whitestone's absence on wedding leave he was involved in the arrangements for the first inflow of funds which subsequently formed the subject of the First FX Transaction commenting on an email to Mr Seiler's then chief of staff, Mr Benischke that it was "great news" that Mr Seiler supported the case for the payment of a finder's fee of 70% of the first year's income on the account.

(2) In Mrs Whitestone's absence, Mr Campeanu completed the "Finder's Assessment Form" to set Mr Merinson up as a finder on the Yukos Capital account and signed it on her behalf, recording that Julius Baer undertook to pay Mr Merinson 25% of net income generated but did not record the "one-off" payment that had been agreed with Mr Merinson.

(3) Mr Campeanu personally approved the transfer of 50% of the First and Second Commission Payments paid to Mr Merinson to Mr Feldman in April 2011.

105. Furthermore, in January 2011, in the context of BJB Compliance's consideration of changes proposed by Mrs Whitestone to Mr Merinson's Finder's agreement, Mr Campeanu had discussions with Mrs Whitestone regarding the issues raised by Compliance. On 31 January 2011 in an email to Mr Seiler and his head of administrative support, Mr Schwarz, Mr Campeanu wrote that he had "checked the correspondence and file notes louise made in mycrm for the relevant meetings and discussions" and could "at this point find no reason to believe that there is anything underhand or improper going on." Mr Campeanu was therefore representing to senior management at that time that the transactions concerned were entirely proper and that he had personally examined whether there was any cause for concern, and concluded there was not.

106. Mr Campeanu was also the London leader of Julius Baer's Russia desk and as Mr Bates said in evidence, there were concerns about whether he was managing his team effectively, including Mrs Whitestone. Mr Bates gave evidence to the effect that Mr Campeanu should have addressed the role of Mr Merinson with Mrs Whitestone earlier.

107. It is therefore clear that Mr Campeanu's evidence would have been highly relevant to consideration of the Authority's case against all three Applicants.

108. In her evidence, Mrs Whitestone contended that she discussed a number of significant matters relating to the various transactions with Mr Campeanu, including the rationale given by Mr Feldman for the payment of Finder's fees to Mr Merinson and the split of the fees between Mr Merinson and Mr Feldman.

109. As Mr Strong submitted, Mr Campeanu's relevance to Mr Seiler's case is in relation to what Mr Campeanu's responsibilities were (as opposed to whether he complied with them), what Mr Seiler believed he was doing, and what Mr Campeanu told Mr Seiler.

110. Mr Jaffey submitted that it was clear that Mr Campeanu's evidence would be exculpatory to Mr Raitzin. He relies on the following matters:

(1) Mr Campeanu knew more about each transaction for which the Authority criticises Mr Raitzin than Mr Raitzin did.

(2) Mr Campeanu's email of 31 January 2011 demonstrates that he believed that there were no concerns with the transactions.

(3) Mr Campeanu needed to explain why it was not until after Mr Raitzin ceased to be in his role that he said there was any problem, concern or wrongdoing. The Authority's conclusion that Mr Campeanu's conduct did not justify regulatory action is powerful support for Mr Raitzin's case that he, working with less information, was not reckless. Mr Raitzin proceeded on the basis that Mr Campeanu was content with the matters concerned.

111. Mr George submitted that the Authority had sound, justifiable, reasons for choosing not to call Mr Campeanu because it did not believe that he could be tendered as a witness of truth and the Authority was therefore not prepared to rely on his evidence. Mr George also submitted that Mr Campeanu's evidence was not central to the case and he was peripheral to the transactions and not somebody who was consulted for material information by anyone making decisions or recommendations, that being Mrs Whitestone on each and every occasion. Mr George also observed that there was no property in a witness and none of the Applicants have themselves made any effort to call or compel Mr Campeanu which he says should be the beginning and end of any argument as to adverse inferences being drawn against the Authority because of his absence.

112. We do not accept those submissions. In our view, the observations made by the Tribunal in *Frensham*, as set out above at [96] are directly on point. As Mr Jaffey submitted, the public interest is served by the Authority calling relevant evidence before the Tribunal even if it might exculpate the individuals which the Authority believes ought to have regulatory action taken against them. In the light of the Authority's concerns that Mr Campeanu's evidence might not be reliable (and we fully understand why it has taken that view in the light of the inconsistencies between the position Mr Campeanu took in his email of 30 November 2012 and what he said to Mr Seiler in his email of 30 January 2011) it could have applied to the Tribunal for permission to treat Mr Campeanu as a hostile witness with the result that all parties could have cross-examined him. As Mr Jaffey submitted that would have enabled the Authority to make any submission it thought fit about his evidence, challenging Mr Campeanu as necessary, whilst ensuring the best possible evidence was before the Tribunal. We cannot of course be

certain that Mr Campeanu's evidence would have been exculpatory in relation to the Applicants, but it may have undermined the Authority's case.

113. Neither do we accept that it would have been practicable for any of the Applicants to have sought to compel Mr Campeanu to attend. There is no evidence that any of the Applicants had the means of contacting him. In any event, it is the Authority who has the burden of proof in these proceedings and should be seeking to assist the Tribunal by bringing to it all relevant evidence. We do not accept that Mr Campeanu's participation in the transactions was peripheral. Even though he was not involved to the extent of Mrs Whitestone, as we have described at [104] above he was involved at various critical points in the narrative.

114. Accordingly, where appropriate, and as indicated when making our findings of fact, we have drawn adverse inferences from the failure to call Mr Campeanu when considering particular matters where Mr Campeanu's evidence may have been relevant. For example at [355] we have given greater weight to Mrs Whitestone's evidence as to whether Mrs Whitestone had a conversation with Mr Campeanu in July 2010 when the possibility of the payment of a retrocession to Mr Merinson was being discussed. At [409] we have drawn an inference that it is likely that Mr Campeanu was aware of the change in the amount of the retrocession to be paid to Mr Merinson from 70% to 80% of the commission generated for Julius Baer.

The Authority's investigation

115. As we have mentioned above, the Authority's investigation has proved to be highly unsatisfactory in a number of important respects.

Delay

116. We accept the fact that the investigation into the Applicants could not realistically have been commenced prior to July 2016. JBI did not inform the Authority of Mr Campeanu's suspicious activities report until July 2014, and a criminal investigation was opened shortly thereafter and not concluded until July 2016 with no action being taken. However, during the period of that investigation the Authority was asked not to investigate any individuals although its investigation of JBI itself was able to continue.

117. Mrs Whitestone was put under investigation and interviewed shortly thereafter. Mr Campeanu was interviewed in April 2017. Thereafter, the investigation appeared to progress at a glacial pace. In our view, the lengthy delay since then is entirely attributable to the Authority.

118. As Ms Clarke submitted, the predominant reason for the excessive delay in this case was the failure of Enforcement to staff the case appropriately. Members of the case team including lead investigators and managers either left and were not replaced, or were re-allocated to other more "very high-profile" investigations. A new team had to be appointed in May 2018, who had to become familiar with all the material relating to the case. It appears that there has not been a single member of staff which has been with the case from the outset and, as Ms Clarke submitted, no continuity in the case team at all. Likewise, there has been no continuity with regard to the senior management responsible for the matter. In answer to a question from the Tribunal, Mr Neary said that there had been at least five Heads of Department responsible for the case since it started.

119. We agree with Ms Clarke that a delay of 5 years from the date that Mrs Whitestone was first notified of the investigation (12 September 2016) to the issuing of her Decision Notice (23 June 2021) is on any view unacceptable. Mrs Whitestone spoke movingly of the impact that the prolonged nature of the investigation and regulatory proceedings have had on her and her family life. Ms Clarke made powerful points to Mr Neary, from which he did not demur, as to

the stressful effect of the delay and the uncertainty inevitably created as to when it will all end. It appears to us that when such a situation arises, it is for the Authority to give serious consideration as to whether it is appropriate to continue with an investigation which it does not have the resources to complete within a reasonable period of time and where it has decided that its priorities for its limited resource lie elsewhere.

Disclosure failures

120. There has been a serious failure on the part of the Authority with regard to its disclosure obligations. It is clear that the constant changes in the case team and failures in the management of that team has been a major contributor to that failure. One result of that was the failure of the new team fully to appreciate what material was available for disclosure.

121. As we explain in more detail below, the investigation into the Applicants in essence relied on the material gathered by the Authority in relation to its separate investigation into JBI. That investigation commenced in 2015 and the outcome was a settlement of the regulatory proceedings brought by the Authority and the issue of a settled Final Notice to JBI in February 2022. That notice recorded that the Authority had imposed a financial penalty on JBI for failing (i) to act with integrity (based on the allegations made against the Applicants in these proceedings) (ii) to inform the Authority of Mr Campeanu's suspicious activities report before July 2014 and (iii) to have adequate policies and procedures in respect of JBI's use of Finders exacerbated by the control that functional line management within BJB exerted over the business conducted by JBI.

122. Following Mr Campeanu's suspicious activity report, JBI had commissioned two third party reports into the matters raised by Mr Campeanu, the first by Deloitte and the second by Eversheds. Those firms reported their findings to JBI in August and November 2014 respectively.

123. Mr Neary accepted in his evidence that in relation to the regulatory proceedings against the Applicants the Authority relied heavily on the material that was provided by JBI to Deloitte and Eversheds for the purpose of their investigations and, to supplement that, asked JBI to undertake various searches of email accounts. That material was requested, and provided, in the context of the investigation into JBI. It was therefore clear that the Authority carried out little by way of an independent investigation itself. The Authority did, however, obtain further documents through requests made to the Swiss regulator, FINMA.

124. The material provided to the Authority in 2015 included an index of documents that Eversheds had been provided with, but which did not form part of Eversheds' report but had been collated previously by JBI and reviewed by Eversheds in preparing its report. The Authority failed to ask for copies of that material at the time. In June 2020, during the course of the RDC proceedings, in response to disclosure requests from Mrs Whitestone's solicitors, Enforcement requested by telephone that JBI carry out searches for the specific categories of documentation that Mrs Whitestone's solicitors had requested. During that telephone call, Eversheds mentioned the index of documents referred to above. It appears that when told about the existence of these further documents during the call, the Enforcement case team did not realise that they already had a list of documents and that could have been saved on Enforcement's case management system. As a result, Enforcement requested a copy of the documents referenced in the index and these were then disclosed.

125. The documents disclosed in June 2020 included some highly material documents showing BJB Compliance involvement in August 2010, just after implementation of the First FX Transaction, and their knowledge of Mr Merinson's position as the Finance Director for Yukos International. As Mr Strong submitted, those documents demonstrate that Mr Seiler had no more information than BJB Compliance had regarding the relevant matters at that stage. In

addition, the documents disclosed show that senior people in BJB other than Mr Seiler and Mr Raitzin were considering whether Mr Feldman had a conflict of interest in relation to the First FX Transaction.

126. The Authority did not consider that these disclosures made any difference to the Authority's case or reconsider its position in relation to Mr Seiler and Mr Raitzin.

127. The most serious failure, however, did not emerge until well after the hearing of these references had concluded. The Tribunal had asked the Authority to prepare a list of the documents which had been subject to late disclosure. In the course of compiling that list, the emergence of a document which had not previously been disclosed prompted the Authority to conduct a further review of some (but not all) of the various tranches of documents disclosed by FINMA.

128. That exercise resulted in the disclosure of a highly material email which had been identified by the Authority twice, in 2016 and 2018, as a relevant document but had not been disclosed. It was not identified as a relevant document when the case was handed over to the new case team in 2018. The Authority says that was a "mistake".

129. The Authority says it has a process that should have corrected the mistake because a full disclosure review was undertaken from late 2018 to mid-2019 which ought to have identified the document as relevant and disclosable. However, the reviewer considering the document identified it as relevant but not undermining, and therefore not requiring disclosure, since the Authority was not relying on it.

130. As the Authority has accepted, the document is capable of undermining some parts of the Authority's case. However, because it was not identified to the team preparing the draft Annotated Warning Notices it was not identified to this team and they were therefore unaware of it.

131. Any reasonably competent and properly trained reviewer should of course have identified the document as being disclosable on the basis that it had the capacity to undermine part of the Authority's case. That is immediately apparent from reading the document. It is therefore extremely troubling that such a basic error could have happened.

132. The Authority has not explained why its processes failed and whether or not it considers it necessary to review those processes. This raises the question as to whether there was an effective secondary disclosure review under Rule 6 of Schedule 3 to the Upper Tribunal (Procedure) Rules 2008. In order to meet its obligations in that regard, the Authority should have conducted a comprehensive re-review of the materials it held by reference to the pleaded case of all the parties which might well have discovered the error.

133. The Authority simply asserts that having completed its latest review it does not consider that there is any appreciable risk that there are other further similar documents that should have been disclosed.

134. Regrettably, the Tribunal is not able to take that assurance at face value bearing in mind the multiple failures of the investigation in this case. The Tribunal cannot be satisfied that there are no other relevant documents that should have been disclosed.

135. In those circumstances, we have been cautious in drawing inferences as to what may or may not have happened in any particular circumstance where we are asked to draw an inference based on the fact that there is no documentary evidence to support a position contrary to the inference that we are asked to draw.

136. As to the document itself, we sought representations from the parties as to whether it should be admitted to evidence at this late stage and whether it was necessary or desirable for

parties to be cross-examined on it. That would be a highly unsatisfactory outcome but fortunately the parties agreed that it would be unfair on any party to take that course. Accordingly, we have not admitted the document but, in our findings of fact we have not made a finding which is contradicted by that document, and accordingly no party has been prejudiced as a result of our decision not to admit the document into evidence.

137. The Applicants made applications for their costs in dealing with that issue. We have jurisdiction to consider making a costs order where a party has acted unreasonably in the conduct of the proceedings. The parties came to an agreement on costs without the Tribunal having to decide on those applications.

Potential failure to gather relevant documents

138. It is highly likely that potentially there are documents which have not been made available to the Tribunal which are relevant to the issues in dispute, as Mr Neary conceded during his evidence.

139. Mr Neary confirmed that the Authority did not obtain a full set of documents considered by Deloitte and accepted that there were documents which were available but not known to the Authority and not considered until after the representations phase of the regulatory proceedings before the RDC commenced, such as Julius Baer's FX standard rate card, which was received in September 2020. Mr Neary also agreed that there was a failure to probe the evidence gathering and disclosure made by JBI, which was itself under investigation and that there were documents which should have been captured in the keyword search terms that were applied but that were not captured.

140. Mr Strong gave further examples of where the Authority's document gathering exercise failed to capture obviously relevant material, as admitted by Mr Neary as follows:

> (1) When searching for documents about Finder's arrangements, no search was conducted of Mr Narrandes's emails, despite it being accepted that he was a relevant person in JBI Compliance.
>
> (2) No documents were obtained from BJB Bahamas and no investigation was conducted into what BJB Bahamas Compliance knew of the Relevant Risks.
>
> (3) Although the Authority required emails showing what information Mr Seiler would have received in his capacity as a non-executive director, it did not require documents showing what he knew in his capacity as Market Head.
>
> (4) In any event, the keywords applied to identify documents mentioning Mr Seiler in his capacity as non-executive director omit highly relevant terms, including (but not limited to), Merinson and Feldman (and any variation of those), and Fair Oaks.
>
> (5) The searches that BJB carried out for FINMA (at the request of the Authority), for documents regarding the management of the Yukos accounts between January 2009 and April 2014, did not search the email boxes of (i) BJB Compliance; (ii) BJB Legal; (iii) BJB Business & Operational Risk; (iv) Mr Courrier or (v) Mr Nikolov, head of administrative support for Mr Raitzin, despite, as we shall see, these individuals being centrally involved in some of the key events.
>
> (6) When the interactions between BJB Compliance and BJB Business & Operational Risk came to light in June 2020, as detailed at [125] above, the searches which obtained those documents did not include some relevant material. For example, (i) Mr Baumgartner, Head of BJB Compliance, was not a custodian,

(ii) nor was Ms Thoma, the Head of the Booking Centre in Zurich, (who signed Mr Merinson's Finder's Agreement with BJB Zurich) or anyone from BJB Legal and (iii) the keyword searches were also insufficient, not including for example: Yukos, Fair Oaks, DM or DF (for Mr Merinson or Mr Feldman respectively).

Overall approach to the investigation

141. In essence, the Authority's case against the three Applicants has been derived primarily from its acceptance of the version of events put forward by JBI, as supported by the Deloitte and Eversheds investigations. As Mr Strong observed, when a firm is put under investigation and is keen to settle the matter and move on it is common for the firm to blame individuals who were no longer employed for serious misconduct and otherwise accept systems and control breaches. Although Mrs Whitestone was interviewed, Mr Raitzin and Mr Seiler were not. It appears that Mr Raitzin was prepared to be interviewed, but BJB imposed conditions that were not acceptable to the Authority. As far as Mr Seiler is concerned, he was not invited for interview until 5 June 2018. By that stage, the Authority was indicating that it expected to submit documents for legal review by the end of the following month, so there would have been little time for anything Mr Seiler said in an interview to be properly assessed as regards its impact on the Authority's case. In any event, Mr Seiler was working in Singapore at the time of the interview request, and it was not practicable for him to be interviewed at that time.

142. It is clear from the Final Notice issued to JBI on 10 February 2022 that there were serious issues with JBI's governance and its control environment in relation to the management and oversight of Finder's arrangements during the period which is relevant to the issues in dispute in this case, and the fact that the apparent fraud effected by Mr Feldman and Mr Merinson on Yukos was not prevented. Those matters, taken together with the serious failure by JBI to notify the Authority of Mr Campeanu's suspicious activity report for a period of nearly two years, clearly justified disciplinary action being taken against JBI as a firm and the imposition of a substantial financial penalty. As the Final Notice records, the Authority considered that the inadequate policies and procedures in respect of JBI's use of Finders permitted JBI to engage with Mr Merinson, Mr Feldman and Yukos in a way which meant there was a serious risk of JBI facilitating and/or itself engaging in financial crime.

143. However, the allegations regarding the activities of the Applicants in relation to the arrangements with Mr Merinson and Yukos could easily have been divorced from the allegations against the firm and investigated thoroughly and independently by the Authority, bearing in mind the clear conflict of interest between the interests of JBI and the three individuals. The failure to do so, has to put it mildly, put the Authority in a very awkward position with different findings against the Applicants as a result of the outcome of these references to those made in the JBI Final Notice.

144. A stark example of the Authority's failings was the embarrassing situation that the Authority found itself in as regards its allegations concerning the Third FX Transaction. In response to the original allegation in that regard in Mrs Whitestone's Warning Notice, in June 2020 her solicitors made a written disclosure request which included requests for disclosure of documents relating to the Third FX Transaction. Consequently, when disclosure of documents was made as a result of that request, that is the documents referred to at [124] above, the Authority realised that its case in respect of the Third FX Transaction was completely wrong. It attempted to recover the situation by substituting a completely different transaction as forming the basis of the Third FX Transaction. We consider the situation in more detail below, including the question as to whether it was open to the Authority to rely on a new allegation that was not set out in the original Warning Notice.

Mr Campeanu

145. All three Applicants were highly critical of the Authority's failure to investigate Mr Campeanu. They say that the fact that the Authority now says that Mr Campeanu cannot be relied upon to tell the truth under oath before the Tribunal makes it inexplicable that no steps have been taken to prohibit him from working in the financial services industry in the United Kingdom. Mr Neary accepted in his evidence that the Authority was of the view that there was ample evidence that he was reckless as to the truth of what he said during his interview with the Authority in April 2017.

146. It is clear that the reason that the Authority chose not to investigate Mr Campeanu was that given by Mr Neary in his evidence. Mr Neary said that it was considered that Mr Campeanu's email in November 2012 was the reason that any of the relevant events came to light. He also said that the Authority considered that Mr Campeanu was not the one who had given the approvals.

147. Of course, there is an important public interest in supporting genuine whistleblowers who act in good faith, as Mr Neary acknowledged. However, Mr Neary also acknowledged in cross examination that the Authority did not believe that Mr Campeanu had been acting in good faith and that his email was "not legally protected whistleblowing". That position is supported by the fact that Mr Campeanu was dealt with very gently in his interview. None of the documents that contradicted the position that he took in his suspicious activities report were put to him.

148. It cannot of course be the case that it is a defence for any of the Applicants to say that action should have been taken against others instead of, or in addition to, themselves.

149. Neither is it for this Tribunal to determine whether or not Mr Campeanu is fit and proper to work in the financial services industry. We have not heard from him and it would be unfair to come to any conclusion in that regard in his absence. Nevertheless, the reasons given by the Authority for not investigating, in the light of their belief that he was not truthful in his interview, was not a genuine whistleblower and could not be offered as a witness of truth in the Tribunal, must be questioned on rationality grounds.

Conclusions

150. Mr George fairly accepted in his closing submissions that the delays that have occurred were regrettable as was the failure to disclose the documents contained in the appendix to the Eversheds report.

151. However, Mr George submits that the evidence now before the Tribunal has been available to the Applicants for well over two years and that in reality, the evidence before the Tribunal was coherent, proportionate and fit for purpose. In such circumstances, and in particular in the context of the present prohibition orders, which seek to protect the public and the financial services industry from harm, the correct approach cannot be for the Tribunal to punish the Authority for historic shortcomings in its investigation by refusing to make findings it would otherwise be inclined to make on the evidence before it.

152. We accept that we cannot decline to make appropriate findings as a sign of our disapproval of the way the investigation has been conducted. We must decide the case on the basis of the evidence before us which relates to the matters referred. However, in circumstances where it is likely that there are gaps in the evidence, we must take that into account. In that context, where the Authority says that there is no documentary evidence to support whatever an Applicant is saying may or may not have happened regarding a particular event, or where the Applicant concerned says that an email was sent or a document existed, then there may be grounds for giving more weight to the Applicant's evidence that might otherwise have been the case in circumstances where a more thorough investigation had been undertaken.

153. In relation to the documentation showing the involvement of BJB Compliance which emerged in 2020, as Mr Strong submitted and Mr Neary accepted, in assessing whether a person's reaction showed a lack of integrity, it is relevant to look at how other people reacted at the time.

Documentary Evidence

154. In addition to the witness evidence, we had a number of bundles of documents provided by the parties in electronic form, much of it derived from the Authority's investigation. As indicated in this decision, we have relied on a significant amount of these documents in our findings, even where they were not specifically drawn to our attention by the parties during the hearing.

FINDINGS OF FACT

Swiss private banking for politically exposed persons and the use of finders

155. It is helpful to start with some background as to the manner in which Swiss private banks operated at the time of the events in dispute in these proceedings in the context of the services that they provided for politically exposed persons ("PEPs").

156. In his evidence Mr Raitzin gave a description of the role of private banks.

157. Mr Raitzin said that private banks during his professional career provided a bespoke service to individuals and companies that were not adequately served by the retail banking system, particularly those who had complex needs or were politically exposed. The charges agreed with clients were often substantial. This could reflect, to a lesser or greater extent depending on the client, the complex due diligence and anti-money laundering work needed to take on the client and the high cost of providing a bespoke specialist private banking service. It was, therefore, usual for private banks to charge larger fees than other banks. This is the model which was operated by all private banks in Mr Ratizin's professional experience, in Switzerland and elsewhere.

158. Mr Raitzin's evidence was that, for example, in the Relevant Period, Julius Baer typically sought to charge its clients 100 plus basis points a year in fees and commissions. For larger clients, it would be usual for Julius Baer to charge in the range of 60-80 basis points a year in fees and commissions. Complex transactions or higher risk clients that involved more detailed Compliance work, for example because they were PEPs, also justified the charging of higher fees. Ultimately, there was no upper limit on what Julius Baer could charge a client.

159. Mr Raitzin said that there was a historic cultural dimension that is important in understanding the Swiss private banking model when compared with that of larger retail banks. Historically, Swiss private banks offered their customers high levels of confidentiality. That confidentiality was used legitimately by customers, particularly those from less politically stable countries whose assets were, for example, at risk of confiscation. That way of working has slowly, but in his view rightly, begun to change following a settlement reached between UBS and the United States Department of Justice in 2009 pursuant to which UBS admitted to facilitating US tax evasion and agreed to pay a financial penalty of USD780 million. Mr Raitzin explained how he helped to initiate the necessary cultural change at Julius Baer, including investigating Julius Baer's conduct in relation to its US customers, as referred to at [91] above.

160. Mr Raitzin explained that the use of Finders was ordinary commercial practice in the Swiss private banking market in 2010 and was an important part of how the market operated. He said that Finders were seen as a perfectly legitimate means by which banks could generate new business. Finders would typically have an existing relationship with a client or prospective client of the bank and have a degree of influence over whether the client would entrust their

assets to the bank to manage for them, which, Mr Raitzin said, was the whole point of their use. Finders could often be professionals such as lawyers, but individuals who were not professionals could be (and were) registered with Julius Baer as Finders.

161. The use of Finders was a key part of the model for generating business at Julius Baer. Mr Raitzin recognised that the use of Finders was not without risk. The principal risk associated with their use was the potential for conflicts of interest. Mr Raitzin said that generally, he did not want there to be any more than six Finders per market, as his sense was that more than six was likely to be too many to oversee and to manage. Similarly, he said he was not interested in Finders who brought in less than CHF50 million because of the work involved in vetting them and overseeing the arrangements.

162. As Mr Jaffey observed, it was apparent that in 2010 thinking in the Swiss private banking market around the management of Finders' potential conflicts was not the same as it would be if a similar business model were used in the United Kingdom in 2023. Mr Bates gave evidence that the possibility that paying Finders' fees might be against the interests of the client, or provide an avenue for misappropriation, was not high on the agenda as a risk to look out for.

Julius Baer: relevant background

163. The Julius Baer Group undertakes private banking activities and is based in Switzerland, where its primary operating company is BJB, a Swiss entity which is regulated by the Swiss regulator, FINMA. Julius Baer also has a London based wholly owned subsidiary, JBI, which is authorised by the Authority to provide investment advisory and management services but is not authorised as a bank in the United Kingdom. Consequently, JBI's clients are also clients of BJB and it is BJB which provides clients with custodian, dealing and banking services via a number of branches or other subsidiaries around the world which are known as "Booking Centres". Relevant to these references is that those Booking Centres included Bank Julius Baer & Co Limited, BJB's subsidiary incorporated in the Bahamas ("BJB Bahamas") and BJB's branch in Switzerland.

164. There were two main aspects to the business of JBI. First, it employed a number of Relationship Managers who were responsible for bringing in new clients to Julius Baer and then managing those relationships. Among other things, that meant ensuring that the clients were happy with the service that they were receiving and introducing them to relevant business areas of Julius Baer in order to provide the services that the clients required. Secondly, JBI provided asset management and investment advisory services to its clients where those services were required. So for example, Mrs Whitestone was a Relationship Manager and did not become involved in providing investment advice or investment management services to clients. Insofar as those services were required from JBI the client would be introduced to the investment management and advisory team. Mr Porter worked on the investment management and advisory side, and, as we shall see, was introduced to Yukos by Mrs Whitestone. Although Mr Porter, at the relevant time, was responsible for the Private Clients Advisory team at JBI he had a dual function in that he also managed a number of client accounts as a Relationship Manager.

165. As previously mentioned, where the client required a service that was not provided by JBI, such as custody or the taking of deposits, then JBI's client would be introduced to the relevant Booking Centre.

166. When a JBI client opened a new account, it was the responsibility of JBI Compliance, as well as Compliance at the Booking Centre where the account was opened, to carry out appropriate know your customer and anti-money laundering checks. As we shall see, before certain high-risk clients could be taken on, enhanced due diligence and approval of senior management outside London was necessary. That applied to Yukos.

167. During the Relevant Period, JBI was a relatively small office, having around 40 employees.

Yukos: relevant background

168. The Yukos Group comprises a series of holding companies incorporated in various jurisdictions which own the residual non-Russian assets of the Russian oil group of the same name. Yukos fell out of favour with the Putin regime. Its assets (but not Yukos itself) were nationalised in 2006 and most of those assets ended up in the hands of Rosneft, the Russian state-owned oil company.

169. Since that time, there has been extensive litigation and arbitration worldwide with Yukos being generally successful obtaining large judgments and awards as it sought to recover its assets. Enforcement proceedings were brought in the Netherlands and the United Kingdom when the Russian courts purported to set aside arbitration awards or refused enforcement of judgements. We were also told that the European Court of Human Rights awarded Yukos €1.86 billion.

170. During the time when Mrs Whitestone acted as JBI's Relationship Manager for Yukos, it held a number of accounts in the names of its various subsidiaries, including:

(1) Yukos Capital SARL ("Yukos Capital"), a company incorporated in Luxembourg, which opened accounts with: (i) BJB Switzerland in November 2009 and (ii) BJB Bahamas in July 2010. The immediate parent company of Yukos Capital is Yukos International UK BV ("Yukos International"), a company incorporated in the Netherlands. Yukos Capital and Yukos International hold the monies recovered (primarily through litigation) for the benefit of Yukos's shareholders. It was common ground, as known to the Applicants, that in due course, those profits were to be distributed to Yukos's shareholders. For instance, when approval was sought for the opening of an account for Yukos International with BJB it was stated that the assets on the account would be managed for the surviving corporate structure of Yukos for the benefit for all original investors who were considered to be "the beneficial owners on the account by the virtue of holding stock". Mrs Whitestone was the Relationship Manager for these accounts.

(2) Yukos Hydrocarbons Investments Limited ("Yukos Hydrocarbons"), a company incorporated in the British Virgin Islands, which opened accounts with: (i) BJB Singapore in 2008 for which Mr Campeanu was the Relationship Manager and (ii) BJB Guernsey in July 2011for which Mrs Whitestone was the Relationship Manager.

(3) Fair Oaks Trade and Investment Limited ("Fair Oaks"), a company incorporated in the British Virgin Islands, which opened an account with BJB Bahamas in September 2010. Mrs Whitestone was the Relationship Manager for this account.

171. The Annex to this decision sets out the structure of the relevant Yukos Group entities and the accounts held by those entities.

172. Mr Merinson was a Yukos employee throughout the period of JBI's relationship with the Yukos Group Companies. He was described by Mrs Whitestone as the *"*Chief Financial Officer" of Yukos Capital and Yukos International. Mr Feldman was the sole director of Yukos Capital, and one of four directors of Fair Oaks and Yukos Hydrocarbons (the others being Messrs Harlan Malter, Sergei Ketcha and Cleanthis Georgiades).

173. Yukos was rightly treated by BJB as a high-risk client and a PEP. As Mr Jaffey observed, any bank to Yukos would have to be willing to accept the hostility of the Russian Federation, be able to maintain a high level of confidentiality, not be conflicted by work for other Russian

clients and be willing and able to hold and transact funds which the Russian Federation considered had been improperly taken from it.

174. Furthermore, as Mr Porter said in his evidence, Yukos adopted a conservative investment policy which requires skill and expertise to execute with substantial work to run the portfolio.

175. We accept, as Mr Raitzin stated in his evidence, that the high level of complexity and risk associated with acting for Yukos would be reflected in the fees charged. As Mr Raitzin's unchallenged evidence demonstrated, a number of private banks were unwilling for Yukos to open accounts with them because of the adverse position that Yukos had taken regarding the Russian State and that in some instances other banks had even closed Yukos accounts for this reason. Accordingly, Yukos was willing to pay substantial fees for its private banking services because of the highly pressurised political context in which it was operating and the limited number of banks willing to take on its business. As Mr Raitzin said, the political sensitivity associated with the relationship was why Ms Carolyn Thomson Bielmann, a very senior member of BJB Compliance who held the position of Head of Anti-Money Laundering and Sensitive Clients, was assigned responsibility for monitoring the relationship.

Julius Baer's management structure and reporting lines

176. The transactions which are the subject of these references arose out of business generated by Mrs Whitestone in her capacity as a Relationship Manager employed by JBI in London in respect of which she was approved by the Authority to perform a controlled function, namely the CF 30 (customer) function. Mrs Whitestone was therefore subject to the procedures and policies of JBI which in turn was also subject to the Authority's regulatory requirements as a firm authorised by the Authority.

177. Mrs Whitestone was employed as a Relationship Manager on JBI's Russian and Eastern European Desk from 5 January 2009 until 28 November 2012, reporting to Mr Campeanu. The Russian and Central and Eastern European Desk reported to JBI's Management Committee. Members of that Committee included Mr Bates, who was JBI's Chief Operating Officer, responsible for ensuring that the right platforms, systems and other controls were in place, and Mr Daniel Gerber, JBI Chief Executive to whom Mr Bates reported.

178. Mr Bates had, among other things, responsibility for JBI Compliance. The head of compliance, who from 2010 was Mr Allan Dampier, reported to Mr Bates. Working with Mr Dampier, Mr Bates introduced a conflict of interest policy and an anti-fraud policy specific to JBI. These policies were included in JBI's Operations Procedure Manual which made it clear that the obligation to comply with that manual was part of an employee's employment contract.

179. JBI Compliance had responsibility for conducting due diligence on new clients and updating know your customer information on new clients taken on by JBI, each client requiring a JBI Compliance sign off.

180. However, JBI was also subject to a large extent to Julius Baer Group policies and procedures, which had to be implemented locally. Furthermore, JBI operated a "matrix management" structure. Under this structure, JBI's employees had a reporting line to local line management at JBI, as well as a functional reporting line to a regional head at BJB. JBI's Board was composed of a mixture of JBI senior management and BJB Regional Heads who acted as non-executive directors. In this structure the Management Committee of JBI also reported to a BJB Regional Head and required in relation to some matters approval from BJB Regional Heads who also sat on JBI's Board as non-executive directors and were superior within the JB Group structure.

181. As a result of these arrangements, as we shall see, Mr Seiler, as the Russia and Central and Eastern Europe Market Head, was required to give approval for certain matters relating to

JBI's clients who were connected with Russia and Mr Raitzin, as Region Head for the region that included Russia, made certain decisions relating to clients connected to Russia.

182. Therefore, the JBI Russia and Central and Eastern European Desk had a functional reporting line to BJB in Zürich. Both Mr Seiler and Mr Raitzin gave evidence to the effect that was only in relation to more strategic matters, an issue that we will return to later. Because of functional reporting lines, Mr Campeanu had a "solid" reporting line to JBI's Chief Executive, initially Mr Gerber and subsequently Mr Bates, and a "dotted" reporting line to Mr Seiler. In turn, Mr Seiler reported to Mr Raitzin on such matters.

183. As found by the Authority in the JBI Final Notice, in the matrix management structure, as it existed during the Relevant Period, JBI senior management had responsibility for, amongst other things, ensuring compliance with UK regulatory requirements and providing oversight of JBI's business activities; BJB Regional Heads had responsibility for, amongst other things, business units meeting quantitative targets (for example, amount of net new money, assets under management and revenue generated by the business units within their region) and determined the remuneration of JBI staff within their region. This separation of responsibilities meant that the functional reporting line might make decisions regarding JBI's business without giving proper regard to UK regulatory standards. As a consequence, although JBI senior management had responsibility for ensuring compliance with UK regulatory requirements, they failed to do so leading to the disciplinary action described in the JBI Final Notice.

184. In November 2009, JBI recorded in its Index of Conflicts of Interest that the dual reporting lines meant one reporting line may not receive adequate management information "compromising [their] ability to meet their responsibilities" and "may be viewed as "lesser" reducing their ability to meet responsibilities".

185. In a BJB memo dated 7 June 2010 it was noted that JBI Relationship Managers "report primarily to their Region Heads and only secondly to the local management … This set-up might lead to a conflict of interest between the adherence to local regulations and the achievement of quantitative objectives". The recommendation was that local line management's authority in enforcing relevant compliance regulations should be strengthened. That memorandum itself indicated the confusion that prevailed within the business in that it wrongly stated that the solid reporting line went to the respective Region Head to set the individual objectives which are relevant for the Relationship Manager's financial compensation with the functional reporting line being to the Head of the legal entity who is responsible for ensuring compliance with local regulatory standards for the whole business generated by the entity. As described at [182] above, the opposite was the case.

186. As a Julius Baer Group Internal Audit Report for JBI dated 4 January 2011 observed, the complex management reporting structure of the business in conjunction with the dual management oversight hindered clear ownership of responsibilities or procedures for the escalation of issues, such as the acceptance of new clients of risk countries without timely involvement of local management.

187. Mr Bates's evidence confirmed that in practice the formal structures put in place were not respected. He said that in practice there was more of a "dotted" reporting line to him rather than a "solid" line. He said that a lot of the problems that JBI had with matrix management was that whilst he would have hoped and expected to have a solid reporting line to him locally and a dotted functional line going to Zürich, the opposite was felt to be true. It appears that there were particular difficulties with the Russia and Central and Eastern European Desk with members of that team dealing with and obtaining approvals from Zurich rather than first obtaining approvals locally, resulting in local management not being aware of what was

happening at the local level. We return to those issues later when considering the particular transactions with which these references are concerned.

188. According to the formal structures put in place, Mrs Whitestone should have been reporting to her direct line manager, Mr Campeanu, in respect of day-to-day operational matters. She had no direct or dotted reporting line to Mr Seiler. Accordingly, it was the responsibility of Mr Campeanu to report to Mr Seiler when appropriate in respect of strategic and business matters, which Mr Seiler would need in appropriate circumstances to escalate to Mr Raitzin. That, in particular, applied to matters which under the structure required Mr Raitzin's approval. In other words, the structure envisaged that when approval of the more senior managers was required, the matter should be escalated via the reporting lines and not directly to the senior manager concerned.

189. Therefore, matters regarding JBI clients, such as the decision to take on clients or the undertaking of due diligence, should initially be dealt with under the supervision of local management, involving local Compliance where necessary, before the matter was escalated up the functional reporting chain when the procedures necessitated the involvement of the managers in the functional reporting line. For example, the Julius Baer Private Banking Client Acceptance Policy dated 30 January 2009 stated, in respect of clients associated with risk countries (including Russia) that the daily monitoring of business relationships with such clients was the responsibility of the Relationship Manager and his/her superior.

190. It was clear that both Mr Bates and Mr Seiler were aware that the local reporting lines were not being respected in practice. Mr Bates's evidence was that JBI managers were constantly reminding the JBI Russia and Central and Eastern European Desk to respect local reporting lines. Mr Seiler's evidence was that he discouraged Mrs Whitestone from bringing operational matters to him rather than first raising them with local management. There is no documentary evidence to that effect, but in our view it is most likely that such matters would have been raised informally without being put in writing. It is clear that Mr Seiler was irritated by receiving detailed information and requests directly from Mrs Whitestone. For example, in an email dated 31 January 2011 to Mr Campeanu Mrs Whitestone observes that Mr Seiler's "main issue" was that she wrote everything in so much detail that he did not have time to read it all.

191. It was clear that responsibility for enforcing the reporting lines lay with the senior management of JBI. They were the ones responsible for supervising and managing the team on the JBI Russia and Central and Eastern European Desk. Mr Bates's evidence was that they were constantly reminding people that those with responsibility on a local level needed to go through local compliance and local management to get things approved. Again, there is no documentary evidence of this. However, in our view the reason for that is because it would be expected that such matters would, initially, be raised informally by telephone or in direct conversations. When such informal warnings did not have effect, it would then fall to senior management to consider whether more formal warnings needed to be given, possibly involving the Human Resources team. However, consistent with the Authority's findings in relation to JBI that its management was weak, the plausible explanation is that these informal warnings were never followed up.

192. As far as Mr Seiler is concerned, he had no line management responsibility for operational matters at JBI. Mr Raitzin's evidence was that Mr Seiler was non-confrontational by nature and that Mr Raitzin had to coach him in conflict management. Accordingly, there was nothing in the management structure to suggest that Mr Seiler had responsibility for dealing with failures to follow the reporting lines and he was a person temperamentally inclined to avoid confrontation. Therefore, in so far as he was aware that this was happening, the

obvious thing for him to do would be to raise the matter informally with those who had line management responsibility in London, either Mr Gerber, Mr Bates or Mr Campeanu. Indeed, Mr Bates accepted in his oral evidence that it was "possibly the case" that Mr Seiler told him that Mrs Whitestone was communicating directly with him when there is no need to do so because she had her own manager in London. Mr Seiler's oral evidence, in response to Ms Clarke's questions in cross examination to the effect that he never raised these issues was that he did raise them with either Mr Campeanu or Mr Gerber. We accept that it is likely that he did so and that these matters were not followed up by those who had responsibility to deal with them. Mr Seiler said in his witness statement that it is likely he did raise the issue directly with Mrs Whitestone on occasion, but he did not repeat that in his oral evidence. In view of what we have said as set out above, we think it is unlikely that he did so or, if he did, it is likely that he did not do so in a way that would have clearly indicated that he was instructing her not to approach him directly in respect of matters which should go through her line manager.

193. As a consequence of the lack of clarity in reporting lines and ineffectual attempts to enforce them, in our view it would not appear to Mrs Whitestone that in all circumstances she had to clear matters with local management before discussing issues directly with either Mr Seiler or Mr Raitzin. As we discuss later, she was ambitious and keen to make an impression with senior management, as both Mr Seiler and Mr Raitzin stated, and that will explain why in some instances she took matters directly to them without first seeking local approval. The fact that she was not seriously discouraged from doing so for the reasons we have stated would no doubt have emboldened her to continue to do so. Furthermore, as mentioned later, her relationship with her line manager, Mr Campeanu, became increasingly fractious and ultimately broke down completely. We accept that in those circumstances reporting directly to Mr Campeanu became correspondingly difficult.

194. Furthermore, there was nothing in Mrs Whitestone's contract regarding reporting lines but she can recall on her induction being told by Mr Campeanu that it was more important to report to Mr Seiler as a Market Head than it was to report to Mr Gerber as the Chief Executive Officer of JBI.

195. It was undoubtedly the case that Mrs Whitestone was given mixed messages as to the reporting lines. The matrix management system did undoubtedly cause confusion and uncertainty as regards who had ultimate responsibility for decision-making and, as will become apparent as we review events that took place during the Relevant Period, Mrs Whitestone would consistently approach Mr Seiler and Mr Raitzin directly on matters without there being serious attempts to dissuade her from that course. As we have also said, Mrs Whitestone was keen to impress her superiors as to the work that she was doing and in the absence of being specifically prevented from doing so, it is likely that she considered that it was in her interest to continue to have a dialogue directly with more senior members of the management team. This is also consistent with Mr Campeanu's reference to the need to prioritise relationships with the business heads rather than local management.

Relevant Julius Baer policies and procedures

Account opening

196. Julius Baer had enhanced due diligence, approval and oversight requirements in respect of certain "high risk" clients. The relevant policy was Julius Baer's Private Banking Client Acceptance Policy which applied to all Julius Baer entities worldwide, and was supplemented by the operational guidelines for cross unit relationships between JBI and BJB (the "Cross-Unit Operational Guidelines") and the JBI Operations Manual. The Cross-Unit Operational Guidelines dealt with the situation where the client's assets were booked with a Booking Centre

and the client was managed by a Relationship Manager in a subsidiary in another location. That was the case with Yukos.

197. The JBI Operations Manual stated that it was the responsibility of the relevant Relationship Manager to undertake the necessary verification of the client, including the necessary know your customer information, and then seek approval for the opening of the account at the appropriate management level.

198. Julius Baer's Client Acceptance Policy identified various categories of "high risk" clients, which included: (i) clients originating from, residing in, or maintaining business associations with a risk country ("risk country clients"), where risk countries were identified by the location and/or associations of the client, and not where the relevant bank account was opened; and (ii) clients intending to place assets with Julius Baer of an overall size exceeding CHF 50 million ("large clients").

199. As Mr Seiler accepted, where clients were associated with a risk country, such as Russia, the Market Head (Mr Seiler in this case) needed to approve the account opening. The Cross-Unit Operational Guidelines provided in relation to sensitive clients that the local compliance officer would conduct a compliance assessment on the relationship with a copy of the know your customer documentation being kept locally and following the obtaining of the relevant approvals at the location, the documentation would be forwarded to the Regional Head of Private Banking and subsequently to those in Compliance responsible for sensitive clients who would submit the application to the Head of Private Banking in Switzerland.

200. These guidelines made it clear that enhanced due diligence should be conducted for each relationship and the information recorded accordingly in Switzerland. At the booking centre the relevant Compliance Officer would conduct an additional "Compliance Assessment" for each relationship with regard to completeness and plausibility and carry out additional investigations as necessary. Insofar as there was any disagreement between the Market Head and Compliance in the decision as to whether to open an account, the approval of the Region Head (in this case, Mr Raitzin for most of the Relevant Period) was also required. For large clients, the Region Head (again, Mr Raitzin in this case) needed to approve the account opening.

201. In respect of risk country clients, the Client Acceptance Policy also provided that, once accepted, while the "daily monitoring of such business relationships is the responsibility of the Relationship Manager and his/her superior", the "results of this monitoring process must be recorded in an appropriate form and reported to the corresponding Market Head, Region Head and where necessary the CEO BJB". The Relationship Manager was also required by the Policy to report to the Market and Region Head any "unusual or suspicious developments of the business relationship on a case-by-case basis e.g. changes to contact persons, significant changes in the size of an account, special non-standard transactions, etc", and that the Region Head received a monthly report on risky clients opened during the relevant period.

202. The Yukos entities, as the Applicants accepted, were high risk clients as they were both associated with a high-risk country (Russia) but also entities that were anticipated as placing assets significantly exceeding CHF 50 million (where, for example, the First FX Transaction transpired to be USD 422 million).

Finders Policy

203. During the Relevant Period, Finders (also known as introducers) had for many years represented a well-established means of attracting new business to private banks in Switzerland. Their role was to introduce potential clients to the bank in return for remuneration. Most Finders had some relationship with the clients that they introduced, which meant, as Mr Fellay said in his evidence, that they would have, to a greater or lesser extent, some influence over whether the client invested with Julius Baer. Mr Seiler said that he would not have found it surprising that a Finder was close to and had some form of advisory or consultancy relationship with clients they introduced, and that was confirmed by each of Mr Raitzin, Mr Porter and Mr Fellay. As a consequence, as referred to later, the standard form of Finder's Agreement used by Julius Baer required disclosure of remuneration by the Finder to the client and expressly permitted Julius Baer to make similar disclosures.

204. The use of Finders was an operational matter for individual Relationship Managers and their Team Heads. Mr Seiler's unchallenged evidence was that when a Relationship Manager wished to make use of a Finder, they had to obtain approval from their local management and Compliance Department, and, if different, from the Booking Centre which was to enter into the Finder's agreement. There was a team within the Finance Department in Zurich responsible for Finders. From 2010, Mr Courrier was Head of External Asset Managers and Finders for Latin America and other areas. It appears that during Mr Raitzin's period as Region Head for Russia, Central and Eastern Europe Mr Courrier had responsibility for Finders in that region. Mr Raitzin's unchallenged evidence was that he appointed Mr Courrier to this role as he considered his skill set ideally suited to overseeing and formalising the Finders arrangements within the Region for which Mr Raitzin was responsible. At that time, Mr Raitzin was the only Region Head who sought systematically to formalise arrangements with Finders by appointing a single individual with that responsibility. Prior to that, responsibility for Finders fell to each individual Market Head.

205. Arrangements with Finders at Julius Baer were governed by an internal policy and framework which applied globally. By that framework, in order to introduce a new Finder to Julius Baer, Relationship Managers were required to prepare extensive due diligence information and to liaise with members of the senior management, compliance, legal and finance teams for approval.

206. From June 2010, Julius Baer adopted a "Cooperation with Finders" policy ("Finder's Policy"). This contained a standard Finder's agreement for use by those working with Finders at Julius Baer. That agreement, which applied globally, stated that it did not establish any kind of employment relationship between Julius Baer and the intermediary, who is stated to be independent, acting exclusively in his own name and at his own economic risk. The agreement also made provision for standard remuneration for Finders. It is to be noted that the agreement made no mention of the identity of any particular clients to be introduced, and the Finder's assessment form to be completed did not call for any information about potential sources of business to be introduced. The agreement simply recited that the Finder intended to introduce private investors to Julius Baer from time to time as potential clients. Clearly, any clients introduced would be subject to Julius Baer's Client Acceptance Policy. The Finder had to hold a personal account with BJB. As Mr Jaffey observed, that would enable initial and continuing oversight and visibility of where any funds paid to a Finder went.

207. The Finder's Policy provided that contracts with Finders were required to be in writing, absent which no remuneration was to be paid to a Finder. The Market Head (i.e. Mr Seiler in respect of Finders in the Russia and Central and Eastern European region) had to be informed of the signing of a contractual agreement with a new Finder, while the Region Head (i.e. Mr

Raitzin in respect of Finders in the Russia and Eastern European region during the Relevant Period) had authority to overrule any veto of a Finder by Finance, Legal or Compliance. Any variations from the standard Finder's agreement had to be screened by Legal and Compliance and approval was required from both the Finance Department and the relevant Region Head; similarly, where a Finder was to be granted higher than standard commission rates, decision-making authority vested in the Region Head.

208. Consistent with Mr Seiler's evidence as to the involvement of local Compliance, both Mr Gerber and Mr Dampier confirmed to the Authority in interview that JBI Compliance would conduct due diligence on new Finders. Mr Gerber stated that he expected that this review would help flush out any conflict issues, and Mr Dampier said that he expected that this, combined with an annual review by JBI of all clients, including Finders, would identify who the Finders really were and any relevant connection with the client(s) being introduced. Mr Narrandes confirmed to the Authority in interview that the local compliance review was expected to identify any conflict issues and would be conducted before the Finder's arrangements were passed to JBI's senior management.

209. Under the Finder's Policy, it was the right of the Finance Department to veto a new relationship with a Finder if the relationship was not consistent with business policy. The Policy stated that "Finance calls attention to risks and may consult [Legal and Compliance] to assess a particular case". It required the Relationship Manager to submit a "Finder's Assessment Form" to the Finance Department for assessment. That form required the Finder's CV to be provided. As Mr Seiler observed, that would have enabled the Finders' Team to raise a red flag if a Finder was seeking payment for introducing his or her own employer. The Finance Department would in turn decide whether Legal and Compliance, or input from other departments was required. Ongoing monitoring of the Finder relationship was the responsibility of the Finance Department and the Relationship Manager.

210. Under the Finder's Policy, there were a number of standard remuneration models used by Julius Baer for Finders over the relevant period.

(1) A net income model, by which a fixed share of "up to 30%" of the annual net income generated from the newly introduced client was payable to the Finder over a maximum of 10 years. Net income included all fees generated by Julius Baer from services, such as recurrent fees (e.g. for account operation) or brokerage fees, less any costs arising in carrying out the bank's mandate. On the standard model (i.e. unless an exception was approved by Mr Raitzin) the net income on which commission was paid to Finders did not include any margin charged on FX trades.

(2) A net new money model, by which a fixed percentage of the net new money (i.e. all flows into the bank, excluding loans) was paid to the Finder in two instalments over two years. For money under discretionary management, remuneration could not exceed 1.5% of net new money. For money under advisory management, remuneration could not exceed 0.75% of net new money. Under this model, the Finder's remuneration was not adjusted according to the fees levied on the client by the bank. Instead, the bank simply paid the fee to the Finder, effectively accepting the risk that it might or might not make sufficient money from charges over the ongoing relationship to justify this.

(3) An assets under management model, by which a fixed share of up to 0.2% of the assets under management (i.e. all bankable assets managed by or deposited with Julius Baer) generated from the relationship was paid to the Finder, over a maximum of 10 years.

211. The JBI Final Notice found serious deficiencies in JBI's policies and procedures regarding the use of Finders. These findings include:

(1) JBI provided no rules or guidance as to the circumstances in which it might be inappropriate for a Finder's agreement to be established (as a result of conflicts of interest or otherwise).

(2) Nothing in the Finder's Policy or elsewhere was sufficient to effectively identify the risks and therefore enable JBI to identify and manage any conflicts of interest or financial crime risks.

(3) JBI relied on the account opening processes to identify any issues arising from a Finder relationship, but this was not sufficient to effectively identify the risks and therefore enable JBI to identify and manage any conflicts of interest or financial crime risks.

(4) In practice the account opening processes were not sufficient in identifying risks from Finders' relationships.

(5) The provisions for ongoing monitoring of Finders' relationships were limited, and the Authority found no evidence that systematic reviews were in fact undertaken.

(6) The Finder's Policy contained an undertaking on the part of the Finder that the Finder (and not Julius Baer) would notify potential clients of the existence and content of the Finder's agreement and in particular the remuneration received by the Finder rather than imposing an obligation to ensure that clients had in fact been informed of and consented to the arrangements with Finders or any payments being made.

Conflicts of Interest Policy

212. During the Relevant Period as well as a Julius Baer Group Conflicts of Interest Policy there was a JBI Conflicts of Interest Policy. Employees of JBI were subject to both policies.

213. Both these policies were drafted in very general terms and gave little specific guidance to employees as to how to identify conflicts. Both policies define a conflict of interest as those actual or potential situations where Julius Baer's own interests or activities may be, or appear to be, adverse to those of a client or where Julius Baer's interests or activities in relation to one client may be, or appear to be, contrary to the interests of another client.

214. There is no specific reference to conflicts of interest that may arise as a result of engagement by Julius Baer of a Finder. In particular, nothing is said about the obvious conflict that arises as a result of the Finder being remunerated by Julius Baer in return for the introduction made to the bank by the Finder and how that conflict should be managed. Clearly, the recommendation that the Finder makes to its client to use Julius Baer's services as opposed to the services of any other bank could be influenced by the rate of remuneration being offered by the banks in question. Neither does the Finder's Policy say anything about that issue. The closest it gets is a statement in the JBI Conflicts of Interest Policy which identifies as a type of conflict that may arise that a person "directly or indirectly linked" to JBI has an interest in the outcome of the service provided to the client or other transaction carried out on behalf of the client, which is distinct from the client's interest in that outcome. Clearly, it could be argued that a Finder is "linked" to JBI by virtue of the Finder's agreement, but we doubt that a relevant employee, such as a relatively inexperienced Relationship Manager, would appreciate from that statement that there was potential conflict between the interests of the Finder and the interests of the client. Obviously, that conflict is heightened where the Finder is an employee or otherwise closely connected to the client.

215. That there was no clear guidance within Julius Baer on this issue is demonstrated by the different positions taken by Mr Seiler and Mr Raitzin.

216. The policies say that all employees are tasked with an ongoing responsibility to identify and appropriately respond to conflicts of interest. If there is no specific policy in place for managing an identified conflict of interest, the employee was directed to refer the conflict of interest to their local Legal and Compliance department for assessment and guidance.

217. Mr Seiler and Mr Raitzin accepted that the employee of a client could not be a Finder, in the light of the obvious conflict of interest that would arise. Mr Seiler drew a distinction between employees and consultants, the latter of which he said he considered acceptable in some instances but not others. In particular, Mr Seiler considered that a Finder relationship would not be appropriate if the Finder was responsible for guiding clients as to where to place their funds. Mr Raitzin did not accept that position. He said it would be appropriate provided the client had consented to the arrangement. Both Mr Seiler and Mr Raitzin accepted that it would not be acceptable for a Finder to be an employee of a client who was a wholly owned subsidiary of the potential Finder's employer.

218. However, it is of course the case that if in full knowledge of all the facts the client gives its consent to the Finder being remunerated by the bank, even in circumstances where the Finder has a close connection to the client, either as an employee of the client or a connected company, then there is no reason why such an arrangement could not be approved, subject of course to the bank's own policies in that regard.

219. Mr Bates's evidence, which we accept in the light of what was said at the time in the various policies as set out above, was that in 2010 the possibility that paying Finder's fees might be against the interests of the client was not high on the agenda as a risk to watch for nor was the risk that a director of a client company might be acting in breach of his duties in approving Finder's fees. We note that those issues were addressed in the Finder's policy that was adopted in 2014. The JBI Final Notice noted that it was not until May 2014 that JBI put in place specific policies and procedures in relation to the on-boarding and on-going management of Finders and that JBI had a limited role in relation to the management and control of Finders' relationships.

Other relevant procedures

Recording of telephone calls

220. Although, in accordance with common practice, all calls made on JBI lines would be recorded and the recordings made available to line management and Compliance, in addition the JBI Operations Manual provided that all client visits and key telephone calls must be recorded in detailed file notes which are kept on the computer network with a hard copy being kept on the client file. Mrs Whitestone's evidence was that her understanding was that there was no requirement to make a specific contact report unless a transfer or trade instruction was involved or changes to the investment portfolio or the mandate were being made. She said it was not realistic for her to provide a transcript of every conversation she had with a client. She referred to the fact that as the telephone calls were being recorded the recording was a record of the communication. There was clear evidence that Compliance did from time to time listen to telephone calls that took place with clients. Mr George in cross examination sought to criticise Mrs Whitestone for not making written records of conversations with clients, as required by the JBI Operations Manual, and suggested that she failed to make such records in order that a full account of her dealings with Mr Feldman and Mr Merinson were not recorded.

221. We do not agree with that suggestion. In view of the fact that telephone calls with clients were routinely recorded, it would have been a risky strategy for Mrs Whitestone to rely on the fact that nobody would check what was said in a telephone call if an issue arose. We think her explanation that in general a written record of a telephone call was not required unless it

involved important matters such as the examples referred to at [220] above is plausible and that in practice the requirements of the JBI Operations Manual were interpreted in that way.

222. That is confirmed by Mr Bates's evidence. He said in his witness statement that it was JBI policy that any material interaction with the client where advice was given or any material changes were made to the account needed to be recorded on a file note, referring to the JBI Operations Manual as authority for that proposition. Mrs Whitestone also referred to occasions when she was specifically asked to make a record of a telephone call with a client, such as when Ms Thomson Bielmann specifically asked her to make a record of a conversation with Mr Feldman in September 2010. It is important to remember that busy bankers, particularly more junior ones, do not have the same discipline of litigation lawyers in making sure that prompt and full records of all telephone conversations are committed to writing. Consequently, we do not give significant weight to the fact that not every conversation Mrs Whitestone had with representatives of Yukos was reduced to writing.

MyCRM

223. Mr Bates gave evidence as to a client relationship record keeping system, known as MyCRM, which he initiated on joining JBI. This system provided one central client record that could be used from account opening onward to oversee and monitor clients. Mr Bates confirmed Mrs Whitestone's evidence to the effect that JBI Managers and Compliance would have had access to her records in MyCRM so that they could see what had been recorded in respect of her client accounts. Once Mrs Whitestone acquired her own assistant, Ms Melanie Denman, in January 2010, Ms Denman from time to time as well as Mrs Whitestone herself would upload contact reports and other client communications and documents into MyCRM.

Dealing with US persons

224. As we referred to at [91] above, Julius Baer had run into serious regulatory problems with the US authorities. Following this, Julius Baer adopted a Group-wide policy that it would not accept US nationals as signatories on client accounts where the proposed signatories were on US soil. As we shall see later, this affected the way in which Julius Baer was able to accept instructions from Mr Feldman, a US person, in relation to the operation of Yukos Capital's account. As Mr Raitzin recognised, taking on a client where, as with Yukos Capital, there was a single director who was resident in the United States was particularly challenging when it came to obtaining instructions from the client.

Role and experience of each Applicant

Mrs Whitestone

225. Louise Whitestone (née Yerbury) was employed by JBI as a Relationship Manager on its Russian and Central and Eastern European Desk from 5 January 2009 until 28 November 2012. In this role she was responsible for the day-to-day conduct of JBI's relationships with clients for whom she was appointed Relationship Manager.

226. There is no question that Mrs Whitestone is a highly intelligent individual. She is proficient in languages, particularly in written and spoken Russian obtaining both bachelor's and master's degrees in Russian with a distinction in spoken Russian at the undergraduate level.

227. Mrs Whitestone's first employer was Clariden, a Swiss private bank, where Mrs Whitestone worked in its representative office in London. She was employed initially as an Administrative Assistant from 2004 for two Relationship Managers. She was promoted to a junior relationship management position in 2007, whilst continuing to work on administrative tasks part time, opening a small number of accounts attracting approximately CHF 5 million of net new money.

228. In 2008 Mrs Whitestone started performing a junior Relationship Manager role full-time, continuing to work for smaller scale clients than she subsequently handled at JBI. Mrs Whitestone's unchallenged evidence was that she was focused on Kazakhstan as her main marketing region rather than Russia, as Kazakhs were considered less sophisticated in the financial markets, and they generally chose to keep their funds on deposit and not engage in any trading. Consequently, although Mrs Whitestone first became an approved person on 12 April 2005, originally in the CF21 function (investment advisor function) there is no evidence that she engaged in regulated activities to any significant extent, such as the giving of investment advice during the time that she was at Clariden, notwithstanding the testimonial that was given on her behalf by a senior manager from her time at Clariden to the effect that she became a "fully fledged Relationship Manager" with investment management responsibilities. As we have previously observed, the practice in private banks is that the role of Relationship Managers is to market the bank's services and ensure that the clients are kept happy. Mrs Whitestone's evidence was that she would often be providing lifestyle management and concierge services and we find that evidence to be plausible in circumstances where the clients were relatively unsophisticated despite being wealthy, lacking in knowledge of life in London, and showing no particular interest in more sophisticated investment products, and she was a relatively junior member of staff who had started as an administrative assistant. Accordingly, we accept that when she left Clariden to join JBI she had no significant experience of FX Transactions or other sophisticated investment products dealt with by JBI.

229. Mrs Whitestone clearly impressed JBI after she was headhunted for a Relationship Manager role at JBI. No doubt her advanced language skills were highly attractive to JBI in the context of that bank's desire to develop its business in Russia and Kazakhstan and it appears that Mrs Whitestone came across as being highly articulate and confident in her ability to develop significant business at JBI, notwithstanding her lack of experience. Accordingly, Mrs Whitestone was employed by what was known as an entrepreneurial contract which linked her personal remuneration to the income derived from the client relationships she managed. She received a monthly base salary and a formula-based bonus which was determined both by the net new assets attracted into the accounts she managed and by the return achieved by investing those assets in line with the client's instructions. She received a signing on bonus of £40,000. In 2009, she received a bonus of £34,500. In 2010, as a result of the inflow of money into the Yukos accounts she managed and the activities on those accounts, her bonus increased to £381,300. For 2011, she was paid a bonus of £98,400. We were told that Mr Campeanu had a similar entrepreneurial contract.

230. Whilst Mrs Whitestone may well have been confident in her ability to develop business, it appeared that she had little in the way of mentoring in her time at JBI or adequate training as to the risks that the business she was aiming to bring to JBI would pose. In relation to Mr Campeanu, it was generally accepted by those who knew him and gave evidence that he was a poor manager and not a good role model for a young (age 29) Relationship Manager such as Mrs Whitestone seeking to make an impression. Mrs Whitestone gave graphic evidence as to the toxic environment that prevailed on the Russia and Central and European Desk in London and instances of highly inappropriate behaviour. None of the other witnesses suggested that Mrs Whitestone's observations were unwarranted and accordingly we accept her evidence in that regard. As she described, initially she made a huge effort to get on with him and play to his humour, which was full of what might have been described at the time as "banter" and which appeared to have been tolerated then more than it is now, some 13 years later. As Mrs Whitestone said in her witness statement, as the only female Relationship Manager she had to display some bravado to get on with Mr Campeanu but eventually matters became too much and ultimately their relationship broke down completely particularly, as we find later, when

Mr Campeanu became jealous of the business that Mrs Whitestone was generating through the relationship with Yukos.

231. Mr Bates said that Mr Campeanu's team was confrontational, and Mr Campeanu in particular was difficult to manage, particularly as regards the lack of respect shown for the proper reporting lines. Mrs Whitestone therefore did not have a good example to follow. Mr Fellay's evidence, which we accept, was that when he came to deal with Mrs Whitestone following the Second FX Transaction, as described in more detail later, he came to the view that Mrs Whitestone did not really have a mentor. He agreed with Ms Clarke's assessment that Mrs Whitestone was naïve and frankly lacking in experience. Accordingly, Mr Fellay did provide Mrs Whitestone with a degree of mentoring after their relationship got off to a rocky start and they grew to like each other. As he confirmed in his evidence, Mr Fellay, after his initial concerns believed that Mrs Whitestone was acting in good faith in relation to the matters in respect of which they came into contact.

232. Mr Fellay felt that Mrs Whitestone was out of her depth in dealing with the relationship with Yukos. In our view, that assessment is justified in both the lack of mentoring and leadership shown to Mrs Whitestone, the failings in the systems and controls at JBI and the lack of adequate training given to Mrs Whitestone as regards a number of key issues. Mr Fellay also had a poor impression of Mr Campeanu, saying he did not trust him and did not regard him as a suitable person to act as a line manager and mentor for Mrs Whitestone.

233. As a result of these deficiencies, it did not appear that Mrs Whitestone worked in a collegiate and collaborative environment in which she would learn how to improve her life skills in dealing with challenging clients, in particular, to learn to be able to assess warning signs of potential financial crime. As she confirmed in an answer to a question from the Tribunal, there was no specific training on specific dangers of doing business in former Soviet states and the sort of traits and trends that were going on in those countries at the relevant time. JBI Compliance did not appear to be concerned at the risks of bribery and corruption in relation to these countries. In an email of 14 November 2011 a member of JBI Compliance informed Mr Bates that after discussions with Mr Campeanu as to the potential for them to be subject to bribery and/or corruption within their jurisdictions of business, Mr Campeanu had confirmed that "this has never been an issue, nor is it likely to be." This is in stark contrast to Mr Campeanu's allegation in his email of 30 November 2012 where, among other things, as mentioned at [102] above, he suspected that in the dealings with Mr Merinson there had been potential breaches of the Bribery Act 2010.

234. The lack of a rigorous approach to potential financial crime, in particular misappropriation risk, is confirmed by the deficiencies in training provided by JBI at the relevant time.

235. We have referred earlier to the fact that JBI's Conflicts of Interest Policy was drafted in very general terms and gave little specific guidance to employees as to how to identify conflicts. We have seen the text of a presentation by JBI Compliance on Conflicts of Interests Training in September 2010 which does not appear to take matters much further. There was no training on the specific risks presented by Finder's arrangements. We accept Ms Clarke's observation that training on generalised risks such as bribery, corruption and financial crime was superficial, formulaic and sporadic. Although the Finder's Policy was adopted in June 2010 and was available on JBI's intranet, Mrs Whitestone cannot recall reading it nor is there any evidence that steps were taken to draw it to the attention of Relationship Managers generally. Mr Bates was unable to recall any specific training relating to Finders, consistent with his evidence, as referred to at [219] above, that paying Finder's fees was not high on the agenda as a risk to watch for.

236. Mrs Whitestone accepted that Finder's agreements had to be in writing, as required by the Finder's Policy. The obligation in the policy to inform the Market Head of the signing of a contractual agreement with a new Finder did not appear to be followed in practice. Mr Seiler denied its existence, but we think what he was saying was, more accurately, the requirement was not followed in practice and he appeared to have no knowledge of the Finder's Policy, which is another indication that it was not widely publicised. Mr Raitzin, however, was on the Executive Board which promulgated the Finder's Policy, and therefore knew it well.

237. Mr Bates was unable to give any evidence as to how training policies were embedded in JBI's staff training scheme at the time. As Ms Clarke submitted, there is no direct evidence of a formal and effective staff training scheme in place prior to or during the events in question which Mrs Whitestone took. Mrs Whitestone's log of her training whilst at JBI does not reveal any in-depth training on any subject.

238. Furthermore, there was no reference in the goals set for Mrs Whitestone in her annual appraisal to undertaking specific training in relation to matters on which she was inexperienced, such as investment products or the risks involved in dealing with Russian clients. The document talked about Mrs Whitestone participating in the development of a country market plan for Kazakhstan (under the leadership of Mr Seiler) but said nothing about Russia.

239. Therefore, at the time that the relationship with Mr Merinson and Yukos began to be developed, we find that Mrs Whitestone had limited expertise in relation to investment products and advising on them, the risks involved in dealing with clients in the Russian market and the risks involved in the use of Finders.

240. We place no weight on the fact that Mrs Whitestone had been approved to perform a controlled function by the Authority. As we have said, it was not expected that Mrs Whitestone would give detailed investment advice to clients but her marketing activities could technically amount to engaging in regulated activities by making arrangements for clients to acquire investment products through the advice of colleagues and it is often the case that as a matter of caution regulated firms ensure that employees whose main focus is on marketing, such as Relationship Managers, become approved persons.

Mr Seiler

241. Mr Seiler has worked in banking and investment management since 1988, principally in Switzerland, although he also worked and was regulated in Singapore between 2017 and 2019. Between 30 March 2011 and 18 June 2014, Mr Seiler was a non-executive director of JBI and as such was approved by the Authority to hold that controlled function.

242. Mr Seiler joined Julius Baer in 2008 as Deputy Sub-Region Head for Russia and Central and Eastern Europe. In early 2009, Mr Seiler became Sub-Region Head (also referred to as Market Head) for Russia and Central and Eastern Europe and was responsible for growing the bank's business in this market. During Mr Seiler's period in that role Julius Baer's assets under management in Russia and Central and Eastern Europe rose from around CHF 2 billion to around CHF 12 billion, and by the time Mr Seiler left Julius Baer was generating revenues of around CHF 100 million per annum.

243. As we described at [199] to [201] above, Mr Seiler's approval was required for the opening of an account with a client associated with a risk country, such as Russia. The relevant guidelines also required results of monitoring by the Relationship Manager to be reported to the Market Head.

244. There was a dispute as to the extent of Mr Seiler's responsibilities in relation to the opening of accounts for high-risk clients and for the monitoring of those clients thereafter.

245. Mr Strong submitted that:

(1) Mr Seiler's role was primarily a business development one, which was a strategic, non-operational role. Mr Seiler did not have any client relationship management role, nor did he have any significant involvement in foreign exchange transactions.

(2) During the Relevant Period, Mr Seiler was not responsible for the relationship with any specific clients, and generally had no oversight of what transactions were undertaken for any particular clients. He did not have access to information about transactions undertaken at corporate entities other than BJB, or to the client relationship records at JBI.

246. As regards account opening for Mrs Whitestone's clients, Mr Strong submitted that, as Mr Seiler said in his evidence, Mr Seiler's involvement was simply in respect of him expressing whether he "supported" the account opening, the question of approval having already been considered by local management and Compliance locally and at the Booking Centre. Mr Seiler accepted that he could not ignore red flags, but inevitably his focus would be on business considerations, and it was not his role or responsibility to redo checks that should have been done by others.

247. Mr Seiler rejected the suggestion that Relationship Managers such as Mrs Whitestone were obliged to report the results of their day-to-day operation of accounts of risky clients to him in his role as Market Head, in addition to their superior. He said that he expected the report would be made only to the Relationship Manager's line manager and that nobody followed the strict wording of what was written in the relevant guidelines.

248. Mr George submitted that the distinction Mr Seiler drew between an "approval" and the "giving of support" was non-existent. The suggestion that all that was required from him was "advice" was at odds with the contemporaneous documents, where the account opening documents specifically include a place for his signature. Although the Authority accepts that it was appropriate, pursuant to the policy, for ongoing reporting to go from Mrs Whitestone to Mr Seiler via Mr Campeanu (as opposed to initial approvals which were to be given by Mr Seiler himself), Mr Seiler's evidence was that account opening and other client-specific matters would not be mentioned in his regular discussions with Mr Campeanu. If that were the case, Mr George submits that Mr Seiler wholly failed to discharge his duties under the Client Acceptance Policy.

249. Mr George submitted that the reality was that Mr Seiler had a very significant role overseeing, and giving approvals in respect of Russian client accounts, including those managed by Mrs Whitestone (as is clearly apparent from the role that he played in respect of Yukos). Mrs Whitestone's evidence, therefore – that she was to report to Mr Seiler "only in terms of sensitive / PEP / large clients (in terms of client take-on and ongoing profitability), larger reductions in client fee structures…"– is much more accurate. Mr George submits that in reality, Mr Seiler was Mrs Whitestone's line manager in respect of concerns such as ongoing profitability, large payments, and fee reductions. It is for that reason that Mrs Whitestone recalls Mr Campeanu telling her that it was more important to report to Mr Seiler as Market Head than it was to report to Mr Gerber.

250. Furthermore, Mr George submits, the fact that Mr Seiler did not discourage Mrs Whitestone from bringing operational matters to him supports the view that Mr Seiler did not genuinely believe that such matters were not his responsibility, where he continued to receive and engage with emails from Mrs Whitestone for more than 3 years, without ever communicating his alleged concerns.

251. Mr George therefore invites us to reject Mr Seiler's characterisation of himself as merely the "marketing guy". Mr Bates's witness evidence was that Mr Seiler's role did involve marketing but his role also involved approving the clients that Relationship Managers took on in terms of any risks, account opening approvals and fees. As the documents record, therefore, the matrix management system allocated most management responsibility to functional management which, in this case, meant that even though local management bore the regulatory burden, responsibility for external decisions rested with individuals that were outside local management control.

252. Our conclusion is that Mr Seiler is broadly right in his contention that his role was primarily a marketing and strategic one and that is how, in general, he sought to perform it. However, we cannot accept that his role was completely divorced from operational matters as he suggested. There were two main reasons for this. First, in practice, those below him frequently did not follow the established reporting lines and, in practice, Mr Seiler did, as we shall see, respond to requests made to him directly rather than through the established reporting lines. Secondly, in relation to matters where Mr Raitzin had responsibility for approving the relevant matter, he sought to obtain Mr Seiler's views on the matter before giving his approval. Again, we will see how that happened in practice. In particular, although Mr Seiler had no formal responsibility for giving approval in relation to any matters concerning Finders, in practice Mr Raitzin did seek Mr Seiler's views in that regard when changes to the arrangements with Mr Merinson were proposed.

253. In relation to account opening for high-risk clients, such as those connected with Russia, Mr Seiler's evidence was that he would have expected the relevant account Relationship Manager, local management, local, and where appropriate, BJB Compliance, to have addressed all relevant due diligence and risk issues before the matter was brought to him to be plausible. That is what BJB's policies and procedures suggested should happen. Consequently, it would then be for Mr Seiler, as the relevant Market Head to assess whether the opening of the account was consistent with the strategic objectives of BJB in relation to matters for which he was responsible, such as the potential profitability of the relationship and the risk appetite of BJB for further clients of this kind. This was the way that Mr Seiler described his role in relation to account opening in an exchange with Mr George:

> Q. ….you are the person responsible for approving any new relationships in a risk country such as Russia, aren't you?
>
> A. Not directly . It was --the system was that if that relationship manager prepares it to the superior , then it will --then it goes to the local management, then it –it goes to compliance, and at the end, if it's a risk country, then I give my support. I cannot approve. Approve only compliance can do. I can -- …
>
> So, just to finish , if I was --if I was --I mean, compliance has the overall decision-making; I support account opening or not."

254. It is important to note Mr Seiler's comment that he did not approve the account opening "directly". His evidence is consistent with a process where the relevant local Relationship Manager and management were happy to approve the account and where relevant individuals in Compliance had given their approval before the matter came to Mr Seiler. Whether his role can be described as one of "support" as he described it or "approval" as the written procedures clearly stated it to be, is, in our view a distinction without a difference. What is, however, important, is, as submitted by Mr Strong, that Mr Seiler's focus was on business considerations and not second-guessing work done by others. We agree, however, that he could not ignore "red flags" that he became aware of. Mrs Whitestone's evidence on this point, as summarised at [249] above is not inconsistent with this analysis. The matters she referred to are clearly relevant to the question of strategic business objectives and profitability which undoubtedly

fell within Mr Seiler's remit as Market Head. Mr Raitzin's evidence was consistent with that of Mr Seiler. His evidence was that in effect there were Market Heads in each location, so as to ensure that the procedures required in that location were complied with. He said that Mr Campeanu fulfilled that role in relation to Russia in JBI and accordingly matters should have gone through Mr Campeanu before being referred to Mr Seiler.

255. We therefore do not accept that Mr Seiler became Mrs Whitestone's line manager in relation to these matters. Neither did the fact that in practice some matters were brought to him directly change the position or give him any greater responsibility than he had under the written procedures. Those procedures were consistent with his role being a strategic and business orientated one rather than one connected to day-to-day management of issues. The fact that Mrs Whitestone was not discouraged by Mr Seiler to bring operational matters to him is, as we have previously stated, due to a weakness of management rather than any indication that reporting lines were being changed.

256. We do not consider that the memorandum referred to at [185] above affects the position. Although that memorandum stated that Relationship Managers reported primarily to their Region Heads and only secondarily to local management, that statement cannot be relied upon because the memorandum wrongly stated that there was a solid reporting line to the Region Head. It appears that it was true, as that memorandum stated, that the Region Head had a role in relation to compensation for Relationship Managers, but that must be seen in the context of the business orientated role performed by the Market and Region Heads.

257. Mr George referred to an email from Mr Gerber to various senior managers at BJB on 8 September 2010. In that email, Mr Gerber observed that the current matrix management model "allocates most management responsibility to functional management even though local management bears the regulatory burden". Mr Gerber said that the current allocation of responsibility might need to be reviewed and potentially adapted due to UK regulatory developments. However, the statement is made at such a high level of generality that in our view it cannot be inferred that operational management of subsidiaries regulated outside Switzerland such as JBI, as opposed to strategic management of particular business areas which operated across the Group under the existing matrix management structure, was the responsibility of senior management in Switzerland.

258. As regards the obligation of Relationship Managers to report the results of their day-to-day operation of accounts of risky clients, we have not seen any evidence that such reports took place in practice. In our view, that is not surprising in view of the fact that guidelines were often not strictly observed or enforced. We therefore accept Mr Seiler's evidence on this point, but would agree with the Authority that if, as he stated, he did not discuss such matters with Mr Campeanu, who Mr Seiler accepted was his direct report, then he did fail to discharge his duties under the Client Acceptance Policy in that regard.

259. Mr Raitzin's evidence was that the results of monitoring client relationships would in practice be prepared by a specialist department in Compliance and reported to the Market Head and Region Head, which is consistent with Mr Seiler's evidence that he did not directly receive reports on these matters from Relationship Managers. Again, there is no evidence to contradict what Mr Raitzin said and we accept his evidence on this point.

260. As Mr Strong submitted, it is important context (as demonstrated by our findings below) that Mr Seiler's role was always demanding and time-intensive, and included managing the team in Switzerland, as well as travelling to the Russia and Central and Eastern Europe desks at Julius Baer's numerous offices around the world to oversee marketing initiatives.

Mr Raitzin

261. Mr Raitzin began his banking career in 1980 at Deutsche Bank in Buenos Aires. In 1981, he joined Citibank, moving to its International Private Banking division in 1985. In 1986, he was seconded from Latin America to Zurich and then New York in 1987, following which, in 1990, he took up a position with Chase Manhattan Private Bank in Geneva. In 1995, he moved to Union Bancaire Privee. In 1998, he joined ABN Amro Group, where he remained until he joined Julius Baer in 2005. He stayed at Julius Baer until his retirement In 2017. Mr Raitzin has therefore spent his whole career in banking and was in senior management positions from 1995.

262. After two years at Julius Baer, he was appointed to its Executive Board, by which time he accepts that he was an "experienced senior manager". He was also employed by BJB as the Regional Head for Latin America and Spain, and between 2010 and January 2011 he was appointed as the Interim Head of the Russian, Central and Eastern European and Israeli market.

263. As previously mentioned, Mr Raitzin also had responsibilities for managing BJB's voluntary tax disclosure to the US Department of Justice, which, as he said, he had championed and promoted, despite strong opposition at times from his fellow directors. He described himself as a "trusted troubleshooter*"* for the CEO of Julius Baer. We accept his evidence that as a result of his experience in conducting the exit and review process of US clients he generally took a more cautious line than his colleagues when it came to compliance.

264. The pressures on Mr Raitzin during the Relevant Period are evident from the unchallenged evidence set out in his witness statement. He estimates he received over 100 emails each day. He had heavy travel commitments, which made keeping on top of emails harder still. He had over 340 staff under his management and nine direct reports, of which seven were very senior managers or heads of a country or group of countries. The pressures on Mr Raitzin at the time of the Second Commission Payment were particularly intense. For example, as considered in detail below, when he had discussions with Mr Seiler in relation to the Second FX Transaction, he was in Kyiv having attended an external meeting and given a presentation on an emergency basis when the CEO could not attend.

265. His evidence was that it was rare for him to make fewer than two to three foreign trips per month, including to Latin America. Again, his unchallenged evidence was that, for example, between July and December 2010, Mr Raitzin travelled to Argentina, Brazil, the Czech Republic, Germany, Israel, Poland, Ukraine, the UK and Uruguay. In some months he would spend two weeks out of four travelling. When not travelling, much of Mr Raitzin's time in Switzerland was spent preparing for and then attending the BJB Executive Board and risk management meetings, then holding meetings with his direct reports, and paperwork (plus a little time at home with his family).

266. As Mr Jaffey observed, Mr Raitzin was therefore a senior board level executive, with responsibilities stretching across the globe. It was clearly impossible for him to perform all his responsibilities without relying on a team to do the necessary preparatory and research work and make recommendations to him. As Mr Jaffey submitted, there was a reporting structure below Mr Raitzin which was intended to ensure that (i) only the decisions which could not be dealt with at a lower level reached him; and (ii) he had access to the information and analytical work he needed to make such decisions as he was required to make. In our view, bearing in mind his senior position and his many commitments he was fully entitled to do so.

267. In particular, Mr Raitzin relied on his Head of Administrative Support, Mr Nikolov, whose background was in FX and Compliance. Mr Raitzin and Mr Nikolov spoke regularly.

268. As regards Mr Raitzin's responsibilities in relation to Finders he placed reliance on Mr Courrier, the Head of Finders and External Asset Managers for Mr Raitzin's region. He was also Market Head for BJB Bahamas. Mr Courrier reported directly to Mr Raitzin and was regarded as the expert as regards Finder relationships.

269. Mr Raitzin also regarded Mr Baumgartner, the Head of Compliance and Ms Thomson Bielmann, the Head of AML and Sensitive Clients, who reported directly to Mr Baumgartner and was responsible for BJB's Compliance work in respect of all complex, high-risk and sensitive cases, as highly competent executives who he could rely on. As we shall see, Ms Thomson Bielmann took the lead in relation to Yukos and the Finder arrangements with Mr Merinson when Compliance became involved.

270. As we shall see, not surprisingly because Mr Raitzin himself was not an expert on Russia, he relied on Mr Seiler to provide him with his recommendations and advice in relation to matters concerning Yukos, even though it was ultimately his own decision in relation to matters that fell within his responsibility as Region Head. The matters which are relevant to these references are Mr Raitzin's role as Region Head in approving the opening of accounts for large clients in high-risk countries and the approval of non-standard remuneration arrangements and variations from the standard Finder's agreement.

271. We need to bear these considerations in mind when considering whether Mr Raitzin found suspicious any of the information that he was provided with in the various emails that he was sent or copied in on and the attachments to those communications.

272. In relation to both Mr Seiler and Mr Raitzin, in reviewing the communications that they received, we have endeavoured to put ourselves in the shoes of the recipient in order to ascertain how the information communicated would have appeared to the recipient at the time. That requires us to take into account the context in which it was received, the working practices of the recipient, their role in relation to the matters concerned and the role of others who were involved with the matters, including the sender. We have therefore tried to avoid too much detailed textual analysis and the application of hindsight.

Events prior to the Relevant Period

Opening of accounts for Mr Merinson and Yukos Capital

273. Mrs Whitestone first came across Mr Merinson when she was employed at Clariden. She was introduced to him by the client of a colleague and, having intellectual interests in common regarding Russian literature, that common interest was the focus of their initial discussions.

274. In May 2009 Mr Merinson contacted Mrs Whitestone after she had moved to JBI. She met him face to face on 11 June 2009, as recorded in her brief contact report of that meeting. The report recorded that Mrs Whitestone discussed the opening of an account for Yukos International with Julius Baer in its Frankfurt Booking Centre and Mr Merinson provided Mrs Whitestone with "comprehensive background information both on himself and Yukos International" and that he signed all the account opening documents to open a personal account. The report finished by saying "We will also set him up on a Finder's agreement."

275. The know your customer form completed for Mr Merinson recorded that he was employed by Yukos International and recorded that his position was "Adviser". Mrs Whitestone also made a record of the due diligence carried out on Mr Merinson. The document, dated 12 June 2009, recorded that Mr Merinson started to work for Yukos in Moscow in 2002 and in 2003 moved to Amsterdam where he established Yukos International, stating that he still worked at that company as the "Financial Controller and Treasurer". The document gave details of Mr Merinson's net wealth, stating that the sole source was his salary. It was stated

that the account will be funded with around US$400,000 and that the account would, semi-annually, receive Finder's fees as a result of his Finder's agreement with Julius Baer.

276. On 13 July 2009, a member of BJB Singapore's Legal and Compliance team wrote to Mr Seiler about the account opening. The email mentioned that Mr Merinson was a Russian residing in Amsterdam and connected to Yukos. The email attached the know your customer information and due diligence memorandum prepared by Mrs Whitestone and also her contact report referred to above. The email referred to the fact that the main know your customer information documented by Mrs Whitestone was to be "found on the due diligence memo and call report.". The email recorded that Mr Merinson should not be considered a PEP but proposed that the account should be placed under special monitoring. The email concluded by saying that information had been sent to Mr Seiler for his consideration and approval as Market Head of Russia. Mr Seiler replied on the same day in an email the text of which simply said "I approve". Accordingly, Mr Merinson's account was opened with BJB Singapore on 29 July 2009.

277. The Authority submits that Mr Seiler would have read the attachments to the email and therefore would have been aware of Mr Merinson's employment status with Yukos and of Mrs Whitestone's intention to set up Mr Merinson as a Finder on the Yukos account. Mr Seiler accepted that if he was aware of Mr Merinson's employment status, he would have identified that it was unacceptable for him to be set up as a Finder in relation to Yukos. The Authority submits that Mr Seiler did identify this but chose to ignore it and that Mr Seiler had no reason to believe that Mr Merinson was going to be set up as a Finder for a client other than Yukos. The Authority submits that there is no reason why Mr Seiler, having read these documents, would not have understood that to be the case, nor did Mr Seiler make any queries in order to ascertain if that was in fact the case.

278. The Authority has not satisfied us that it is more likely than not that Mr Seiler read the attachments in any detail, or that if he did, he would have appreciated that it was intended that Mr Merinson was to be registered as a Finder on the Yukos account.

279. We accept Mr Seiler's evidence that there was no reason for him to study the attachments closely and that he did not do so. As he explained in his evidence, and as we have accepted, his role in relation to sensitive clients from Russia was essentially a strategic one. As Mr Seiler said, at the time Julius Baer was considering strategically what clients they wished to accept, such as those holding prominent positions within Russia or where there were unusual Finder's agreements and that he was not focusing on operational issues. As Mr Strong submitted, whether or not Julius Baer wished to accept a particular client would not have required close analysis of the details of documents whereas discussions around the mechanics of account opening would have done so. Mr Seiler's role was strategic and, as we have previously said, he would be entitled to rely on others who have previously reviewed the documentation from an operational point of view, particularly those in Legal and Compliance who had clearly reviewed the documentation prior to it being provided to Mr Seiler.

280. There was nothing in the profile of Mr Merinson that Mr Seiler saw that indicated that he was a high-profile resident of Russia which required a strategic decision from him as to whether to take him on as a client. The email he received clearly stated that Mr Merinson was not a PEP. In those circumstances, we think it unlikely that Mr Seiler would have paid much attention to the details of the documentation provided. Neither do we accept that it would have been apparent from the documentation Mr Seiler saw that he was to be set up as a Finder for Yukos. The only reference to Mr Merinson becoming a Finder was that contained in Mrs Whitestone's contact report, and it made no mention of whose accounts he was to be linked to as a Finder. As Mr Strong submitted, the fact that a potential Finder is employed by a particular

company does not suggest that there is any intention that they will introduce their employer to the bank. On the contrary, the natural assumption to be made by someone in Mr Seiler's position is that the Finder would be introducing people other than their employer, particularly since BJB is a private bank whose customers are predominantly individuals and family trusts, not corporates. We therefore accept Mr Seiler's evidence that he was unaware at that time that Mr Merinson would be a Finder for Yukos and therefore had no reason to enquire about this. In any event, as noted above, the documents should have been considered by at least Compliance and senior management at JBI, and an email exchange suggests that the Compliance department did indeed consider them. JBI did not raise any issue, and nor did Compliance in Singapore which had presumably also reviewed the documents it sent to Mr Seiler.

281. We therefore accept that in the circumstances, there was nothing to alert Mr Seiler that Mr Merinson's account was anything which required particular attention, and there was no reason for him to register, or commit to memory, Mr Merinson's employment status.

282. Mrs Whitestone's evidence was that at the time she prepared the know your customer and due diligence documents referred to at [275] above, she did not intend to set Mr Merinson up as a Finder in respect of Yukos International or Yukos more generally. She said that there was no discussion about Mr Merinson being a Finder for any of the Yukos accounts until between March and July 2010, and that before that time, she intended to set Mr Merinson up as a Finder only in respect of two individuals, Messrs Leonid Nevzlin and Platon Lebedev, each of whom she said were shareholders in the 70% shareholder of Yukos Oil. The idea was said by her to have come from Mr Nevzlin himself who, according to Mrs Whitestone, "appreciated that of all the people he was entrusting Yukos Group roles to, Mr Merinson would be making the biggest sacrifice" and that he had therefore told Mr Merinson that he would "ensure that he was well remunerated with an incentivisation bonus scheme through the Yukos structure and that Mr Merinson could register himself as the introducer with a number of private banks on the personal accounts of Mr Nevzlin and Mr Lebedev…"

283. The Authority invites us to reject that evidence. The Authority submits that her contention that Mr Merinson was intended to be a Finder on accounts for Mr Nevzlin and Mr Lebedev is (i) not supported by any of the documents from this period, and (ii) in any event makes no sense where those individuals were, respectively, imprisoned (with a sentence of 5 years) and under an international arrest warrant. Neither of those individuals would be opening accounts with Julius Baer any time soon where the documents anticipate that the account for which Mr Merinson was due to be finder was to be funded on a regular ("semi-annual") basis.

284. The Authority has not satisfied us that it is more likely than not that at the time that discussions took place with a view to the opening of Mr Merinson's account and an account for Yukos International in June 2009 that there was an intention that Mr Merinson should be registered as a Finder on that account. Our reasons for that conclusion are as follows:

(1) There is no document that demonstrated there was any discussion or agreement on this point at the time.

(2) In effect, the Authority suggests that Mrs Whitestone did not record the possibility of the individuals referred to above being introduced by Mr Merinson in order that the true position should be concealed. However, in our view there is no reason why Mrs Whitestone should consider it necessary to disclose who the potential clients to be introduced would be at the time that Mr Merinson's account was opened. As we have found, the standard Finder's agreement did not give details of any potential clients to be introduced as the account opening process did not require disclosure of those details at that stage. Any client who was to be introduced by a Finder would have to go through the account opening process and only if the account was approved and funded would the relevant Finder be linked to that account and, if the Finder had not yet introduced any

potential clients, a Finder's agreement entered into. Therefore, at that time, as it transpired, the link between Mr Merinson and Yukos would be clearly revealed to those approving the Finder's arrangements, bearing in mind that his employment status with Yukos International had been clearly stated in the due diligence memorandum prepared at the time of the opening of his account. Therefore, even if it was contemplated that Mr Merinson was going to introduce Yukos accounts in due course, there is nothing to be gained from concealing the fact at the time Mrs Whitestone prepared the contact report, because that position would readily become apparent when the Finder's agreement was signed and linked to the relevant Yukos account. In any event, as we have seen, Legal and Compliance in Singapore had seen both the contact report and the connection between Mr Merinson and Yukos and did not see fit to draw that to Mr Seiler's attention or consider that it was a matter that needed further investigation. That reinforces the position that the procedures did not envisage that details of those to be introduced needed to be disclosed where there was a general reference to the fact that it was contemplated that a person would become a Finder in the account opening documentation.

(3) We do not see how it would have been in Mrs Whitestone's interest to have mentioned Mr Nevzlin and Mr Lebedev as potential clients to be introduced if that was untrue, particularly as their personal circumstances, as described by Mrs Whitestone, were such that the prospect of them immediately opening an account was somewhat remote. That fact in itself may well explain why there is no record of discussions about Mr Merinson becoming a Finder for these individuals specifically.

285. As to the proposed account for Yukos, on 23 July 2009, Mrs Whitestone sent an email to Mr Merinson identifying an issue with the proposed signatories for the new Yukos account. As that email records, while Julius Baer was able to accept US nationals as signatories, a Group-wide policy prevented this where the proposed signatories were on US soil. It is not in dispute that this was a big issue for Julius Baer at that time following the difficulties that it experienced with the US regulatory authorities, as described above. The proposed solution in the present case, at least initially, was that a management company, TMF Management BV ("TMF Management"), would have Power of Attorney in respect of the account.

286. On 8 October 2009, Mrs Whitestone spoke with Mr Feldman for the first time. It was following that discussion that the prospect of Yukos Capital as well as Yukos International opening an account with Julius Baer first became apparent. Mr Feldman was already known to Julius Baer. He was a director of Yukos Hydrocarbons which already had an account with BJB Singapore and accordingly had already passed Julius Baer's due diligence requirements. In that role he was known to Mr Campeanu who was the Relationship Manager for Yukos Hydrocarbons.

287. Mr Feldman was a New York Attorney and former Corporate Secretary of Yukos Oil who had been hired to put ethical and governance procedures in place at Yukos. He then became the group's Leading Counsel and was appointed as a Director of a number of Yukos Companies. Previously in his career, he had worked as a senior lawyer for the Securities and Exchange Commission, the US securities regulator and a leading Boston based international law firm. He was the sole director of Yukos Capital, the company engaging the most significant pieces of litigation relating to Yukos. With that background, we accept Mrs Whitestone's assessment that Mr Feldman was a plausible businessman and she had no reason to doubt his integrity. Neither did anybody else within Julius Baer make it known to Mrs Whitestone that there were any concerns about Mr Feldman.

288. On 9 October 2009, Mrs Whitestone sent an email to Mr Seiler, copying Mr Eric Benischke, Mr Seiler's then Chief of Staff. The email highlighted her discussion with "the client" – a reference to Mr Feldman, seeking his approval not only to open an account for Yukos International but also for another "Luxembourg-incorporated" Yukos entity (i.e. Yukos Capital). This email recorded that the companies had the same beneficial ownership (where Yukos Capital is 100% owned by Yukos International), but that Yukos Capital had only a "single director"; and that Mrs Whitestone's "Russian contact" – (i.e. Mr Merinson but he was not named or identified as a potential Finder in respect of these accounts), was the "Chief Financial Officer of both companies".

289. The email recorded Mrs Whitestone's request for "approval to open both of these accounts, subject to the court decisions going in the client's favour… but allowing the US resident directors to issue transaction instructions (only from Amsterdam..)", noting that the "overall relationship would be worth at least USD 300 mil at around 50 bps per annum – a total of USD1.5mil in annual revenues". As Mr George observed, by that request, Mrs Whitestone was asking for Mr Seiler's help to arrange a non-standard permission to allow US residents to issue transaction instructions from Amsterdam, in support of which she emphasised the monetary value of the relationship to Julius Baer.

290. On 2 November 2009, Mrs Whitestone sent a further email to Mr Seiler, with the subject "Yukos Capital SARL account". The email states that Mrs Whitestone was due to meet both her "prospect" (Mr Merinson, but he was not named) and the "sole director" of Yukos Capital (Mr Feldman but he was not named) two days later – on Wednesday 4 November 2009 – to discuss what she suggested was the imminent receipt of monies from Yukos's litigation with Rosneft (then anticipated to be USD 389 million, of which USD 300 million might be received by Julius Baer). She therefore, once again, sought confirmation from Mr Seiler as to whether she would be permitted to open an account which would allow Mr Feldman (as a US resident and sole director of Yukos Capital) to give instructions "from outside the US" – asking if Mr Seiler had "managed to get this approved".

291. Mr Seiler's response – "kannst du das bitte wieder aufnehmen" – which was sent to Mr Benischke alone translates as "Can you take that up again, please?". Mr Seiler, in accordance with his usual practice, tasked his Chief of Staff to take this forward.

292. On 3 November 2009, Mr Benischke sent a memorandum to Mr Raitzin (copying Mr Roi Tavor, Market Head for Brazil) in respect of the proposed account for Yukos International. The memorandum set out the basics of the Yukos story, as regards its litigation with Rosneft (which Mr Raitzin confirmed in his evidence he was aware of). The memorandum stated that, were the bank to approve the opening of an account for that company, Julius Baer could expect to receive an inflow of approximately of USD 300 million arising from Yukos's litigation with Rosneft, with approximately USD 1.2 million in revenues for the bank (approximately 40 basis points). The matter had been referred to Mr Raitzin because of the connection with a US resident and his role in relation to the task force dealing with problems raised by US clients.

293. Mr Benischke's memorandum noted the proposed solution to the US problem was that all investment decisions were to be taken and all communications made from Amsterdam, and that the US Directors of Yukos International "would even agree to sign a resolution and Power of Attorney to authorize the management company [TMF] to sign the Julius Baer account opening documents on their behalf". On that basis, he recommended approval of the opening of an account for Yukos International.

294. The accompanying email from Mr Benischke noted that Mr Raitzin was due to travel for business the following day, and that Mr Benischke therefore intended to "take it up" with Mr Tavor. Mr Raitzin's evidence was that he does not now recall the memorandum but he accepted

that it is, of course, more likely than not that he read a 2-page memorandum that was specifically prepared for him by Mr Benischke.

295. Mrs Whitestone did not manage to secure Mr Seiler's final confirmation as to whether Yukos would be able to operate its accounts extraterritorially (in the way set out above) before meetings with Mr Merinson and Mr Feldman on 4 November 2009. There are two contact notes for those meetings. It appears that there was an initial meeting with Mr Merinson alone, the subject matter of which related purely to Mr Merinson's own account, although there was a brief reference in the contact note to the prospect of "the opening of a subsidiary company account" – a reference to Yukos Capital. The note for that meeting also records that the parties discussed "the prospect of singing [sic] [Mr Merinson] up as a introducer with Julius Baer". The note stated that Mr Merinson hoped that he would be in a position to fund his account in the first few months of 2010. There is a second, longer contact note regarding a meeting involving both Mr Merinson and Mr Feldman which recorded Mr Feldman providing relevant corporate documentation and information regarding himself and the desire to open an account for Yukos Capital in anticipation of funds being received on the conclusion of litigation in Amsterdam either within the next few days or up to four months later. There is no mention in this note of Mr Merinson becoming a Finder in relation to Yukos Capital.

296. The Authority's case is that the short contact note for the 4 November meeting with Mr Merinson clearly records Mrs Whitestone's intention – in 2009, and well before March 2010 – to set Mr Merinson up as a finder for Yukos. Mr George submits that Mrs Whitestone's evidence to the contrary is inconsistent with the account that she gave in her interview with the Authority, in which Mrs Whitestone specifically recalled her memory of a conversation with Mr Seiler in London, in or around October or November 2009, during which she had explained that "[Mr Feldman] had asked whether Dmitry could be a finder on that account", where the account being discussed was "Capital SaRL" (i.e. Yukos Capital).

297. Mrs Whitestone was questioned about a meeting believed to have taken place on 7 July 2010, a meeting which we deal with later. Seeking to put that meeting into context, Mrs Whitestone explained that "we had opened an account for this company in like November/December the previous year". Mrs Whitestone then explained that:

> "I remember Thomas Seiler and Wolfgang Langer had been in London and I'd spoken to them about potentially opening an account for Capital SARL and what would be the source of funds and the size of the funds, etc. And also that Daniel had asked whether Dmitry could be a finder on that account and the context of that request. He explained to me that Bruce Misamore and he and the Board generally had decided they wanted to incentivise [Mr Merinson] and reward him….".

298. The Authority has not satisfied us that it is more likely than not that at the time that these discussions took place on 4 November 2009 that there was an agreement that Mr Merinson should be registered as a Finder on the Yukos Capital account.

299. As Ms Clarke submitted:

> (1) If there had been such an agreement, then it would be expected that there would have been a Finder's agreement signed at that time and linked to the Yukos Capital account when it was opened. In our view, if the proceeds of the litigation were to be received by Yukos Capital over the next few days, as the second contact note suggested, then it is likely that Mr Merinson would have asked for a Finder's agreement to be completed at that stage because otherwise there would be no obligation on BJB to pay him a Finder's fee when the account was funded. Furthermore, the note of the meeting with both Mr Feldman and Mr Merinson does not record the question of Mr Merinson being a Finder for Yukos Capital being discussed.

(2) The next contact report regarding a meeting between Mrs Whitestone and Mr Merinson is dated 23 March 2010. At this meeting, it is discussed that the funds were due to come into the Yukos Capital account "in the next 6 months". There is no reference to a discussion at that meeting about Mr Merinson being set up as a Finder on this account, or of the fact that he had not signed a Finder's agreement, or that he needed to be formally linked as the Finder for this account. If it had been agreed by then that Mr Merinson would be linked as the Finder for this account, it is likely that he would be pressing for this to be confirmed in writing, so that he would get his fee when the account was funded.

300. As regards what Mrs Whitestone said in her interview with the Authority, under cross-examination, Mrs Whitestone said that at the time of her interview she did not have access to the majority of the documents she had access to in 2019 and when she did she acknowledged straightaway that she had the timing wrong and that the first time that she discussed Mr Merinson becoming a Finder was between April and July 2010. She said she gave the answer she did in good faith at her interview. We accept that explanation. As we have said, subjects of interview with the Authority may give answers that turn out not to be correct when they have had a chance to reflect and review the relevant documentation. By the time of her interview the events in question had already occurred some 7 years ago and her answers were given in the context of a discussion around the events of 7 July 2010, which was shortly before the Finder's agreement was actually signed.

301. This may also account for Mrs Whitestone's mistaken belief in July 2010, which we refer to later, that Mr Merinson already had a Finder's agreement with BJB in contemplation of the earlier potential introduction of other individual clients – which would then be linked to the Yukos Capital account.

302. It is also relevant in this context that the short contact note of the meeting on 4 November 2009 between Mr Merinson and Mrs Whitestone in which the reference to him becoming a Finder was mentioned, was not, due to the deficiencies in their investigation, obtained by the Authority. It was volunteered by Mrs Whitestone when making her representations to the RDC because of having received it as a result of the deposition she made in the context of the US proceedings against Mr Feldman. The Authority also considers that Mrs Whitestone was seeking to conceal the fact that in November 2009 it was contemplated that Mr Merinson would be a Finder linked to the Yukos Capital account. If that is so, it is unlikely, in our view, that she would have provided the document voluntarily to the Authority.

303. On 4 November 2009, following the meetings referred to above, Mrs Whitestone sent a further email to Mr Seiler and Mr Wolfgang Langer, with Mr Benischke and Mr Campeanu copied in. Mrs Whitestone's email recorded that she "already ha[d] approval from yourselves and from Carolyn [Thomson Bielmann] for the opening of the account from a reputational risk point of view"; but that the outstanding question was whether Julius Baer could "accept [Mr Feldman's] signature on the account opening documents and [whether] he [would] be able to operate the account himself", as long as instructions were not taken from Mr Feldman when he was on US soil. We have seen no email communication between Mrs Whitestone and Mr Seiler between 9 October 2009 and 4 November 2009. The 4 November email is part of a chain where the immediately preceding email is that sent on 9 October 2009. We therefore infer that Mr Seiler had indicated in principle his approval to the opening of the account, either by telephone or in a meeting and indeed Mrs Whitestone's email refers to Mr Seiler having given his approval from the "reputational risk point of view", which is consistent to how Mr Seiler described his role in relation to the opening of accounts for Russian clients.

304. Later on 4 November 2009 Mr Seiler emailed Mrs Whitestone, stating that he would "have a meeting this afternoon" and keep Mrs Whitestone "posted". Mr Seiler cannot recall

any details of this meeting, including whether or not he attended it but, as he suggested, the meeting was, in all likelihood, one attended by Mr Raitzin and/or Mr Tavor, the other recipients of Mr Benischke's memorandum and the persons whom Mr Seiler described as the "expertise group" on the US issue that the bank was facing. Mr Raitzin cannot recall attending the meeting and an email from Mr Benischke to Mr Raitzin on 3 November said that since Mr Raitzin was travelling he would take the matter up with Mr Tavor. We therefore infer that it was Mr Tavor who attended the meeting and gave the approval that followed on Mr Raitzin's behalf, which happened very shortly after Mr Seiler's email. Mr Seiler then sent a further email, which is only 20 minutes after his first email referred to above, updating Mrs Whitestone that they would "get approval" and that he had "just got the confirmation".

305. The following day (5 November 2009), Mrs Whitestone created an enhanced due diligence document for Yukos Capital which recorded that "JB Region 5 is already very familiar with the Yukos situation (indeed some key Yukos managers and shareholders are already clients) and the Head sub region Russia (Thomas Seiler) has already indicated his approval for this account". This memorandum also recorded that because Yukos Capital had a single US resident director no correspondence can ever take place between the US and Julius Baer and that all transaction instructions would be issued from Amsterdam. Mrs Whitestone also sent an email to Mr Merinson which records the "exceptional" nature of the approvals that Mrs Whitestone had managed to obtain. She said that she had "used up all my internal favours for it so I really hope it's worth it!". Mrs Whitestone confirmed in her oral evidence that she believed that those "internal favours" were provided by Mr Seiler but that the approvals came from Ms Thomson Bielmann.

306. Mr Seiler's evidence was that Mrs Whitestone had over represented his role in obtaining these approvals. He said that he had only acted to "help and clarify" the situation. The Authority submits that this evidence is inconsistent not only with Mrs Whitestone's email but the wider documentary record set out above. The Authority says that Mr Seiler had actively pushed to obtain the approvals for Mrs Whitestone, as he had promised her he would do.

307. In that regard the Authority relies on an email that Mr Seiler sent to Mr Campeanu on 23 July 2010 under the heading "Yukos". In that email Mr Seiler said:

> "Just a quick thought on Louise's account. Roughly a year ago she came to me saying that the [account] opening was not accepted. I told [her] to give me all the information so I could take it up with the relevant people. After talking to compliance and legal I was able to make them reassess the decision and [account] opening was approved. I think that part of the success remuneration should be allocated at my discretion".

308. Although the heading on the email is "Yukos" and therefore at first sight might appear to relate to the Yukos Capital account, what Mr Seiler says in this email is, in our view, inconsistent with the steps that he actually took in relation to the opening of the Yukos Capital account in November 2009, a date which is considerably less than one year before Mr Seiler's email of 23 July 2010. As Mr Strong submitted:

(1) Mrs Whitestone did not approach Mr Seiler saying that the account had been rejected. She emailed him on 9 October 2009 with information provided by the client, and there was no suggestion that anyone opposed the account opening at that stage.

(2) On 2 November, she asked him if the account opening was approved, and Mr Seiler tasked Mr Benischke with dealing with the matter, as he then did.

(3) On 4 November 2009, Mrs Whitestone emailed Mr Seiler again saying she already had approval from Ms Thomson Bielmann (so Compliance had not opposed the account opening), and all she needed was confirmation of whether the sole director's signature could be accepted to operate the account because of the US issue. That was a point which

required consideration by Mr Raitzin's team dealing with the US tax disclosure issue (which included Mr Tavor).

(4) There is no evidence that Mr Seiler discussed anything with either Compliance or Legal, nor that any decision was reassessed. It is hard to believe that Mr Seiler could have persuaded either department to change their view without a documentary trail having been left.

309. Mr Seiler's oral evidence was that he was not referring to an actual situation that had happened but was just illustrating how a senior manager could help someone to achieve an objective which did not result in him receiving any benefit by way of extra remuneration. This comment was made in the context of a discussion that was taking place between Mr Campeanu and Mr Seiler about whether any part of Mrs Whitestone's bonus in relation to Yukos should be allocated to Mr Campeanu, bearing in mind his pre-existing relationship with Yukos Hydrocarbons. Therefore, it is quite likely that the reference to "Yukos" in the heading of the email was because the discussion related to the question of allocation of remuneration in respect of the Yukos account and that Mr Seiler had simply described something that had not actually happened, but might have done. It is quite likely, as he suggested in his oral evidence, that he was embellishing the actual facts as to what happened in relation to the Yukos account opening to make his point. His unchallenged evidence in his witness statement was that at the time of this email Mr Campeanu was arguing that, as Mrs Whitestone's Team Head, his bonus should take into account the monies brought in on the Yukos account for which Mrs Whitestone was the relationship manager (and that context was not challenged). We therefore accept that Mr Seiler was setting out a hypothetical scenario to explain that senior people should not expect to be rewarded in their bonus for assistance provided to junior employees, such work being a normal part of their role, and that Mr Campeanu was therefore wrong to be seeking a share of Mrs Whitestone's bonus.

310. We therefore conclude that in relation to the opening of the Yukos Capital account, Mr Seiler gave his approval from the strategic point of view in October 2009 and, when approached by Mrs Whitestone to assist with the US issue, arranged for Mr Benischke to take up the matter with Mr Raitzin's team and obtain the necessary confirmation that the solution proposed to deal with the US issue was acceptable. The short period of time between Mrs Whitestone pressing for Mr Seiler to deal with the issue on 4 November and the obtaining of the approval indicates that Mr Seiler's personal intervention was limited. Although Mrs Whitestone seemed to indicate in her email to Mr Merinson that she had called in a lot of "internal favours" our view is that she had exaggerated what had actually happened in order to impress the client, referring as she did in her email to the Chairman of the Bank having given his approval to the matter. There is no evidence that Mrs Whitestone actually knew what Mr Seiler had done in practice to achieve the resolution of the US issue.

311. On 13 November 2009, Mrs Whitestone sent an email to Ms Thomson Bielmann, copying both Mr Seiler and Mr Benischke, with the subject "Yukos Capital S.a.R.L". Mrs Whitestone's email noted that Yukos Capital had a "single US-resident director" and reaffirmed her understanding of Mr Merinson's role in the Yukos Group, noting that: "[w]hen I need to communicate with the client, I will contact Dmitri Merinson, my Russian contact who is the CFO of Yukos Capital S.a.R.L. and who attends all the board meetings".

312. Clearly, this email revealed to Mr Seiler that Mr Merinson was the CFO of Yukos Capital and that Mrs Whitestone would contact Mr Merinson when she needed to communicate with the client. However, as Mr Seiler confirmed in his oral evidence, there was nothing in that email that indicated to him that Mr Merinson was to be a Finder in relation to the Yukos Capital account.

313. In the circumstances, we accept that Mr Seiler had no reason to commit to memory anything about Mr Merinson in the context of the account openings. We accept that it is entirely plausible that Mr Seiler doubts that he drew any particular conclusion about Mr Merinson's responsibilities at that time. As Mr Strong observed, Mr Fellay confirmed in cross-examination that he had missed the reference to Mr Merinson's employment status when considering the BJB Bahamas account opening documents relating to Yukos, and it was only "on examining the file later on with even more detail [i.e. with an eye on potential wrongdoing], there was a line buried in the middle of a memo […] that I had missed at the time".

314. Mrs Whitestone's email also noted that TMF Management, the management company that was intended to operate an account on behalf of Yukos International, would not be able to operate the account for Yukos Capital where TMF was uncomfortable giving instructions on transactions over USD 1 million and Yukos Capital was due to receive "USD349mil". The proposed operating procedure for the Yukos Capital account therefore was that all instructions would be issued from Amsterdam and that signed copies would then be faxed and couriered to Mrs Whitestone in London.

315. Ms Thomson Bielmann forwarded Mrs Whitestone's email to Mr Roman Baumgartner (Global Head of Compliance) and Mr Tavor inviting their views on Mrs Whitestone's proposal and the opening of an account for Yukos Capital. Ms Thomson Bielmann's email recorded that, unlike the proposed account for Yukos International, there would be no management company with a Power of Attorney on the account and that instructions would therefore emanate from "the sole director, a US resident". The email also records that the case had been "discussed and, due to the size of the assets involved, [Mr Raitzin] agreed to the opening", albeit that Mr Raitzin and Mr Tavor's involvement appears to have arisen from the difficulties arising from the US residence of the Yukos directors.

316. Later the same day, Ms Thomson Bielmann sent a further email to Mr Tavor, asking him to "put the case for [Mr Raitzin's] review". Mr Tavor replied that he had "no objection" as long as no communication occurred in or via the US, which Mr Baumgartner also agreed to. Ms Thomson Bielmann then sought confirmation as to whether the matter would still have to be presented to Mr Raitzin. Mr Tavor confirmed that in the light of Mr Baumgartner's approval that would not be necessary and confirmed his approval to the account opening.

317. Ms Thomson Bielmann subsequently sought final approval from Mr Boris Collardi, the CEO of Julius Baer. The Compliance Approval Report which accompanied that email records Mr Seiler's approval of the account opening, as both Market Head and 'Superior' – Mr Seiler having specifically confirmed that he "knew the background of the account". Unlike the account for Yukos International (which was never eventually opened), an account for Yukos Capital was opened with BJB Switzerland on 13 November 2009.

The "Veto Letter"

318. This document was made subject to a considerable amount of scrutiny, both in submissions and the cross examination of Mrs Whitestone.

319. However, the document predates the Relevant Period in respect of Mrs Whitestone and the Authority has not pleaded reliance on it in relation to its allegations of recklessness made against Mrs Whitestone, the Relevant Period in that regard commencing in July 2010, whereas the letter was dated 23 March 2010.

320. Accordingly, we do not regard this letter as a material piece of evidence in respect of the allegations made against Mrs Whitestone and accordingly, we shall deal with it relatively briefly.

321. On 23 March 2010, Mrs Whitestone met with Mr Merinson at JBI's office in London. Mrs Whitestone's contact report of that meeting records that Mr Merinson asked her to provide him with a letter confirming the process for funds transfers, that is that she calls Mr Merinson to confirm the instruction. The following day, Mrs Whitestone provided what has been referred to as the "Veto Letter" to Mr Merinson as an attachment to an email and he approved it. The Veto Letter, the subject of which was "Julius Baer Bank Account of Yukos Capital S.a.r.l", was signed by Mrs Whitestone and another Relationship Manager at JBI (Mr Nebojsa Djordjevic), and stated as follows:

> "In accordance with the above mentioned account, we confirm that on receipt of transfer instructions we will not execute without receiving valid confirmation from Mr Dmitry Merinson. Miss Louise Yerbury will personally telephone Mr Merinson to attain his approval. In the case of Mr Merinson being uncontactable, Miss Yerbury will send Mr Merinson an email to his personal address to request his verbal confirmation and await response before proceeding. This procedure applies with no exceptions."

322. In its closing submissions the Authority stated its case is that the Veto Letter was created to ensure that Mr Merinson had control over the Yukos Capital account, and that Mrs Whitestone knew or suspected this. The Authority submits that is clearly the effect of the Veto Letter, giving its words their plain and ordinary meaning; and, absent any proper explanation, the Tribunal is invited to find that this was also its purpose.

323. The Authority went on to submit that this was a letter that Mrs Whitestone wished to conceal from senior management because it might raise questions about Mr Merinson's role in relation to the Yukos Capital account in the context of it being contemplated that Mr Merinson would be registered as a Finder on that account. Mrs Whitestone did not make any reference to that letter in any of the communications she had with senior management regarding the approvals she sought for the payment of retrocessions to Mr Merinson. The Authority submits that Mrs Whitestone's evidence that the letter was drafted by Compliance is not credible as the evidence clearly shows that the letter was requested by Mr Merinson.

324. Mrs Whitestone's explanation as to how the letter was created was that shortly after November 2009 (Mrs Whitestone cannot remember exactly when) in order to reduce the risk of fraud, the acceptable practice at JBI for client instructions and money transfers changed so that Relationship Managers would be required to call the clients upon receipt of a written instruction to verify that the instruction had indeed been sent by that client. As Yukos Capital had a sole director whom Mrs Whitestone could only call if she was certain that he was outside the US, it was necessary to agree with Ms Thomson Bielmann and JBI Compliance how JBI would verify that the transfer instructions signed by Mr Feldman that were received by fax and DHL, had indeed been issued by that client. Ms Thomson Bielmann was not comfortable with an arrangement where Mrs Whitestone could potentially call Mr Feldman in the US - i.e. if he had changed his travel plans from what he had previously told Mrs Whitestone. She therefore agreed with BJB and JBI Compliance (i.e. Compliance in London) that instead she would always call Mr Merinson to confirm if he had indeed forwarded the relevant instructions. As this was not the usual form of instruction verification, it was necessary to provide a confirmation letter about it to Mr Merinson. Mrs Whitestone says the wording of the letter was agreed in full with JBI Compliance and Ms Thomson Bielmann was certainly aware of it. The wording was not intended or understood (by Mrs Whitestone or Compliance) to be giving Mr Merinson "veto control". It reflected the level of concern that BJB had with regard to dealing with US Persons. Obviously, any client instructions that Mr Merinson was passing on were required to have been signed by Mr Feldman.

325. There are a number of unsatisfactory aspects to this letter. First, it is written on JBI notepaper whereas Yukos Capital's account was of course with BJB in Zürich. Secondly, it is

addressed to Yukos International in Amsterdam rather than Yukos Capital itself although the letter itself makes it clear that it is addressing an issue with the Yukos Capital account. Thirdly, it is signed by two Relationship Managers of equal seniority whereas the JBI Operations Manual provided that a contractual document, which this letter arguably was, required one of the signatories to be more senior to the other.

326. However, there are a number of factors which provide support for Mrs Whitestone's explanation. First, this is another example of a document which came to light very late in the Authority's investigation.

327. It was Mrs Whitestone who provided the 23 March 2010 contact report referred to at [321] above with her written representations to the RDC. The Authority had not obtained this document from JBI, despite the fact that JBI had obtained it and supplied it to the lawyers handling Mrs Whitestone's US deposition. It is that contact report that refers to the fact that Mr Merinson requested the letter, which the Authority relies on to support its' allegation that this was a matter that Mrs Whitestone wished to conceal. However, as Ms Clarke submitted, if so, it made little sense for Mrs Whitestone to volunteer the document, which was plainly contrary to her interests.

328. The letter itself was disclosed by the Authority on 10 August 2020, following Mrs Whitestone's disclosure request in June 2020. It transpired that it was held on BJB's record-keeping system in Zürich and Mr George accepted that it was probably also held within MyCRM by JBI. Those facts undermine the suggestion that Mrs Whitestone was seeking to conceal the document from senior management. When Ms Sonja Senn-Sutter of BJB's Business and Operational Risk Department, discovered the letter on BJB's systems in August 2010, as we refer to in more detail later, it was provided to Ms Thomson Bielmann. As Mrs Whitestone said in her evidence, if it had caused her concern and if she was not aware of it, it is likely that she would have raised it with Mrs Whitestone.

329. There are no emails or other communications which show that Mrs Whitestone did in fact discuss the terms of the letter with Compliance or that Compliance had a part in drafting it. As we have previously said, the Authority in its investigation did not search the inboxes of either Mr Narrandes or Ms Thomson Bielmann or call them as witnesses. In those circumstances, for the reasons we have already given, we give more weight to Mrs Whitestone's evidence. Neither are there any communications which indicate how the letter ended up on BJB's systems in Zurich. However, it does not appear that Mrs Whitestone herself had access to such systems, so in our view it is more likely than not that it was entered on these systems through Compliance, which supports Mrs Whitestone's position that Compliance was involved.

330. As we have remarked, the letter has a number of deficiencies which suggests that Compliance did not see the final version, because if they had done, it is likely that they would have commented on these deficiencies. We therefore think it is more likely than not that the text of the letter would have been either drafted or reviewed by Compliance and it was then turned into a letter.

331. As to the question as to whether the letter was a contractual rather than an operational document, Mr Bates's evidence was to the effect that it was a difficult question the answer to which was dependent on the context, stating that if Mr Narrandes had a conversation with Mrs Whitestone and in fact advised on the drafting of the letter and said that it was acceptable for two signatories of the same level to sign it then that would be accepted. Mr Bates completed his evidence on this point by stating that in his view the letter looked like a communication rather than a contract.

332. Finally, we have found that in November 2009 there was no agreement that Mr Merinson would be registered as a Finder on the Yukos Capital account and there is no evidence that position changed between November 2009 and 23 March 2010 when the Veto Letter was created. Accordingly, the Authority's suggestion that the letter was concealed so as not to reveal Mr Merinson's proposed status as a Finder in relation to the Yukos Capital account cannot be sustained.

333. Accordingly, we are not satisfied that the purpose of the letter was to give Mr Merinson a veto over movement of monies on the Yukos Capital account or that Mrs Whitestone took steps to have it filed in a place where as few people as possible were ever likely to see it, as suggested by the Authority. In our view, it is more likely than not that Mrs Whitestone was correct in her explanation as to why the letter was created.

Events during the Relevant Period

July 2010: the negotiation of Mr Merinson's Finder's fee

334. On 2 July 2010, Mrs Whitestone emailed Mr Merinson regarding arrangements for her to meet both Mr Feldman and Mr Merinson. The meeting was initially proposed for 10 am on Wednesday 7 July, but at Mr Merinson's request was rearranged for Tuesday 6 July at 9.30 am. In her initial email Mrs Whitestone stated that she had asked JBI's Chief Investment Officer (Mr Porter) to be available should any investment advice be required.

335. Mr Porter's evidence is that he met Mr Feldman twice, first on 7 July 2010 and secondly on 8 July 2010. He says that during those meetings he talked about the market, investing in CoYs[2] and how they worked and investing in short-dated US dollar-denominated bonds. He does not recall meeting Mr Merinson.

336. Mrs Whitestone said that Mr Porter was also present at the meeting held on 6 July. She referred to an email sent by Mr Matthew Taylor, a member of Mr Porter's team to herself on the morning of 7 July 2010. "Please find attached a term sheet for the CoY as discussed yesterday".

337. Mrs Whitestone prepared a contact note of these meetings which was uploaded to MyCRM. The text of this note is as follows:

> "Contact Report – Yukos Capital SaRL -Daniel Feldman and Dmitri Merinson 9 am Wednesday 7th July 2010 – Just St James's Restaurant
>
> I met with Daniel Feldman, the sole director of Yukos Capital SaRL (and sole signatory on the JB account) and Dmitri Merinson, the introducer registered on the Yukos Capital SaRL account (currently with 25% of net revenues) for breakfast this morning at Just St James's. They have concluded the final court proceeds between Yukos Capital SaRL and Rosneft and the Dutch Supreme Court has denied Rosneft's appeal and ordered Rosneft to pay to Yukos Capital SaRL a minimum of GBP280milion. On the 16th July 2010, they will find out the exact amount which could be anything up to GBP430mil and also the mechanics of the transfer. They have set up an escrow account at Fortis Bank, London, to which Rosneft will be transferring the funds on 28th July (Rosneft have already provided the bank guarantee for GBP280mil for this date).

[2] We were told that a CoY is a derivative instrument combining an FX linked deposit with a currency option, with the aim of providing a higher yield return than that available for a standard deposit but also carrying a higher risk than a standard deposit due to the exposure to FX rate movements. The investor gets a particular rate of return and whether they get their money back in the currency they invested in or a different currency depends on the exchange rate at the maturity of the product.

Currently, the idea is to then transfer the funds immediately from Fortis to Yukos Capital SaRL's account with JB Zurich. If there is any concern about assets being frozen at Fortis bank (this is extremely unlikely considering the enforcement of this payment by the Dutch court is open public knowledge - see, for examplehttp//themoscowtimes:com/business/articleldutch-court-denies+rosrefts-yukos-appeal/409152.html.), they would instead ask Rosneft to transfer the funds directly to YCSaRL's JB Zurich account and they would request that we open a JB Bahamas account for YCSaRL to which we would do an onward transfer of the whole amount (so that Rosneft do not know where the money is).

On the 16th July, the clients will also know exactly what restriction they will be subject to. Currently, they believe that the funds will have to stay on the YCSaRL account for a 6 month period, after which they will be able to use the funds to repay certain creditors. The vast majority of the total loan amount needing to be repaid is to be transferred to another company within the Yukos structure (as repayment of an intra-company loan), Yukos Hydrocarbons, for which Viorel already has a JB Singapore account. The clients have therefore asked if I can open a JB Bahamas account for Yukos Hydrocarbons, with myself as the sole RM, to which they will transfer funds to repay the loans. Of course all supporting documentation for this flow of funds will be provided.

Daniel Feldman asked if we would be able to pay a one-off fee to Dmitri Merinson, the introducer on the Yukos Capital SaRL account, totalling around 1% of the total assets on the account (this is just to indicate the kind of amount that they are hoping Mr Merinson will receive although of course contractually, it could not be worded like that). I explained that this could only be done if the bank has guaranteed RoA of at least 1.2% so that we still get 20 basis points. Daniel agreed with this and we are meeting again at 2pm today with Darren Porter to discuss the possibility of investing the funds into a USD/GBP CoY (from which we would make 1.4%) and once we have received our commission, we make a one off retrocession payment to Mr Merinson of 70% of our net revenues. We then would not pay the 25% retrocession to him in accordance with his introducer contract until at least 1 year after the credit of the funds to the Yukos Capital SaRL account. Daniel is happy to do this. In addition, we have agreed that we will open a subaccount which will hold 10% of the total funds and will be subject to a 50 basis point custody fee per annum, justifying the client's access to the time and advice of Darren Porter. The remaining funds will be held on the main account and charged at 10 basis points per annum.

If we can do this for the client, the funds will stay with us on the Yukos Hydrocarbons account, and as other funds are unfrozen or repaid to Yukos entities following certain court decisions (including this one), there will be further substantial funds to come.

They are returning at 3pm today to meet with Darren Porter and discuss investments."

338. The information contained in the contact note was provided almost verbatim in an email sent on the same day to Mr Seiler. Mr Campeanu was copied in on that email. 7 July was Mrs Whitestone's last day in the office before she took leave to get married. She returned to the office on 2 August 2010.

339. There is a further contact note which relates to the meetings held on 6 and 7 July. The text of this note is as follows:

"Wednesday, 7 August 2010 9:30 am Meeting with Daniel Feldman, Dmitri Merinson, Darren Porter and Louise Yerbury/Whitestone

I met with the clients who confirmed that the court had enforced the order for Rosneft to repay the loan to Yukos Capital Sarl and that the funds would be remitted by mid August latest. At the time, Daniel Feldman, sole director of Yukos Capital Sarl, expressed that the intention was to receive approximately USD 422 million in GBP equivalent, convert it into USD taking commission of up to USD 1,250,000 on the FX, 80% of which would be paid to the finder registered on the account, Dmitri Merinson. The other 20% of which would be JB's own commission (up to USD 250,000). The funds would then be held for 6 months with JB (JB

> Bahamas account of Yukos Capital Sarl) until the funds were paid away as the repayment of an intra-company loan. Darren Porter joined our meeting and we discussed investing the funds into CoYs for this period. Darren clearly explained the mechanics of a CoY to Daniel and gave him some fact sheets to take away and study in the evening. He also provided some information on the cable rate. We arranged for Darren to meet with Daniel the following morning to continue to discussion and Darren promised to bring some more information to the meeting accordingly (including some corporate bond examples (see separate meeting report complied [sic] by Darren).
>
> Internal ROA projections
>
> The maximum RoA that we could have generated from the funds according to this plan was therefore: –
>
> 6 basis points on the FX (USD 250K) + 52.5 basis points from the CoY (70 basis points for half year of 140 basis points on the CoY, minus the finder's 25%) = 58.5 basis points"

340. Mrs Whitestone's position is that this contact note is a record conflating the meetings that she says took place on 6 and 7 July and a subsequent meeting that she says she had with Mr Merinson, Mr Feldman and Mr Porter on 4 August following her return from wedding leave. It is common ground that the heading to the note wrongly states that it relates to a meeting held on 7 August but there is a dispute as to whether any meeting took place on 4 August. Mr Porter says he cannot recall a meeting on that date and, as we have said, did not recall attending a meeting on 6 July.

341. Mr Porter did prepare a contact note recording meetings he says he did have with Mr Feldman.

342. It is common ground that Mr Porter did attend a meeting during the afternoon of 7 July 2010. There is an email from Mrs Whitestone to Mr Porter on that day attaching details of what had been provided to Mr Feldman and Mr Merinson that morning which was described as "USD cash plus ideas". Mr Porter was told that the clients would be arriving in the next 25 minutes.

343. At 12.41 on 8 July 2010 Mr Porter sent an email to Mr Feldman setting out a list of USD short dated corporate bonds that had been suggested at the meeting held on 7 July.

344. There is a contact report dated 19 July 2010 by Mr Porter recording details of the meeting he held with Mr Feldman on 8 July. This was described in the note as a follow-up meeting to that held "yesterday", that is 7 July. The note explained that the purpose of the meeting was to provide Mr Feldman with new CoY rate yield enhancing products. The note recorded that Mr Feldman emphasised that his preference was for "very risk averse" products and that Mr Porter suggested CoYs as well as short-dated US bonds. The note concluded by setting out examples of the CoYs that Mr Porter had provided at the meeting.

345. There is a dispute between the parties as to whether any meetings took place between 6 July and 7 August other than the meetings which it is common ground took place on 7 and 8 July. It is clear that Mrs Whitestone did meet Mr Feldman and Mr Merinson on 6 July but there is a dispute as to whether Mr Porter attended any part of that meeting. As we have said, Mr Porter denied he attended a meeting on 4 August and both the Authority and Mr Seiler made submissions to the effect that no such meeting took place.

346. There is also a dispute as to the extent of Mr Seiler's knowledge and approval of the payment of a retrocession to Mr Merinson of 80% of the commission earned on the proposed FX transaction described in Mrs Whitestone's contact note which wrongly referred to a meeting held on 7 August 2010. As the email to Mr Seiler dated 7 July and the contact note of the same date clearly stated, the proposal at that stage was to pay Mr Merinson a retrocession of 70% of

net revenues to the bank, which at that time was contemplated would derive from investment in a CoY. We therefore need to determine when the decision not to proceed with the CoY was taken and who approved the payment of the retrocession on the FX transaction and in what amount.

347. Connected to those matters is the question as to what explanation was given to Mrs Whitestone by Mr Feldman as to the rationale for the payment of a Finder's fee to Mr Merinson and the extent of Mr Seiler's knowledge in relation to that issue.

348. Mrs Whitestone's position on these matters is as follows:

(1) She was told in a telephone call with Mr Feldman sometime between April and July 2010 that the parent company of the Yukos Group wished to incentivise officers in a confidential bonus pool arising from the litigation. Under the terms of that bonus pool, Mr Merinson did not qualify to participate in it so it was decided that Mr Merinson be remunerated as an introducer of Yukos business to a bank or banks and should liaise with the Group's chosen bank or banks to determine if they would accommodate such an arrangement and on what level. It was decided that Mr Merinson should be remunerated at approximately 1% of this inflow.

(2) Sometime during this period Mrs Whitestone discussed the rationale with Mr Seiler, Mr Campeanu and Mr Narrandes. She explained to Mr Seiler that Mr Merinson was the CFO for Yukos Capital, but that Yukos nonetheless wished to pay him through a Finder's arrangement.

(3) She did not record Mr Feldman's explanation in her contact report or in any subsequent correspondence regarding the proposed payment. However, at the time that the matter was first raised, it was an enquiry from Mr Feldman as to whether paying Mr Merinson a Finder's fee was possible. At that time, the account had not been funded and therefore this was not a crystallised request. It was also conducted on a recorded telephone line and therefore available to (at least) Compliance and her line manager.

(4) Mrs Whitestone did not see as "red flags" either the fact that that Mr Feldman was the director of Yukos Capital and therefore responsible for the management of its monies for and on behalf of its shareholders as beneficial owners or that Mr Feldman was a sole director and sole signatory on the Yukos Capital account and that there was an obvious increased risk of fraud in those circumstances. Her evidence was that it was "not surprising to [her]" at the time that Yukos wanted to pay Mr Merinson such a large sum and that at the time the explanation given was plausible. She accepted that she had been naïve and made mistakes in accepting the explanations of both Mr Feldman and Mr Merinson and regretted those mistakes. She said that one of the problems was that 99% of what they told her was the truth and then there was one percent that was not, and she regretted accepting these explanations.

(5) Mr Campeanu told Mrs Whitestone to elevate to Mr Seiler, the issue of the possibility of paying retrocessions to Mr Merinson. Thus, when Mrs Whitestone discussed the possibility of Mr Merinson becoming a Finder with Yukos, it was Mr Seiler who suggested that rather than pay Mr Merinson a high ongoing percentage he would prefer to pay one-off retrocessions on specific transactions. He suggested 70% on one or a number of transactions which would replace any ongoing % for a period of one year. Mr Seiler told her that it was not unusual for the bank to pay a % on Net New Money – generally 1-1.5%, but that he would prefer to offer 1% and stipulated that the bank would need to earn 0.4-0.5% by year end and 0.2% pa thereafter if the funds stayed more than 6 months in order to justify the high cost of dealing with Yukos.

(6) The reference in the email of 7 July sent by Mrs Whitestone to the fact that the commission arrangements could not be worded as a percentage of assets held on the account is explained on the basis that she did not think that Julius Baer had a standard Finder's agreement under which the fees payable to the Finder reflected a percentage of total assets on the account, and that in those circumstances, she believed that the proposed one-off payment to Mr Merinson would have to be recorded in an annex to any written agreement.

(7) Mrs Whitestone's contact report dated 7 July 2010 at 09.30 set out at [337] above conflates information from the meetings on 6 and 7 July. Mrs Whitestone believes that she probably did not do a separate contact report for this meeting because she was under pressure and the discussion continued into the next day, so she included all the most relevant information from both the 6 July 2010 and 7 July 2010 meetings in her email to Mr Seiler at 15:15 on 7 July 2010 referred to at [338] above.

(8) The fact that this contact report refers to discussion about a CoY – during the morning meeting on 7 July 2010 (at which Mr Porter was not present), can only be because this product had already been suggested by Mr Porter the day before. Mrs Whitestone had never heard of a CoY prior to this, and as Mr Porter himself acknowledged in evidence, this was a relatively new product and perhaps not well understood. There is no way that Mrs Whitestone would have had the knowledge or expertise to suggest such a product herself, or to know how much commission a CoY would be likely to generate especially given at the time it was a relatively new product for the investment professionals as Mr Porter confirmed in his evidence. A second meeting then took place on 7 July at circa 3pm, which Mr Porter attended. This is why Mrs Whitestone emails Mr Porter as described at [342] above. This must have been done because Mr Porter was already aware that the client wanted to convert the inflow and was considering a CoY investment.

(9) The contact report which is wrongly dated 7 August 2010 refers to a meeting on 7 July 2010 (at which Mr Porter was not present) at 09.30am. This contact report conflates information from meetings on 7 July 2010 at 9:30am (without Mr Porter in attendance) and on 4 August 2010 (with Mr Porter in attendance) and also reflects the information Mrs Whitestone understood had been agreed by Mr Campeanu in her absence. The document refers to Mr Merinson receiving 80% of the commission, rather than 70% as envisaged in the email sent to Mr Seiler on 7 July. Mrs Whitestone did not, as alleged, unilaterally renegotiate the commission split without recourse to her superiors as demonstrated by the following:

> (a) The wrongly dated contact report refers to the amount that was due to be received by Yukos from the Dutch litigation. When Mrs Whitestone went on leave this amount was not known and was not due to be confirmed until 16 July.
>
> (b) The wrongly dated contact report refers to Ms Yerbury/Whitestone – which would not be the case prior to her wedding.
>
> (c) It appears that the wrongly dated contact report was uploaded to MyCRM on 19 August 2010 – therefore after the First FX Transaction had taken place.
>
> (d) The 80% commission split is also not consistent with the 70% figure given in her 7 July contact report and her later email. If 80% had been agreed on 7 July, then she would have written this in these other documents too. There would have been absolutely no reason not to do

so. Her contact report on 7 July, and the subsequent email, were both full documents, which provided detailed information and there would have been no reason whatsoever to attempt to conceal that Mr Merinson's commission share had increased. This is particularly the case given that Mrs Whitestone was due to depart on wedding leave that day and at that time it was expected that the funds would come into the account while she was away – meaning that this would have had to have been handled by Mr Campeanu in her absence. Therefore, if she had secretly and unilaterally changed the commission arrangements, she would have known that she would inevitably have been found out.

(e) In addition, the way in which commission was to be captured has changed in the wrongly dated contact report:

(i)The 7 July contact report and the subsequent email, refers to investing the funds into a CoY from which the bank would make 1.4%, and once it had received its commission (on the CoY), it would then make a one-off payment to Mr Merinson of 70% of its net revenues. Therefore, at this time, it was clearly contemplated that the retrocession would be paid from BJB's commission on the CoY.

(ii)The wrongly dated contact report refers to the funds being converted from GBP into USD from which a commission of USD1,250,000 would be taken on the FX conversion, 80% of which would be paid to the Finder. This commission therefore is now coming from the FX conversion and not from a CoY

(10) All these factors therefore lead to the conclusion that Mrs Whitestone wrote the wrongly dated contact report after she returned from wedding leave, and that she has conflated some of the information that she was aware of by then, and mistakenly included it in this contact report.

349. The Authority's position in relation to these matters is as follows:

(1) The request for the payment of a one-off introducer fee (then anticipated to be approximately USD 4 million) to Mr Merinson was made by Mr Feldman. As with each of the matters identified below, this was an obvious red flag to both Mrs Whitestone and Mr Seiler. Both knew that Mr Feldman was the director of Yukos Capital and therefore responsible for the management of its monies for and on behalf of its shareholders as beneficial owners. They also knew that Mr Feldman was a sole director and sole signatory on the Yukos Capital account – and of the (obvious) increased risk of fraud in those circumstances. Despite that, both Mr Seiler and Mrs Whitestone deliberately closed their eyes to those risks where any questions, or investigations, might jeopardise the lucrative relationship with Yukos.

(2) The Authority accepts Mr Seiler's evidence that he was unaware of the purported rationale for the Finder's arrangements with Mr Merinson because:

(a) Mrs Whitestone's explanation is not recorded in either of the relevant contact notes, Mrs Whitestone's email to Mr Seiler on 7 July 2010 or in any of the other contemporaneous documents. While Mrs Whitestone asserts that she discussed the rationale for the arrangements with Mr Seiler, Mr Campeanu and Mr Narrandes, there is no documentary evidence in support of that position.

(b) Mrs Whitestone's evidence is not logical or credible. Had Mr Feldman wished to make a one-off payment to Mr Merinson to incentivise him in his work for Yukos, the simple and obvious way to do so would have been to instruct Julius Baer to make a payment from any monies deposited in the Yukos Capital account (where Mr Feldman was the sole signatory on that account). Mrs Whitestone's explanation in her oral evidence – that Mr Feldman was "trying to keep Dmitri Merinson on a… arm's-length from the official operation of Yukos Capital SARL's bank accounts" is in reality tantamount to an admission that Mrs Whitestone knew that Mr Feldman and Mr Merinson sought to keep the latter's role secret from other persons at Yukos.

(c) In reality, Mrs Whitestone deliberately avoided recording the details of the alleged incentivisation scheme because recording that purported explanation for the Finder's fees in writing would, in all likelihood, have prompted investigation by her senior managers and/or members of Julius Baer's Compliance team.

(3) The Authority does not accept that Mr Seiler did not question the request to pay Mr Merinson a Finder's fee despite knowing that the request had come from Mr Feldman, a director tasked with the proper management of Yukos's assets. Whilst the Authority has no knowledge or position on who first came up with the idea of a "one-off" commission payment or arrangements for the 70% rate of commission it does not accept Mr Seiler's evidence that he had no knowledge of these issues or that he did not discuss them with Mrs Whitestone. The details recorded in the 7 July email were an obvious red flag which Mr Seiler knew was of serious concern.

(4) Mrs Whitestone's recognition that the Finder's fee to Mr Merinson could not be worded as a percentage of the total assets on the account amounts to her recognition that the arrangements with Mr Merinson were unusual and suspicious, where recording them candidly on the face of any Finder's agreement would inevitably prompt investigation into those arrangements.

(5) The request for the payment of commission in that way was an obvious red flag for Mr Seiler who as Market Head was specifically tasked with oversight of unusual arrangements of this kind on Russian accounts and it is not accepted that Mr Campeanu was involved in reviewing the arrangement.

(6) Both Mrs Whitestone and Mr Seiler were aware that Mr Merinson was a Yukos employee and the obvious conflict of interest that arose as a result. Furthermore, all the information needed by Mr Seiler to trigger what he conceded would have been an obvious red flag – namely a proposal to pay an employee Finder's fees – was clearly contained in Mrs Whitestone's 7 July email. It is not credible that Mr Seiler could have paid such little attention to an account of this significance or that he did not realise what Mr Merinson's role was.

350. Mr Seiler's position in relation to these matters is as follows:

(1) The first document sent to him referring to the possibility of Mr Merinson being paid a Finder's fee in relation to a Yukos account was Mrs Whitestone's email of 7 July 2010.

(2) In that email Mr Merinson was being presented as an introducer, not an employee or officer of the client. Mr Seiler did not know that Mr Merinson was in fact not yet registered as an introducer.

(3) He had not registered the information about Mr Merinson's employment status in the documents he had received the previous years but even if he had, by July 2010 he had forgotten it. In July 2010, Compliance departments in London and Nassau whose role was specifically to look for signs of potential wrongdoing missed the significance of Mr Merinson's employment status although they received documents referred to it, as discussed below.

(4) There is no contemporary evidence to support Mrs Whitestone's assertion that the idea for a one-off retrocession was Mr Seiler's. He is absolutely clear in his evidence that the idea was certainly not his own.

(5) He was not told about any confidential incentivisation scheme.

(6) Mrs Whitestone's 7 July 2010 email is inconsistent with her assertion that Mr Seiler told her that Julius Baer would need to generate 40-50bps by year end. Rather than the 40bps which Mrs Whitestone suggests Mr Seiler said needed to be achieved, her email states that the transaction (at that time it being suggested it would be a CoY) "could only be done if the bank has a guaranteed RoA of at least 1.2% so that we still get 20 basis points". Mr Seiler did not at any point object that the arrangements Mrs Whitestone described in her emails to him of July and August 2010 did not generate a high enough return for Julius Baer, none of which envisaged the bank earning 40 basis points by the end of the year net of Finder's fee.

351. Our findings in relation to the disputed matters set out above are as follows.

352. Looking at Mrs Whitestone's email of 7 July 2010 from her perspective, it reads as if she has assumed that Mr Seiler has some knowledge of the fact that it has been anticipated that Yukos would be receiving considerable funds as a result of the completion of the Dutch litigation. What is said in the first paragraph of the email is consistent with what Mr Seiler was told at the time the Yukos Capital account was opened in November 2009, as referred to above.

353. However, there is no indication from the email that Mr Seiler had been given any detailed and specific further information about the funding of the account or the possibility of paying a large retrocession to an introducer prior to this email. The impression that we have formed from reading the reference to Mr Feldman's request as to whether a 1% retrocession could be paid to Mr Merinson is that Mr Seiler is being informed for the first time about this specific proposal.

354. Nevertheless, we are prepared to accept that Mrs Whitestone may well have had some discussions with Mr Seiler in very general terms about the possibility of a payment of a retrocession to an introducer prior to 7 July 2010 and we accept that if that had taken place it is most likely that Mr Seiler would have forgotten about it. We accept he was a very busy man and would not necessarily have addressed his mind to the issue in any detail, but would wait for further details to be provided once the arrangements for funding the account became more established. We are therefore prepared to accept that Mr Seiler may have expressed some positive indications about the possibility of paying a large retrocession but in our view, there is no evidence to support a finding that the idea of paying a large one-off retrocession to Mr Merinson or what the amount that retrocession should be had been instigated by Mr Seiler. We think that Mrs Whitestone is likely to have convinced herself, in her enthusiasm as a young Relationship Manager to develop the relationship with Yukos, that Mr Seiler had approved the arrangements.

355. We believe it is most likely that Mrs Whitestone would have discussed the matter with Mr Campeanu, her line manager with whom she had reasonable relations at that time. We are prepared to accept her evidence that she discussed the matter with Mr Narrandes.

356. It is possible that during whatever discussions that Mrs Whitestone had with Mr Seiler prior to 7 July that Mr Seiler was given some information as to who the introducer on the account was and why the payment was proposed to be made. However, there is not sufficient evidence to conclude that Mrs Whitestone told Mr Seiler enough to arouse his suspicions that there was anything improper in the arrangements. Had he been told, then it is likely that he was given information which was consistent with what Mrs Whitestone had previously disclosed - see for instance her email of 30 November 2009 to Mr Seiler, as referred to at [311] above, where she mentioned that Mr Merinson was the CFO of Yukos Capital without mentioning anything as to his employment arrangements. Again, we would not have expected Mr Seiler to have made any further enquiries at that stage in the absence of any specific proposals and, as we have said, we would not have expected Mr Seiler to have remembered in July 2010 what he may or may not have been told when he was considering the opening of the Yukos Capital account in 2009.

357. We do not consider that there is sufficient evidence to establish that Mr Seiler had stipulated that Julius Baer would need to generate a return of 40 – 50 bps by year end. We accept Mr Strong's submissions, as summarised at [350 (6)] above on this point.

358. As regards the sequence of events, in our view the most likely explanation is as follows.

359. Although in her email of 7 July 2010 (2.10 pm London time) Mrs Whitestone referred only to having met Mr Feldman and Mr Merinson on the morning of 7 July it is clear that part of the meeting occurred on the previous day. It was common ground that her email (and the contact note in almost identical terms) conflates the meetings on 6 July and the morning of 7 July. Mrs Whitestone's email indicates that she had given Mr Feldman and Mr Merinson information about a CoY investment in the morning, and that it was expected that they would return to meet Mr Porter in the afternoon.

360. Mr Porter agrees that he attended a meeting with Mr Feldman and Mrs Whitestone that afternoon, although he does not recall Mr Merinson being present. Mr Porter clearly had little recollection of the details of the various meetings, which we do not find surprising many years after the event, and he was not at the centre of events in the way that Mrs Whitestone was. We think it is more likely than not that Mr Merinson was present when Mr Porter attended the meetings. We also think it is likely that he was present at some time at the meeting held on 6 July. That is because we accept Mrs Whitestone's evidence that she had little knowledge of the features of a CoY and the way that they operated, which is plausible in the light of her limited knowledge of investment products at the time. Accordingly, the details of how such a product operated could only have come from Mr Porter and he indicated in his oral evidence that it is likely that he provided whatever information was passed on to the client about this particular product. Therefore, the most likely explanation is that Mr Porter attended at least some part of the meeting on 6 July, following which details about the product were given by Mrs Whitestone to Mr Feldman and Mr Merinson during the morning of 7 July before Mr Porter joined the meeting for further discussions in the afternoon.

361. It is likely that it was on 6 July 2010 that Mr Feldman told Mrs Whitestone that he wanted to pay Mr Merinson 1% of the assets to be recovered in the Rosneft litigation and suggested that this could be achieved by way of Finder's fees. It is also likely that the following morning Mrs Whitestone and Mr Feldman discussed whether it would be possible to pay Mr Merinson 1% of the money expected to be received from Rosneft by investing in a CoY on which BJB's

profit margin would be 1.4%, of which Mr Merinson would be paid 70%. As we have indicated above, we do not find that Mr Seiler was aware at that time of those specific proposals.

362. It is common ground that the contact report referred to at [339] above is misdated. As suggested by Mr Strong, it is likely that it relates to the meeting which Mrs Whitestone had in the afternoon of 7 July 2010, for which there was no separate contact report. The contact report which formed the basis of the email sent by Mrs Whitestone to Mr Seiler refers only to the meetings which took place on 6 July and the morning of the next day. 7 July 2010 was a Wednesday, and the most likely explanation for the wrong date is that Mrs Whitestone simply typed the wrong month when creating the contact report. Bearing in mind how busy Mrs Whitestone would have been during the afternoon of 7 July, the last day before she went on wedding leave, we accept that this note was prepared after her return to the office in early August 2010.

363. Mrs Whitestone suggests that at least part of this contact report relates to a meeting between her, Mr Merinson, Mr Feldman and Mr Porter on 4 August 2010. However, none of the contemporaneous documents support a finding that she had a meeting with Mr Merinson or Mr Feldman between her return from honeymoon on 2 August 2010 and the meetings at which the First FX Transaction was executed, which began on 11 August 2010. We accept Mr Strong's submissions on this point as follows:

(1) On 26 July 2010, Mr Merinson informed Mrs Whitestone that he and Mr Feldman would be in London from Tuesday 10 August 2010. Mrs Whitestone replied on 2 August 2010, noting that she would keep 10 and 11 August free, signing off her email "See you next week". At just before 3pm on 2 August 2010, Mrs Whitestone was thus not intending to meet with Mr Merinson and Mr Feldman until the following week.

(2) There are no subsequent emails setting up a meeting for 4 August 2010, or any date that week.

(3) Mr Porter has no recollection of a meeting taking place on 4 August 2010.

(4) On Friday 6 August 2010 at 4.45pm London time (Mr Porter's last day in the office before his summer holiday), Mrs Whitestone forwarded to Mr Taylor Mr Porter's contact report of his meeting on 8 July 2010, as referred to at [344] above. This makes sense as preparation for Mr Taylor for a meeting the following week but Mrs Whitestone said nothing in her email about having met Mr Feldman or Mr Merinson earlier in the week of 2 August.

(5) Mrs Whitestone's suggestion that there was a meeting on 4 August 2010 could have arisen solely from a deduction based on the fact that 4 August 2010 was a Wednesday. However, we think she was mistaken in this deduction.

364. Although, as we have said, the contact report refers to matters which were discussed in the afternoon of 7 July, it does, as Mrs Whitestone contended, deal also with matters that only became clear after that date. In particular, it refers to the amount to be received by Yukos from the Dutch litigation which was not confirmed until 16 July, as shown by the email sent by Mr Campeanu to Mr Benischke referred to at [366] below. Mrs Whitestone's email of 7 July 2010 referred to a possibility of receiving a much greater amount.

365. Therefore, the question arises as to whether, as Mr Strong submitted, the contact report records a conclusion reached at the meeting held during the afternoon of 7 July 2010 that, following the discussions held with Mr Porter, a CoY would be an unsuitable transaction and accordingly it was in the afternoon of 7 July 2010 (in a meeting that Mrs Whitestone had with Mr Porter and at least Mr Feldman) that the plan changed from paying Mr Merinson a portion of Julius Baer's profit on a CoY, to doing this via the margin on an FX transaction, with Mr

Merinson now to receive 80% of a margin of around 0.3% on an FX transaction, rather than 70% of a turn of 1.4% on an investment. However, Mr Porter did not appear in his evidence to suggest that the idea of a CoY was dropped during the meeting held on 7 July which he attended and indeed his contact note relating to the meeting he attended on 8 July suggested that the possibility of investing in a CoY was still very much under consideration. Mr Strong suggested that Mr Porter's meeting with Mr Feldman on 8 July 2010 was to continue to discuss CoYs, along with short dated corporate bonds, not in the context of Mr Merinson's Finder's fee, but rather as a possible investment for the 10% of the funds which it was at that time envisaged would be held on an investment advisory sub-account. However, there is no indication that the discussion was confined to this limited amount.

366. Even though we are not satisfied that a meeting took place on 4 August 2010, we think that it is more likely than not that the renegotiation of the Finder's fee and the abandonment of the CoY proposal took place either during Mrs Whitestone's absence or after she returned from wedding leave. The email exchange between Mr Campeanu and Mr Benischke which took place on 16 July 2010 still refers to a proposed Finder's fee of 70% of Julius Baer's income. It could be that the renegotiation did not take place until Mrs Whitestone met Mr Feldman and Mr Merinson the following week. However, whenever it was, and we deal with this issue further below, there is no evidence Mr Seiler was told that the arrangements had changed from those set out in Mrs Whitestone's email of 7 July.

367. In the light of these findings, we now turn to the question as to whether as at the time Mrs Whitestone departed on wedding leave Mrs Whitestone and Mr Seiler recognised that any of the proposed arrangements with Mr Merinson were unusual and suspicious and whether Mrs Whitestone was seeking to conceal full details of those arrangements to prevent them coming under scrutiny.

368. As regards Mrs Whitestone, in our view she did not see as an obvious red flag the proposal for the payment of a one-off introducer fee of the amount proposed to Mr Merinson. As we have found, Mrs Whitestone had no reason to suspect Mr Feldman was acting without integrity, notwithstanding the fact that he was the sole director of Yukos Capital. He appeared as a senior and respected lawyer and had full authority to represent Yukos Capital. What Mr Feldman represented to her was that Yukos wished to reward Mr Merinson by means of a bonus payable out of the proceeds of the litigation. To a more experienced Relationship Manager that may have raised questions of a kind raised by the Authority as to why Mr Feldman did not simply instruct Julius Baer to make a payment from the Yukos Capital account to Mr Merinson when the proceeds were received. Clearly, Mr Feldman had a motive for concealing the fact that Mr Merinson had received these payments but it is perfectly plausible that Mrs Whitestone, with her level of experience and naïveté, would have accepted Mr Feldman's explanation as to the rationale for structuring the payments in this way, as recorded at [348 (1)] above. Mr Feldman must have sensed Mrs Whitestone's naïveté and took advantage of it.

369. As regards the suggestion that Mrs Whitestone deliberately avoided recording the details of the alleged incentivisation scheme, in our view, what had previously been recorded, namely that Mr Merinson was the CFO of Yukos Capital, would have been sufficient for any senior manager or member of Compliance carrying out an investigation to have asked questions about the rationale for Mr Merinson being treated as a Finder. As we shall see, that was a piece of information which did not prompt any suspicions in those who saw it, including members of Compliance. That may indicate that the use of Finder's arrangements to remunerate a person connected with the account holder was not in practice, depending on the circumstances, to be excluded where the payments concerned had been properly authorised by the account holder, as they had been in this case.

370. As we have also found, Mrs Whitestone had received no significant training on the operation of Finder's arrangements and there was little to be found on Julius Baer's systems that would assist her in that regard. Furthermore, as we have said, Mr Seiler said that he would not have found it surprising that a Finder was close to, and had some form of advisory or consultancy relationship with, clients they introduced, and that was confirmed by each of Mr Raitzin, Mr Porter and Mr Fellay. Therefore, we find it plausible that Mrs Whitestone had not identified as a red flag that Yukos Capital was seeking to reward Mr Merinson in the manner proposed by Mr Feldman.

371. As regards Mrs Whitestone's comment in her email that the Finder's fee to Mr Merinson could not be worded as a percentage of the total assets on the account, we reject the suggestion that this statement amounts to a recognition by Mrs Whitestone that the arrangements with Mr Merinson were unusual and suspicious. We accept Mrs Whitestone's explanation that this comment was made because she did not know at the time how the payment proposed would be worded when it was not catered for in the standard Finder's agreement. We also consider that it is unlikely that Mrs Whitestone would have made such a statement openly in her email if she had realised that the way that the payment was being made needed to be concealed. Furthermore, Mr Narrandes, as well as others at JBI, had access to the MyCRM system, on to which Mrs Whitestone's 7 July 2010 contact report was loaded when she returned from leave on 2 August 2010.

372. As regards Mr Seiler, we do not accept that the fact that Mr Feldman was the sole director and signatory on the Yukos Capital account alerted him to the possibility of fraud. We doubt whether that point would have registered with him when he was reading the email, although Mr Seiler candidly accepted in his evidence that it was something that should have occurred to him as being unusual but at the time, he did not pick it up. Mr Seiler would be entitled to believe that that was an issue that Compliance would be alert to and we do not think that he would be expected to be the primary line of defence on that issue.

373. We accept that the email would give Mr Seiler the impression when reading it that Mr Merinson was being presented as an introducer and not as an employee or officer of the client. As we have found at [313] and [356] above, Mr Seiler had no reason to commit to memory anything about Mr Merinson in the context of the account openings which took place in 2009 or that he drew any particular conclusion about Mr Merinson's responsibilities at that time. There is no other evidence that his memory about that issue had been refreshed before he received Mrs Whitestone's email on 7 July 2010. Accordingly, we reject the Authority's contention that Mr Seiler was aware that Mr Merinson was a Yukos employee and that there was an obvious conflict of interest that would have been apparent to him when he read the email from Mrs Whitestone. As we discussed below, this was also a conflict not identified by Compliance who had more information than was made available to Mr Seiler.

374. We accept that Mr Seiler was exceptionally busy with management related activities concerned with the growth of his market and that the attention he could reasonably be expected to have given to the emails he was sent in relation to Yukos must be considered in this context. We think it likely that he only gave cursory attention to it. In the circumstances it is understandable that that the Relevant Risks did not occur to him and to suggest otherwise is, as Mr Strong submitted, the product of reading the email with the benefit of hindsight and knowing Mr Feldman in fact was to share Mr Merinson's commission. Furthermore, the Relevant Risks did not occur to others who had the same and more information as Mr Seiler and did not object, as detailed below. We consider it implausible that all of those individuals had identified the Relevant Risks and did nothing about them.

375. With respect to the level of scrutiny that Mr Seiler would have given to this email, it is important to bear in mind that it would have been reasonable for him to have assumed that Mr Campeanu, Mrs Whitestone's line manager, would have discussed the details with her. Furthermore, as we have found, Finder's arrangements were the responsibility of Relationship Managers, in conjunction with the Finance Department and Legal and Compliance. The fact that he did become involved was a reflection of Mr Raitzin's approach to non-standard arrangements relating to Finder's agreements which was that he would seek the views of Mr Seiler, as the relevant Market Head before giving his approval. Accordingly, we accept Mr Seiler's evidence that he may not have focused closely upon this email. There is no evidence Mr Seiler responded to it.

376. We have also found that Mr Seiler was not aware of the specifics of the alleged incentivisation scheme, nor had he instigated the proposal that Mr Merinson be paid a large one-off retrocession. For the reasons given in relation to Mrs Whitestone, we do not consider that Mr Seiler would have found anything untoward in Mrs Whitestone's statement as to how the Finder's agreement would be worded to accommodate the retrocession payment.

377. We therefore conclude that at the time that Mrs Whitestone departed on wedding leave, neither she nor Mr Seiler were aware of any of the red flags contended for by the Authority.

July 2010: the Finder's Agreement and opening of the Yukos Capital BJB Bahamas account

378. As previously mentioned, Mrs Whitestone went on wedding leave on Wednesday 7 July to 2 August 2010, her wedding taking place on 10 July 2010. During this period of leave, on 8 July 2010, Mrs Whitestone received an email from Ms Priska Thoma (Head of the Booking Centre in Zurich), with the subject "Yukos Capital Sarl", which confirmed that Mr Merinson was "not known as a finder" and could not be set up as such without a Finder's agreement. The email from Ms Thoma was prompted by an email from Ms Melanie Denman – Mrs Whitestone's assistant – seeking clarification of the issue.

379. The email from Ms Thoma resulted in an email on the same date from Ms Denman to Mr Merinson and Mr Feldman, attaching draft agreements for signature. The Finder's agreement provided for payment of Finder's fees equal to 25% of the net income generated by BJB from clients introduced by Mr Merinson which was one of the standard remuneration models. Ms Denman stated in her email that the "one-off" payment that Mrs Whitestone had "discussed and confirmed" with Mr Merinson "[would] be organised separately from this agreement".

380. On 9 July 2010, the signed Finder's Agreement was emailed by Ms Denman to Ms Thoma, with a request that Mr Merinson be set up as a Finder on the Yukos Capital account. This email was copied to Mrs Whitestone. On the same day, Ms Denman emailed the account opening documents for Yukos Capital's proposed account with BJB Bahamas to Ms Tiffany Jones of BJB Bahamas.

381. The account opening documents included:

(1) Mrs Whitestone's email of 9 October 2009 described at [288] above, in which she referred to "My Russian contact (who is the Chief Financial Officer of both companies and lives in Amsterdam)".

(2) Mrs Whitestone's contact report dated 4 November 2009 referred to at [295] above which described Mr Feldman and Mr Merinson in the body of the document as "the director of the company and my Russian contact".

(3) The enhanced due diligence report dated 5 November 2009 referred to at [305] above which recorded that Yukos Capital had a "single US resident director".

(4) Mrs Whitestone's 7 July 2010 contact report setting out the proposed arrangements for Mr Merinson to receive a one-off retrocession payment of around 1% of assets on the account in the same terms as her email of 7 July 2010 to Mr Seiler.

382. As Mr Strong submitted, it would have been expected that Compliance in the Bahamas would have read all these documents together, and Mr Fellay accepted in cross-examination that it was likely that Ms Rochelle Rolle, Head of Compliance at BJB Bahamas, would have read these documents.

383. It would therefore have been apparent to Ms Rolle that Julius Baer was proposing to pay a large commission on a transaction, a substantial proportion of which would be paid to Mr Merinson as a one-off retrocession, and that Mr Feldman had requested this payment. In addition, it would have been possible to deduce that Mr Merinson may have been an employee of Yukos.

384. Mr Fellay (who said he may have seen the account opening documents in July 2010) only spotted the reference to Yukos Capital having a single US resident director and to Mr Merinson being an employee of Yukos "buried" in the documents when he went through the whole file in November 2010 with his concerns of possible misconduct at the forefront of his mind. Mr Seiler, by contrast, even if he focussed on those documents at the time, had not seen the first two documents for 8 and 9 months respectively, and even then, did not see them at the same time, and he had no reason to read them specifically looking for potential impropriety. No-one at BJB Bahamas raised any red flag about the Yukos Capital account opening, despite having the 7 July 2010 contact note.

385. On 16 July 2010, Mr Benischke, Mr Seiler's Chief of Staff emailed Mr Campeanu. The email stated that Mr Benischke had discussed the "Yukos case" with Mr Peter Nikolov – Mr Raitzin's Chief of Administrative Support, specifically, the proposal to pay Mr Merinson a Finder's fee of 70% of net revenues. Mr Benischke's email records that "they" support the case which might suggest that was a reference to both Mr Nikolov and Mr Raitzin. However, the email went on to say that Mr Benischke had agreed to send Mr Nikolov an email with "all the details" so that he could discuss it with "Gustavo" (i.e. Mr Raitzin). On that basis, we consider that the "they" is a reference to Mr Nikolov alone and that this matter had not been discussed at all with Mr Raitzin at this stage.

386. The email also recorded that "Thomas" – i.e. Mr Seiler – "already supports the case". Mr Seiler's evidence is that his support was given on the basis of no further information than that set out in Mrs Whitestone's 7 July Email, and reflected only the fact that the proposed commission payment was less than 1.5%, the maximum stipulated under the Finders Policy, as referred to at [210] above. Mr Benischke's email refers specifically to the Finder's fee being 70% of net revenues which supports the position that a fee of 80% of net revenues had not been agreed at that stage, or at least that it had not been discussed with Mr Seiler.

387. Mr Raitzin's evidence was that he does not recall Mr Nikolov ever bringing this to his attention, but it is possible that Mr Nikolov may have done so and that Mr Raitzin may have first encountered Mr Merinson's name in the Due Diligence form he signed for the account opening. As we have found, that form shows only that Mr Merinson (a name which, we accept, at this point, would have meant nothing to Mr Raitzin) was to be Finder on the account.

388. Bearing in mind Mr Raitzin's approach to these matters, as described below, we accept Mr Jaffey's submission that it is likely that if Mr Nikolov did mention the proposal at this point, it was discussed at a high level. As Mr Raitzin said in cross examination, "I would just basically hear from Peter Nikolov that they were discussing – there were discussions in the background".

389. The approach was that Mr Nikolov "stockpile[d]" requests for discussion on the third Monday of every month. The third Monday of July 2010 was 19 July 2010 i.e., three days after the email stating that Mr Nikolov was "supportive". Mr Nikolov's "support" is unlikely, therefore, to have originated with Mr Raitzin. That is also plain from his email which describes the potential conversation with Mr Raitzin in the future tense. Therefore, it is unlikely that Mr Raitzin had expressed any support for the proposal prior to that time, and in particular at any time before Mrs Whitestone had departed for her wedding leave.

390. Furthermore, in response to Mr Nikolov's request (through Mr Benischke) for "all the details" he received a short response from Mr Campeanu, which explicitly stated that he would "have to double check" the amount of the inflow, "check the agreed fee" with Mrs Whitestone, and that "details…will need to be reconfirmed in two weeks", when Mrs Whitestone returned from wedding leave. The full details sought thus could not be provided until after Mrs Whitestone returned to work.

391. On 20 July 2010, Ms Rolle emailed Ms Thomson Bielmann asking her for approval to open the account, attaching a copy of Mrs Whitestone's 7 July 2010 contact report and a news article by way of update, observing that Ms Thomson Bielmann already had in her possession "a wealth of information" regarding this account.

392. Also on 20 July 2010, Ms Rolle requested a number of documents from Ms Denman in relation to the account opening for Yukos Capital at BJB Bahamas, including the "high risk client profile as attached "just for formality and signing off purposes"". Later that same day Ms Rolle notified Ms Denman that the relationship had been approved locally (i.e. in the Bahamas) and had been sent to "POFT, Region Head and CEO PB for further sign-off".

393. On 22 July 2010, Ms Denman sent to Ms Rolle, Ms Tiffany Jones of BJB Bahamas, and Mr Narrandes the "Due Diligence Form for higher risk relationships" which Ms Rolle had requested, which had been signed by Mr Campeanu, and which noted that the client had been introduced by "Dmitry Merinson (Finder)".

394. Also on 22 July 2010, Ms Thomson Bielmann emailed Mr Raitzin and Mr Peter Nikolov – Mr Raitzin's Chief of Administrative Support, attaching the Yukos Capital "account approval documentation from JBBT Nassau" and "enhanced due diligence compiled by [Mrs Whitestone]". The attachments to this email have not been disclosed and it is therefore unclear what documents Mr Raitzin and Mr Nikolov received, although it may be inferred that the enhanced due diligence document was the enhanced due diligence report on Yukos Capital referred to at [381] above and not, as suggested by the Authority, the due diligence report created by Mrs Whitestone in respect of Mr Merinson, which referred to his role with Yukos International, at the time that Mr Merinson opened his personal account with Julius Baer Singapore. It seems to us more logical that what would accompany the account documentation which related to Yukos Capital would be the due diligence report that related to that entity. Therefore, in our view, there is no evidence to support the suggestion that following receipt of this email Mr Raitzin had received material which indicated to him that Mr Merinson was an employee of Yukos.

395. It appears from an email sent by Mr Courrier to Ms Rolle on 6 August 2010 setting out an accounting mechanism for payments to Mr Merinson, that Ms Rolle would have been aware at this time that there was a Finder associated with the Yukos account, as Mr Fellay accepted in his evidence.

396. In Mrs Whitestone's absence, Mr Campeanu completed the "Finder's Assessment Form" to set Mr Merinson up as a Finder on the Yukos Capital account which he signed per procurationem (i.e. 'pp' or on her behalf). Mr Campeanu also pp'd the due diligence form for the Yukos Capital Bahamian account.

397. The Finder's Assessment Form recorded that Mr Merinson's remuneration was to be paid on the "Income Model" subject to a remuneration condition of "25% p.a" i.e. that the Bank undertook to pay Mr Merinson a share of 25% of net income generated. However, the Yes/No tick boxes on the form against the question "Approval of special remuneration model needed?" were left blank. Accordingly, the form did not record that a large "one-off" payment had been agreed with Mr Merinson.

398. The Authority contends that despite being on her honeymoon Mrs Whitestone was checking her emails to see what was going on in relation to the Yukos account. If that were the case, that could lead to an inference that she was aware of what was being set out in the Finder's agreement, a copy of which was emailed to her while she was away and which, as we have found, did not specifically mention the one off retrocession to be paid to Mr Merinson.

399. Mrs Whitestone's evidence was that she did not look at her emails or deal with work, except on a different account where she "did check her blackberry and dealt with some business briefly while [she] was away". She says that this was prompted by a message sent by a colleague to her personal phone.

400. The Authority relies on what Mrs Whitestone said in her interview with the Authority. In that interview Mrs Whitestone explained the approach she had adopted during a particularly busy work period, which she likened to the approach she had adopted "when… on [her] honeymoon" pursuant to which she would "look at [her] emails and see if there [is] anything important", noting that she would "definitely open and monitor" the "important things". On that basis the Authority contends that Mrs Whitestone would, of course, have read and monitored emails regarding the Yukos account where, at the relevant time, she anticipated an inflow of up to £430 million, which she accepted in cross examination was the "most super-important thing in [her] professional life" at that time.

401. Furthermore Ms Denman, in an email dated 23 July 2010, jokingly chastised Mrs Whitestone for checking a particular email while on honeymoon. In that email, Ms Denman also took the opportunity to update Mrs Whitestone on the Yukos account noting that it was expected to be open very soon.

402. We think it is likely that Mrs Whitestone did at least glance at her emails and her Blackberry from time to time on her honeymoon and if she did, she may have seen that she was copied in on the email attaching the signed Finder's agreement. However, in our view it is unlikely that she read either that document or any of the associated documentation. That would have been difficult, if not impossible on a Blackberry. Therefore, if she did check the position it would be only be to have seen how matters were progressing, knowing, as she did that the matters were in the hands of Mr Campeanu in her absence. We therefore conclude that Mrs Whitestone was not aware of the terms of the completed Finder's agreement while she was on her honeymoon. Nor is there any evidence that during that time she discussed with anybody any of the arrangements regarding the payment of a retrocession to Mr Merinson and, in particular the increase of the amount from 70% to 80% of the net income.

403. Neither do we consider, contrary to the contention of the Authority, that upon her return to the office Mrs Whitestone checked the various account opening and Finder's documents that had been completed on her behalf in her absence, in particular the Finder's Assessment Form which was 'pp'd' in her name by Mr Campeanu. We would not expect that a Relationship Manager would consider it necessary to review formal client related documentation that had been completed on her behalf in her absence and where she knew that as a result of completion of that documentation Mr Merinson had been registered as a Finder linked to the Yukos Capital account. We do not consider that someone in Mrs Whitestone's position would be expected to

be interested in that level of detail. It was reasonable for her to assume that Mr Campeanu, her superior, would have completed the documentation correctly in her absence.

404. Therefore, in so far as the Finder's Assessment Form was completed incorrectly, the responsibility for that cannot be attributed to Mrs Whitestone. We have had no evidence from Mr Campeanu and therefore we will never know why he did not ensure that the one-off retrocession was recorded. One possibility is that the amount of the retrocession had not been included because it was still under discussion at that stage pending confirmation as to when the relevant funds were to be received in the Yukos Capital account.

405. However, as Ms Clarke submitted, a likely explanation is that despite what the Finder's Policy said about Finder's agreements being recorded in writing this was not adhered to strictly and that it was the practice for deviations from the standard arrangements not to be recorded within the terms of the agreement itself. Support for this is found in an email that Mr Courrier, who was the head of External Asset Managers and Finders and would be expected to adhere to Julius Baer's policies in that regard, sent to Mr Fellay on 6 January 2011. Mr Courrier stated in respect of Mr Merinson's Finder's agreement with BJB Bahamas, that:

> "Please note that additionally to terms defined in this appendix, it was agreed VERBALLY to accept three further 70% retrocession transactions between now and 23/11/11 and all three of these can now only be used for new funds (the clients expect two more inflows next year totalling around USD400mil) for transactions where the price/rate booked to the client is at least better than the worst rate/price of the day."

406. Clearly Mr Courrier considered that a verbal agreement to pay a Finder a one-off retrocession was an acceptable way to proceed. As Ms Clarke submitted, if more senior and experienced persons such as Mr Courrier were openly not following the Finder's Policy, and believed it was proper not to document one-off retrocessions then there was no reason for Mrs Whitestone to consider it inappropriate to do so.

407. With regard to the question as to whether the plans to invest in a CoY were abandoned and the retrocession increased to 80% of net income during Mrs Whitestone's absence on wedding leave, Mrs Whitestone's evidence on those matters was that these matters must have been approved by Mr Campeanu and/or Mr Seiler in her absence.

408. We have found no evidence that Mr Seiler was aware of any proposed change to the arrangements outlined to him in Mrs Whitestone's email of 7 July 2010 during this period. As far as Mr Campeanu is concerned, the email exchange of 16 July 2010 which is dealt with at [385] to [390] above refers only to a 70% figure.

409. Again, we are hampered by having no evidence directly from Mr Campeanu on this point. However, in his interview with the Authority he said that an 80% (not 70%) rate was "initially proposed" and did not mention any input from either Mr Seiler or Mr Raitzin. Therefore, if the arrangements did change while Mrs Whitestone was away, then it could only have been Mr Campeanu who had discussions with Mr Merinson and Mr Feldman and approved it. We therefore infer that it is more likely than not that it was Mr Campeanu who agreed the change to the arrangements and communicated them to Mrs Whitestone when she returned to the office. Mrs Whitestone may well have believed Mr Campeanu if he told her that Mr Raitzin and Mr Seiler had approved the new arrangements or that it was unnecessary to refer back to them.

410. There was no evidence that Mr Raitzin approved anything in response to the email exchange between Mr Nikolov and Mr Benischke. As we have found, that email exchange indicated that matters would have to await Mrs Whitestone's return in order that full details could be given.

411. Therefore, in summary, we find that the position when Mrs Whitestone returned from her wedding leave on 2 August 2010 position was:

(1) Mr Raitzin had not given his approval to the proposal to pay Mr Merinson a one-off retrocession and had not been involved in any discussions as to whether it was appropriate to pay a retrocession on the terms set out in Mrs Whitestone's email of 7 July 2010 or in relation to any proposal to increase that amount.

(2) Mr Raitzin was not aware that Mr Merinson was an employee of Yukos International.

(3) Insofar as changes were approved to increase the retrocession to be paid to Mr Merinson those changes had not been communicated to Mr Seiler. Mr Seiler had no more information than that which had been given to him by Mrs Whitestone on 7 July 2010.

(4) Consequently, if changes to the amount of the retrocession had been agreed, that could only have arisen as a result of discussions between Mr Campeanu and Messrs Feldman and Merinson. Mrs Whitestone was not involved in any of those discussions during her honeymoon.

(5) Mr Campeanu alone was responsible for completion of the Finder's assessment form and the Finder's agreement and Mrs Whitestone did not review those documents on her return to the office.

(6) It is likely that Mrs Whitestone believed that during her absence Mr Campeanu had obtained the necessary approval for the new arrangements from Mr Seiler and/or Mr Raitzin or that she formed the impression from Mr Campeanu that further advance approvals were not necessary.

August 2010: the First FX Transaction and the First Commission Payment

Execution of the First FX Transaction

412. As we set out at [366] above, we are not satisfied that Mrs Whitestone attended a meeting with Mr Porter, Mr Feldman and Mr Merinson on 4 August 2010. We have, however, said that the renegotiation of the Finder's fee probably took place during Mrs Whitestone's absence on wedding leave, the process being led by Mr Campeanu. We cannot find when precisely the abandonment of the CoY proposal took place, but we think it is most likely that it occurred during meetings held by Mrs Whitestone with Mr Merinson and Mr Feldman on 11 August 2010. Mrs Whitestone's evidence was that she finally came to understand the mechanics of a CoY and realised that it was a totally unsuitable product for Yukos because CoYs are not capital protected and carried the risk of being converted back into sterling, when the client wanted the funds to be converted from sterling into US dollars and then held in US dollars. We accept that evidence, taking into account Mrs Whitestone's inexperience in relation to investment products. It may well be that having considered the information provided by Mr Porter during his meeting with Mr Merinson on 8 July, in Mrs Whitestone's absence, it became apparent to Mr Feldman that the product was unsuitable and this was communicated to Mrs Whitestone when she met Mr Feldman and Mr Merinson shortly before the First FX Transaction was executed. We therefore think it is likely that Mrs Whitestone is conflating what had happened at the meeting between Mr Porter and Mr Feldman on 8 July and what she was told when she met Mr Feldman the following month. We consider she has convinced herself that the decision not to proceed with the CoY had taken place at a meeting in which both she and Mr Porter were present and which, by a process of reconstruction by reference to the wrongly dated contact note, she said took place on 4 August 2010.

413. The First FX Transaction took place between 11 and 13 August 2010, on Mr Feldman's instruction. Specifically, on 11 August 2010, £271,233,490.87 was received into Yukos Capital's account with BJB Switzerland. Thereafter, between 11 and 13 August 2010, spot FX trades were executed by BJB on behalf of Yukos Capital, converting £271,233,490.87 to US $ 422,419,038.68. The monies were transferred from Yukos Capital's account with BJB Switzerland to Fair Oaks's account with BJB Bahamas.

414. While Yukos Capital was charged the rate of 1.5574 the transactions were executed by BJB at an average market rate of 1.566051. This gave rise to a commission of US $ 2,346,440.93. This resulted in a commission rate of approximately 0.55% of the principal sum converted. The Authority contends that this was approximately 11 times the standard commission rate charged by BJB for a transaction of this size. We return to the question as to the extent to which in the circumstances this was, as contended by the Authority, an inflated fee known to be such by the Applicants later. As a result of the agreement to pay Mr Merinson a one-off retrocession amounting to 80% of the net income earned by BJB from the transaction, which represented 0.44% of the principal sum converted, BJB would retain a sum which represented 0.11% of the principal sum converted, or 11bps.

415. Following the execution of the transaction, Mrs Whitestone recorded what had happened, including the relevant exchange rates achieved and charged, and the amount to be paid to Mr Merinson, in a contact report the content of which was substantially replicated in an email of 16 August 2010 from Mrs Whitestone to Ms Thomson Bielmann, Mr Seiler, Mr Raitzin and Mr Campeanu.

416. The relevant part of Mrs Whitestone's email stated:

> " I'm writing to fill you all in on the current situation with Yukos Capital SaRL:
>
> On Wednesday 11/08/10, an inflow of GBP271,233,490.87 was credited to the JB Zurich account of Yukos Capital SaRL. Over the course of the next two days (and nights!), we sat with the clients and converted the entire sum (in 10 separate tranches) into USD424,765,479.61 (at an average rate of 1 .566051). The FX has been booked to the account as a single transaction at a cable rate of 1.5574 (i.e. USD422,419,038.68).
>
> The total commission taken is therefore USD2,346,440.93, 80% of which is to be paid to the registered Finder, Dmitri Merinson (JB Singapore account 3100624). That means that we should transfer USD1,877,152.74 to Dmitri's account and the remaining USD469,288.19 is JB's net commission.
>
> The clients are very happy with the service (Thursday's meeting in our office ran from 8am until 9am Friday morning and Matthew Taylor stayed with them throughout in the meeting room guiding them to get the best possible rate and thereby maximise the commission) and have now confirmed that once these funds have been transferred to the JB Nassau account for Yukos Capital SaRL, they will stay with JB Nassau for 3 - 5 years minimum."

417. The email also reported that the fee schedule that had been agreed for the Yukos Capital accounts and the Fair Oaks account was 20bps for custody and transaction fees of 12.5 bps per annum, observing that having earned 11bps on the FX Transaction the bank would therefore earn 32 bps "this year (i.e 76.8 annualised)" and thereafter would be earning 20bps custody fees on the investments held.

418. The email ended with Mrs Whitestone making reference to an additional US $ 400 million which was expected to be awarded within the next 6 months and which "they would like to hold with me".

419. Prior to Mrs Whitestone's email, on 13 August 2010 Mr Gerber sent an email to Mr Seiler, with a copy to Mr Campeanu in which he said:

> "First of all I would like to share my excitement about Louise's success with the large client. After a long period of preparation, chasing the client and hoping Louise was finally successful. You probably heard that the assets in excess of 300m USD have arrived and that an FX transaction to converse (sic) them from GBP into USD has yielded about USD 500,000 in commission for JB… This is fantastic. Louise and Matt definitely went more than the extra mile for this client when they basically worked with him for 25 hours non-stop in our offices to execute trade the FX in several tranches. They basically spent the night in the office with the client trading… Quite a story…"

420. In her evidence, Mrs Whitestone explained that the trading strategy was to ensure that the rate charged to Yukos Capital was above the worst rate for the day so that the spread between that and the rate at which BJB transacted would cover both the commission required by BJB and Mr Merinson's Finder's fee. In her cross examination, Mrs Whitestone contended that the trading strategy was guided by a pre-agreement that the bank should achieve 55bps on the trade and that, insofar as it was set by reference to the worst rate of the day, this was only a suggestion of Mr Narrandes.

Correspondence and discussions following the execution of the transaction

421. A few hours after receiving Mrs Whitestone's email of 16 August 2010 Mr Seiler emailed Mr Campeanu commenting on Mrs Whitestone's email as follows:

> "Between our discussion and the situation we have now I am missing an update. In the meantime I could talk to Louise, I will try to call you tomorrow."

422. Mr Seiler did, of course, already know something about the transaction because of what he was told in Mr Gerber's email of 13 August 2010, as set out at [419] above. However, that email did not give Mr Seiler much detail about the transaction, and in particular it said nothing about the rate at which the transaction had been executed or the amount of the retrocession that would be paid to Mr Merinson. Accordingly, it is understandable that Mr Seiler would wish to seek more details about those matters and his email to Mr Campeanu indicates that there were matters in Mrs Whitestone's email of which he was previously unaware.

423. Mr Seiler's evidence was that he did have a conversation with Mr Campeanu. Although in his witness statement he said he could not recall what was discussed, in cross examination he said he wanted to know why the transaction had been done without getting the necessary approval. He went on to say that he told Mr Campeanu that he had to be involved with what Mrs Whitestone was doing and asked for an explanation as to why he had not been informed of the transaction before it happened.

424. Again, we have no evidence from Mr Campeanu on this issue but in our view Mr Seiler's explanation is completely plausible and consistent with the terms of this email which indicated that he was unaware of at least some of the features of the transaction. We therefore accept Mr Seiler's evidence on this point.

425. Mr Seiler also said in his evidence that he spoke to Mr Gerber about the transaction. It is likely that he would do so bearing in mind that Mr Gerber had emailed him directly informing him about the transaction in advance of him receiving Mrs Whitestone's email.

426. There is no documentary evidence about the contents of Mr Seiler's call with Mr Gerber. The Authority has not sought to call Mr Gerber as a witness. Mr Seiler's evidence was that he spoke to Mr Gerber to seek confirmation that the arrangements set out by Mrs Whitestone were in order. We infer from that explanation that Mr Seiler's conversation with Mr Gerber took place after he had Mrs Whitestone's email because there was little detail in Mr Gerber's

original email regarding the details of the transaction, which only became apparent to him after he received Mrs Whitestone's email.

427. Mr Seiler's evidence was that he did not speak to Mr Gerber because he had specific suspicions about the transaction but because it was a large inflow and a transaction that came from a business area under Mr Gerber's responsibility. Mr Seiler said he assumed that Mr Gerber was following the transaction and obtained confirmation of that through Mr Gerber's assurance that everything was in order. As discussed in more detail below, Mr Seiler said that he did not draw to Mr Gerber's attention any concerns about the trading method or the spread rate because at the time it did not appear to him that this was a highly unusual transaction.

428. It is clear from his email to Mr Seiler of 13 August 2010 that Mr Gerber did not have concerns about the transaction and saw it as a cause for celebration. Mr Bates confirmed in his evidence that he was aware of the transaction and that he did not see any problems with it on the basis that nobody had highlighted an issue. Mr Taylor called Mr Porter on holiday to tell him about the transaction. Mr Taylor told the Authority in interview that he wanted to tell Mr Porter about how much had been made on the transaction, which was fully understandable for a young junior trader seeking to impress his superior.

429. As Mr Porter confirmed in his evidence, if senior management at JBI thought there was something suspicious about the transaction they would have raised a red flag. As Mr Strong observed, the Authority called no witnesses who can speak to whether anyone at JBI actually looked into the transaction at the time, but logically there are two alternatives: either (i) no one at JBI thought that the commission made on the First FX Transaction was suspicious and therefore did not look into it; or (ii) someone at JBI did look into the transaction and concluded that it was not suspicious.

430. Against that background, we accept Mr Seiler's evidence that he received some assurance as a result of his conversation with Mr Gerber. As he candidly admitted in his evidence, he believes that he made a mistake in not taking time to scrutinise the arrangements properly and asking the right questions. In essence, with the benefit of hindsight, Mr Seiler should not have relied on what he was told by the management at JBI.

431. With regard to Mr Seiler's intention to speak to Mrs Whitestone, as he indicated he would in his email to Mr Campeanu on 16 August 2010, Mr Seiler's evidence was that he wanted to speak to her to express his frustration at her circumventing the reporting lines and asked her to stop doing so in the future.

432. We accept that it is more likely than not that Mr Seiler did have a conversation with Mrs Whitestone as well as with Mr Campeanu. That would be consistent with his email which suggested he was going to have that conversation and it would be logical that he would do so bearing in mind that the email from Mrs Whitestone had come to him directly.

Did Mr Seiler and/or Mr Raitzin approve the transaction in advance?

433. Against that background, we return to the question as to whether either Mr Seiler or Mr Raitzin or both had specifically approved the First FX Transaction before it took place. We accept Mr Seiler's evidence that during that conversation he indicated his displeasure about not being informed of the transaction in advance. The fact that no disciplinary action against Mrs Whitestone was taken as a result of what had happened does not in our view indicate that Mr Seiler was content with what had happened because he already knew about the transaction in advance, as Mrs Whitestone contended. Mr Seiler was not Mrs Whitestone's line manager; that was Mr Campeanu so that the question of any discipline would be a matter for Mr Campeanu to raise with the HR Department. Another factor was that, as we have found, Mr Campeanu

was probably aware of the transaction, so Mr Seiler had more reason to be upset with Mr Campeanu for not having updated him on what was happening.

434. Mr Seiler and Mr Raitzin contend that they did not know the details of the First FX Transaction, or approve it, before it was executed.

435. Mr Seiler contends that he did not know about the decision not to pursue the CoY, or the details of the First FX Transaction, until after it was executed. He relies, in particular, on his email sent to Mr Campeanu on 16 August 2010 described at [421] above in which he says that he is "missing an update". The Authority says, however, that this email suggests only that Mr Seiler did not know the transaction had been finally executed, not that he did not know it was going to be executed or the proposed details.

436. In contrast, Mrs Whitestone's evidence is that she kept Mr Seiler informed about the change in proposal, specifically the decision not to use a CoY. In her oral evidence, she said that "[she] certainly spoke to [Mr Seiler] after [she] came back" from wedding leave and before the First FX Transaction was executed, in all likelihood "over the telephone from [her] home office phone" to Mr Seiler's office phone or mobile. Ms Clarke observed that it was notable that no concerns were raised with Mrs Whitestone by any of the recipients of Mrs Whitestone's email of 16 August 2010. She submits that the reason for this is because Mrs Whitestone had made all of these people aware in advance of what the newly negotiated arrangements were. Ms Clarke submits that a junior Relationship Manager such as Mrs Whitestone would never be able to radically renegotiate a deal such as the First FX Transaction without the approval of at least, these two. Mrs Whitestone also says she also discussed the proposal with Ms Thomson Bielmann – which means that BJB Compliance were also aware. In addition, Ms Clarke submitted that as Mr Raitzin had specific responsibility for approving non-standard Finder's arrangements he would have had to be informed and agree to what was being proposed.

437. Mrs Whitestone also believes that she had a phone call with Mr Raitzin, whom she had previously met in London, during which she informed him of the decision not to pursue a CoY and by which she sought his approval for the First FX Transaction.

438. The Authority says that the contemporaneous documents do not support Mr Raitzin's account that he knew nothing at all about the First FX Transaction and the proposed commission payment to Mr Merinson. In particular, as described at [385] above, the email dated 16 July 2010 from Mr Benischke to Mr Campeanu demonstrates that the proposal had been discussed with Mr Raitzin.

439. Mr Raitzin disputes Mrs Whitestone's evidence, on the basis set out at [440] to [445] below.

440. First, Mr Jaffey submits that Mrs Whitestone has convinced herself this call occurred on the basis of an error in a document produced by the Authority. In her witness statement, Mrs Whitestone stated (without any additional detail whatsoever) that she told Mr Raitzin about the First FX Transaction in advance, and he approved it. She purported to support this with a citation to the chronology prepared by the Authority which itself cross-referred to Mrs Whitestone's interview with the Authority where she stated that Mr Raitzin approved the Second FX Transaction in advance. There is no other document which records or supports that a call on the First FX Transaction occurred. What appears to have happened is that Mrs Whitestone noticed the Authority's erroneous reference to her having discussed the First FX Transaction with Mr Raitzin, and came to believe that it was true that this had occurred. That Mrs Whitestone has convinced herself of the truth of this conversation (which never occurred) is made all the more likely because she was candid during her cross examination that she was "all over the place" in August 2010 and "hadn't had any sleep"; was dealing with a "manic"

week and was "busy" and "tired". Accordingly, her evidence cannot be viewed as being reliable on this issue.

441. Secondly, on Mrs Whitestone's own evidence, she had barely spoken to Mr Raitzin at this point. It would be improbable for Mrs Whitestone to call Mr Raitzin up, out of the blue, three levels of management up, and request specific authorisation for a totally new transaction. Even if she did telephone Mr Raitzin (which is unlikely), it is unreal to suggest that Mr Raitzin would have happily approved such a transaction over the phone with a Relationship Manager without any reference to lower management and without any contemporaneous document or email. Mr Raitzin's consistent practice was to insist on authorisation taking place through line management, not least when it came to his interim role because he was not an expert in the Russian market. It would be totally inconsistent with all the evidence available of how Mr Raitzin went about approving arrangements, which invariably involved requiring review and approval by those below him in the hierarchy.

442. Thirdly, it would make no sense for Mr Raitzin to later describe the situation to all of his colleagues as a "fait accompli", as he did in his email of 20 August 2010, as discussed in more detail below, if he had personally authorised the transaction in advance.

443. Fourthly, it is not appropriate, as the Authority and Mrs Whitestone sought to do, to draw an inference that Mr Raitzin must have preapproved the First FX Transaction, because he did not discipline Mrs Whitestone for the transaction.

444. Fifthly, Mr Raitzin's evidence was that discipline would have been primarily a matter for Mrs Whitestone's line manager, or Mr Seiler. Insofar as the Authority invites this inference to be drawn, it runs in to the problem of Mr Campeanu's absence as a witness, which it has not been able credibly to explain. He was Mrs Whitestone's line manager. Disciplining her would have been his responsibility. The Authority cannot fairly be permitted to advance an inferential case on why Mrs Whitestone was not disciplined, if it has made a conscious choice not to call the person (and alleged whistle-blower) responsible for disciplining her and who was best placed to understand the true extent to which she was responsible for the *fait accompli* (as opposed to Mr Campeanu himself, or others such as Mr Narrandes, who Mrs Whitestone says was the origin of the structure adopted).

445. Sixthly, something had clearly gone wrong for the "fait accompli" to arise. It did not necessarily follow that this was Mrs Whitestone's fault (or, indeed, a disciplinary issue at all). At the time, Mr Raitzin, although he said he was "annoyed", did not know who (if anyone) was to blame. He explained that he was "more upset with the organisation" than with Mrs Whitestone.

446. In our view neither Mr Seiler nor Mr Raitzin approved the First FX Transaction in advance of its being executed and neither were aware of its terms until they received Mrs Whitestone's email 16 August 2010. Our reasons for this conclusion are set out at [447] to [452] below.

447. As regards Mr Seiler, as we have found, on Mrs Whitestone's return from wedding leave he had no more information regarding the proposed transaction than what had been given to him in Mrs Whitestone's email of 7 July 2010.

448. There is no evidence of any conversations between Mrs Whitestone and Mr Seiler following her return from wedding leave. The tone of Mrs Whitestone's email of 16 August 2010 which started "I am writing to fill you in on the current situation with Yukos…" suggests that she was updating the recipients, notably Mr Raitzin and Mr Seiler, as to matters of which they were previously unaware.

449. Mr Seiler's reaction in his email of 16 August 2010 to Mr Campeanu indicates that he was unaware of the details of the transaction before it was executed. The fact that he emailed Mr Campeanu about it indicates that he would have expected Mr Campeanu, as Mrs Whitestone's line manager, to have informed him about it. We do not read the email in the narrow way that the Authority suggested, namely that it only suggested that Mr Seiler did not know that the transaction had been executed, not that he did not know the details. We therefore accept Mr Seiler's evidence that he was unaware of the structure of the transaction before it was executed and in particular the remuneration arrangements and the increased amount of the one-off retrocession to be paid to Mr Merinson.

450. With regard to Mr Raitzin, we accept Mr Jaffey's submissions as summarised at [440] to [445] above. As she has done with the suggestion that she had a meeting with Mr Porter, Mr Merinson and Mr Feldman on 4 August 2010, Mrs Whitestone has mistakenly convinced herself through a process of reconstruction by reference to the documents, that she had a telephone call with Mr Raitzin before the First FX Transaction. We think it most unlikely that Mrs Whitestone would have telephoned a senior executive she hardly knew to obtain a snap approval for a complex transaction of this kind, of which Mr Raitzin previously knew little. It is also clear from what we have found to be Mr Raitzin's working arrangements that before giving his approval to a matter within his responsibility of this type he would have expected that his reports would have looked into it and made recommendations, as happened when Mr Nikolov looked into the proposal to pay Mr Merinson a 70% one-off retrocession following Mr Benischke's email of 16 July 2010, referred to at [385] above.

451. As we have found in relation to that matter, Mr Raitzin had not given any approval to the proposal to pay Mr Merinson a one-off retrocession by the time Mrs Whitestone went on wedding leave. As was the case with Mr Seiler, there was no evidence that Mr Raitzin had had any discussions with Mrs Whitestone following her return to work.

452. We also accept Mr Jaffey's submissions to why subsequently Mr Raitzin described the matter as a "fait accompli" and his plausible explanation as to why he did not himself take any steps to discipline Mrs Whitestone, bearing in mind that he was not part of her line management.

453. That is not to say that we consider that Mrs Whitestone was in effect acting as a rogue trader in effecting the transaction without the approval of Mr Seiler and Mr Raitzin. It must be inferred that Mr Campeanu was fully aware of the arrangements, since he had had responsibility for the matter in Mrs Whitestone's absence, he sat next to her and had responsibility as her line manager. It cannot have escaped Mr Campeanu's notice as to what Mrs Whitestone was doing between 11 and 13 August 2010. Likewise, Mr Narrandes, the local Compliance representative, worked in close proximity to Mrs Whitestone, and we consider that it was likely that Mrs Whitestone discussed the trading strategy with him to get his input from the compliance perspective. We think it is also likely that Ms Thomson Bielmann had been consulted, and she was a recipient of Mrs Whitestone's email of 16 August 2010. It is clear that Mr Gerber was fully aware of the transaction and gave Mr Seiler comfort regarding it.

454. We think it is likely that Mrs Whitestone was intensely focused on effecting under pressure what was for her the most important transaction of her short career and impressing her newly acquired substantial client. She may well have considered that she had Mr Seiler's approval based on the fact of having outlined the original arrangements in her email of 7 July 2010 and having received no objections. As we have also found, it may well have been that Mrs Whitestone believed that during her absence Mr Campeanu had obtained the necessary approval for the new arrangements or had told her that it was in order to proceed on the basis of what Mr Seiler had been told before. Again, she may have convinced herself that she had

discussions with Mr Seiler following her return from wedding leave. After all, all of these alleged conversations took place many years ago and in those circumstances, it is inevitable that any recall of particular conversations and when they took place must involve an element of reconstruction by reference to whatever documentary evidence exists.

Approval of the First Commission Payment

455. On 17 August 2010, Mrs Whitestone emailed Mr Feldman asking him for confirmation that she could provide an account statement to Mr Merinson showing the inflow and foreign exchange transaction and that the rate achieved was in accordance with Mr Feldman's instructions. Mr Feldman gave that confirmation on the same day.

456. On 17 August 2010, Mrs Whitestone had a meeting with Mr Merinson in JBI's office which Mr Feldman joined by telephone. There is a MyCRM Note Report, dated 16 August 2010 for that meeting. It appears that the note was wrongly dated because other evidence in the form of emails exchanged between Mrs Whitestone and Mr Feldman indicates that the meeting took place on 17 August 2010. The note records that Mr Merinson had sought confirmation "ASAP" as to when he could expect the commission payment in respect of the First FX Transaction to be paid to his account with BJB Singapore. The note also said:

> "[Mr Merinson] wishes to receive the retrocession with the payment reference "Investment Capital Gain" and I need to confirm to him if this is possible ASAP. He is going to transfer a proportion of the commission away to Daniel Feldman's Julius Baer account (via Maseco)".

457. Mrs Whitestone speculated as to whether this note, which had been uploaded by Ms Denman, had been subsequently altered by somebody who had access to the MyCRM system to include the reference to the sharing of the commission. Mrs Whitestone raised this issue because her evidence was that she had no memory of being told this fact or recording it herself. We return to that issue later, but at this stage simply record that in her evidence Mrs Whitestone said that after years of trying to understand whether in fact she had been told about the commission sharing or whether information might have been added to the contact report by someone else, she had come to the conclusion that the likely explanation is that she was made aware of it at the time, but it did not raise any red flags for her. We therefore consider later the significance of this point on the basis that Mrs Whitestone was made aware of the commission sharing arrangement at the meeting held on 17 August 2010.

458. It is common ground that a conference call occurred at some point between 16 August 2010 (when Mrs Whitestone requested authority to make the First Commission Payment) and 20 August 2010 (when Mr Raitzin wrote his "fait accompli" email referred to at [489] below).

459. Mr Raitzin says that he and Mr Seiler (together in his office) had a call with Mrs Whitestone (who was in London) between 16 August and 19 August 2010. Mr Seiler also recalls a conference call in which he and Mr Raitzin spoke to Mrs Whitestone from Mr Raitzin's office. In his first witness statement, Mr Seiler denied that this call occurred. Mr Seiler then served a second witness statement having read Mr Raitzin's witness statement, which retracts that denial and states "it is quite possible…that Mr Raitzin is correct about a call having taken place in August 2010". He did not, however, have any real recollection in his oral evidence of what was discussed on this call, and Mr Seiler now believes that his recollection of the two men calling Mrs Whitestone from Mr Raitzin's office is of this call, rather than as he originally believed, a call which took place at the time of the Second FX Transaction. This situation is a further illustration of how unreliable memory can be about events that took place many years ago and how the timing of particular events can be conflated.

460. Mrs Whitestone also accepts that it is possible that a call between her, Mr Raitzin and Mr Seiler took place at this time, albeit she did not recall the call and thought that it was unlikely

that Mr Raitzin would have instigated it. Mr Raitzin thought that he instigated this call as a result of Mrs Whitestone's 16 August 2010 email although he accepted that it was possible that Mr Seiler had gone to see him about Mrs Whitestone's email and together they called Mrs Whitestone. Mr Raitzin's evidence is that he initiated the call because he wanted to understand who Mr Merinson was, what his relationship was with Yukos, and how Mrs Whitestone knew him, in order to satisfy himself that there was no conflict of interest. As Mr Jaffey submitted, Mrs Whitestone's email of 16 August 2010 said nothing about Mr Merinson's relationship with Yukos, yet he was the registered Finder on the account. It was therefore obvious that Mr Merinson must have had something to do with Yukos. In those circumstances, we accept that Mr Raitzin wanted to find out about the nature of Mr Merinson's connection with Yukos, and to make sure there was no conflict of interest risk (or that such risk as there was could be managed). It is also likely, because Mr Raitzin had not, as we have found, approved the transaction in advance, that he would want to be satisfied that it was appropriate for Mr Merinson to be paid a non-standard Finder's fee, bearing in mind that it was Mr Raitzin's responsibility to approve such payments.

461. We accept Mr Raitzin's evidence that he asked Mr Seiler to be on the call because he was closer to the arrangement and was the Market Head for Russia with relevant expertise. It was also clear that in relation to matters concerning Russia which fell within Mr Raitzin's responsibility, he wished to have Mr Seiler's input before making decisions.

462. There is a conflict of evidence as to whether Mr Merinson's employment status was a topic of discussion on the call. Mrs Whitestone was unable to recall the substance of this call, however, in response to Mr Raitzin's evidence that during this call he asked Mrs Whitestone who Mr Merinson was and what his relationship was with Yukos, she said that she believed that she would have told Mr Raitzin and Mr Seiler that Mr Merinson was an employee of Yukos. She says that she would have told Mr Raitzin something along the lines of what she told Ms Thomson Bielmann in an email she sent on 19 August 2010 (referred to at [478] below) namely:

> "The finder registered on these accounts is Dmitry Merinson who works as the Financial Director for Yukos International U.K. BV. This is a Dutch company within the Yukos group structure and it is indirectly the ultimate 100% shareholder of Yukos Capital SaRL. He does not have signing power on any of the group's companies or bank accounts but he is heavily involved in choosing which banks should hold funds awarded to subsidiary companies of Yukos International U.K. BV. he introduced the business to me and is registered on the account (in accordance with his JB Finder agreement)."

463. Mr Raitzin's evidence was that Mrs Whitestone told him during the call that Mr Merinson was a former employee and that he was a consultant. Mr Jaffey observed that explanation was consistent with what was said in an email sent by Mr Schwarz on 14 February 2011, when in recording the outcome of a conference call with Mrs Whitestone about the Yukos relationship he said:

> "Please also note that DM does not hold any official position at Yukos Capital, does not get any salary but can be considered (compared to JB terms) to an "external employee" which we also use to define eg consultants. He is contracted to help Directors of several entities to stucture [sic] a conservative investment strategy for their assests [sic]."

464. Mr Seiler cannot recall exactly what was discussed on the call.

465. The Authority asks us to accept Mrs Whitestone's evidence on this point and draw an inference that Mr Raitzin was told that Mr Merinson was a Yukos employee on the basis that Mrs Whitestone must have been honest with Mr Raitzin, because she was telling Ms Thomson

Bielmann that he was "Financial Director" for Yukos International at around the same time and she would not have said anything different to Mr Raitzin on the conference call.

466. On the basis of the evidence before us, it is not possible for us to draw an inference that it is more likely than not that either Mr Raitzin is correct in what he says or that Mrs Whitestone's account is to be preferred. None of the participants on that call have a clear memory of precisely what was said after this length of time and anything that is said is likely to be a reconstruction which favours their own position by reference to the documents. The Authority's position is particularly opportunistic bearing in mind its strong submissions that Mrs Whitestone was not a credible witness.

467. We consider that it is more likely that the position advanced by Mr Strong in his closing submissions is the most credible explanation, as follows.

468. If Mrs Whitestone had told Mr Raitzin and Mr Seiler that Mr Merinson was an employee of Yukos they would undoubtedly have reacted to that information. The fact that she told Ms Thomson Bielmann a few days later that Mr Merinson was the Finance Director of Yukos International does not indicate that she provided the same information to Mr Raitzin and Mr Seiler. Ms Thomson Bielmann had the fact that Mr Merinson was "CFO of the company" specifically drawn to her attention at this time, as referred to below, and therefore would have expressly asked Mrs Whitestone about this.

469. Mr Seiler and Mr Raitzin, on the other hand, were not aware of this information at that time and had only been told in Mrs Whitestone's email of 16 August 2010 that Mr Merinson was the registered introducer. Mr Seiler does not recall exactly what was discussed on the call. We accept that Mr Raitzin had no reason to ask whether Mr Merinson was an employee of Yukos because the information that they just been provided with was simply that Mr Merinson was the registered introducer. It is therefore unlikely that the question of Mr Merinson's employment status was specifically raised. What Mr Raitzin wanted to know involved Mr Merinson's role as introducer – which would be relevant to why he was being paid significant sums as such.

470. We therefore agree with Mr Strong that the likelihood is that Mrs Whitestone did not tell Mr Raitzin and Mr Seiler that Mr Merinson was an employee of any Yukos company, but rather gave a satisfactory explanation of why payment of the retrocession was appropriate and justified, that is that Mr Merinson was the introducer on the Yukos Capital account, his role being to advise Yukos Capital on where to place its money and accordingly may well have been described as a consultant, consistent with what Mr Schwarz recorded in February 2011 following his conversation with Mrs Whitestone. Mrs Whitestone may have thought that the only pertinent information was that Mr Merinson was an introducer who was also an adviser to Yukos Capital. In any event, Mr Raitzin did not express any concern and, as he accepted, gave his verbal approval to the arrangements.

471. Again, with the benefit of hindsight both Mr Raitzin and Mr Seiler should probably have probed Mrs Whitestone further on these matters, but in their defence more or less at the same time Compliance were looking into the matter and on the basis of more information that was available to them than had been provided to Mr Raitzin and Mr Seiler.

472. As we have said, Mr Raitzin gave his verbal agreement to the payment of the First Commission Payment following the call but gave instructions that Mrs Whitestone should contact Mr Nikolov in relation to arranging for payment to be made to Mr Merinson. That is why she sent Mr Nikolov an email on 19 August 2010, copied to Mr Raitzin and Mr Seiler which begins:

> "I understand that you are the man to address with regard to the one-off retrocession payment to Dmitry Merinson. Both Thomas Seiler and Gustavo Raitzin have expressed verbal approval for this and they are thus copied in on this e-mail."

473. The email stated that:

(1) Julius Baer had converted GBP into USD 422,419,038.68 for a gross commission of USD 2,346,440.93.

(2) 80% of that gross commission was to be paid to Mr Merinson, the finder, replacing the 25% retrocession he would otherwise have received.

(3) The amount of the retrocession to be paid to Mr Merinson was USD 1,877,152.74.

(4) Julius Baer would retain around USD 470,000 as its own revenue.

474. Additionally, the email requested that the payment be made "preferably with the payment reference "Investment Capital Gain"", explaining that "this is to ensure that it is not classified as employment income which is taxed differently in the Netherlands". That was something that had been recorded by Mrs Whitestone in her contact note of the meeting with Mr Merinson and Mr Feldman on 17 August 2010, as referred to at [448] above.

475. Mr Nikolov replied later that evening, saying he thought the payment reference requested might be possible, but it was a matter for the legal department. The email was forwarded to Ms Nicole Bohn, head of the private banking legal team at BJB Zurich, and Mr Tobias Weidmann, of BJB Zurich's Finders Desk, copying Mr Raitzin.

476. Around the same time, on 19 August 2010, Ms Sonja Senn-Sutter (Business & Operational Risk, BJB) emailed Mr Baumgartner raising questions about both the First FX Transaction and the proposed commission payment to Mr Merinson which she said she wished to discuss with him. Ms Senn-Sutter's questions included:

(1) That transfers on the account appeared to be capable of authorisation by a single director and Mr Merinson, who was described as "CFO of the company" had a "special authorisation without authorisation from the bank" which was a reference to the Veto Letter which Ms Senn- Sutter had discovered on BJB's systems.

(2) The absence of documentation, including on the OnDemand system, for the First FX Transaction.

(3) The quick pass through of the monies from Yukos Capital's account with BJB Zurich to BJB Bahamas.

(4) The relationship between Yukos and Mr Merinson, where he was recorded in the HOST system as an "external customer advisor", noting that 80% of the commission on the First FX was "supposed to be credited to DM ("registered finder" in Singapore)".

477. Mr Baumgartner asked Ms Thomson Bielmann to look into the issues. By her response, also dated 19 August 2010, Ms Thomson Bielmann confirmed that Mrs Whitestone would provide her with a summary and some background information on the relationships, noting that she was "unable to explain why DM is coded as an external customer advisor… tomorrow I'll get to the bottom of that".

478. Mrs Whitestone provided her explanation to Ms Thomson Bielmann by email on the same day which can be summarised as follows:

(1) Ms Thomson Bielmann was informed that the source of the monies received by Yukos Capital and which had funded the First FX Transaction were the proceeds of Yukos's litigation against Rosneft before the Dutch courts.

(2) The reason for the pass through transfer from Yukos Capital's BJB Zurich account to its account in BJB Bahamas was "to ensure confidentiality… so that funds could then be confidentially transferred [to BJB Bahamas] and held without Rosneft knowing their exact whereabouts". Mrs Whitestone explained that the Dutch Court had originally required the monies to remain with Yukos Capital but was prepared to permit Yukos to pay back an intra-company loan with Fair Oaks and, for that purpose, Mrs Whitestone was proposing to open a bank account for that company with BJB Bahamas.

(3) Mrs Whitestone explained that Mr Merinson was the registered finder on the accounts and therefore had been incorrectly identified as an external asset manager. Mrs Whitestone also explained that Mr Merinson "works as the Financial Director for Yukos International U.K. BV" – the "ultimate 100% shareholder of Yukos Capital SaRL"– and that he was "heavily involved in choosing which banks should hold funds awarded to subsidiary companies of Yukos International UK BV" She also noted that he did not have "signing power on any of the group's companies or bank accounts".

479. Ms Thomson Bielmann replied very early on 20 August 2010 thanking Mrs Whitestone for the information stating that she would try and clarify the situation regarding how Mr Merinson's role was recorded.

480. Therefore, it was clear that around the same time as they saw Mrs Whitestone's email setting out the request for the payment to preferably have the reference "Investment Capital Gain", it was made known to Mr Baumgartner and Ms Thomson Bielmann that Mr Merinson was "CFO of the company". Ms Thomson Bielmann was told that Mr Merinson was the "Financial Director for Yukos International", and was "heavily involved in choosing which banks should hold funds awarded to subsidiary companies" and also that he had a "special authorisation" in relation to the Yukos Capital account.

481. Mr Seiler did not see, and was not informed of, the email exchanges referred to at [476] to [479] above.

482. Ms Bohn responded to Mr Nikolov copying Mr Raitzin and Mr Weidmann, on 20 August 2010 stating that the payment could not be described as "Investment Capital Gain", but she raised no objection to the principle of the payment, recommending only "with a view to the high amount" that, if a one-off payment was not yet agreed, the amount should be paid in instalments on condition that the assets remained with Julius Baer. Ms Bohn added Mr Baumgartner, BJB Head of Compliance, to the email chain and asked if the inflow had been analysed.

483. As Mr Strong submitted, it does not appear from Ms Bohn's email that either the payment reference request, the size of BJB's gross commission on an FX transaction, or the size of Mr Merinson's retrocession, raised any red flag with her. Mr Raitzin worked closely with Ms Bohn on the US voluntary disclosure and said that he "would take total reassurance on what [Ms Bohn] would say. She was very thorough". Ms Bohn was the most senior lawyer in the private banking legal team in BJB Zurich so we accept that she was someone that would have been expected to have been alert to any wrongdoing.

484. The payment reference request and the size of the commission also did not appear to raise a red flag with Mr Baumgartner: he responded to all, but also copying Ms Thomson Bielmann, that "The transaction is known to Compliance and plausible". The Authority submitted that Mr Baumgartner's email was only responding in respect of the inflows, and not the commission payment. We see no reason to assume that Mr Baumgartner would not have considered what he was told about the matter as a whole when he said that the "transaction" was "plausible". As Mr Strong submitted, Mr Baumgartner would most likely have said something if he had thought that the retrocession or the requested payment reference raised a red flag. In order to

know what inflow was referred to, Mr Baumgartner would have to have read the whole email chain, and therefore seen the details of the transaction, the retrocession and the request that the payment be referred to as a capital gain.

485. On the same day, 20 August 2010, Mr Nikolov forwarded this email chain to Mr Seiler and asked "Please see below - will you follow up re the wording". Later that day Mr Seiler emailed Mrs Whitestone stating "I m [sic] afraid we have to find an other [sic] wording".

486. Mrs Whitestone responded to Mr Seiler 15 minutes later, stating:

> "That's fine. We can pay it without that reference if I can provide Dmitry with a bank letter confirming that the payment is not employment income, which would probably be better for us anyway."

487. A letter to Mr Merinson was in due course prepared, and signed by Mr Seiler and Mr Nikolov, which stated that the USD 1,744,565.74 paid to him was "as a retrocession rather than as employment income" and that Mr Merinson's Finder's agreement "does not establish any kind of employment relationship between the Bank and the intermediary".

488. Just before Mrs Whitestone's response to Mr Seiler referred to at [486] above, Mr Weidmann responded to Mr Baumgartner's email referred to at [484] above, copying Mr Raitzin into the original email chain and commenting that the retrocession payment was not provided for in Mr Merinson's Finder's Agreement because Mr Merinson's remuneration model was on the net income basis, which meant that there was no payment for retrocessions on FX trades. He also said that the conditions for the income basis was a retrocession of 25% whereas "Louise is requesting 80%". He therefore sought "confirmation of Gustavo Raitzin as the condition exceeds the maximum standards". Mr Weidmann's email was sent to Mr Nikolov, Mr Raitzin, Ms Bohn, Ms Thomson Bielmann and Mr Baumgartner, and there is no evidence that any of them questioned the payment.

489. Mr Raitzin replied to all just under 15 minutes later, copying Mr Seiler as well. He stated:

> "We are in front of a 'fait accompli' so not to [sic] much room for objection, unless we wish to transfer the relationship to another financial institution".

490. There is a dispute as to the significance of the words "fait accompli" as used by Mr Raitzin, in this context. Mrs Whitestone and the Authority contend they do not undermine their contention that Mr Raitzin approved the FX transaction in advance.

491. Mrs Whitestone's explanation for Mr Raitzin's description of her request as a "fait accompli" was that he was referring, not to the fact of Julius Baer having been committed to pay the retrocession, but that fact not being recorded in the Finder's agreement. As Mr Jaffey submitted, that is a strained reading of the words and there is no evidence that Mr Raitzin knew or had been told anything at this point about the drafting of Mr Merinson's Finder's agreement, so it is very unlikely that this would be a comment on that.

492. The Authority's explanation is that by "fait accompli" Mr Raitzin meant, not that the bank was bound, but that "If I start asking questions about this, they'll take the money away" Mr Raitzin's response to this was that the funds had been accepted, the First FX Transaction had been booked and the commitment to the Finder to pay a retrocession was binding (at least as he understood it). If Julius Baer reneged on its commitment, the Finder would be perfectly entitled to prevail on the client to move its funds elsewhere on the basis that the bank would not keep to its word. Furthermore, as he said, "we were going to have to be facing a finder that will come and claim for the 1.8 million."

493. We accept that as a rational and plausible explanation. Mr Raitzin's description of the situation as a "fait accompli" is inconsistent with either he or Mr Seiler having approved the

First FX Transaction or retrocession arrangements in advance. Mr Raitzin's evidence is that Mrs Whitestone had already committed Julius Baer and he made a commercial assessment of the payment. He did so in the knowledge of Mr Baumgartner's email which noted that the transaction was known to Compliance and plausible.

Whether the Applicants were aware that the First FX Transaction and the First Commission Payment were suspicious

494. We now turn to consider whether following the execution of the First FX Transaction and Mr Raitzin's decision to pay the First Commission Payment, the Applicants were aware that those transactions were suspicious and accordingly were aware of any of the Relevant Risks.

495. Our findings of fact as set out above show the state of knowledge of the respective Applicants at this time to be as follows.

496. As regards Mrs Whitestone, she had been aware for some time that Mr Feldman was the sole director of Yukos Capital and that Mr Merinson was employed by Yukos International as Financial Controller and in addition was the CFO of Yukos Capital. She knew all the terms of the FX Transaction which she had been a party to negotiating with Mr Feldman. She also knew that Mr Merinson was proposing to share his commission with Mr Feldman.

497. As regards Mr Seiler, he did not approve the First FX Transaction in advance. He learnt of its terms when he received Mrs Whitestone's email of 16 August 2010. He had conversations with Mr Campeanu and Mrs Whitestone after receiving Mrs Whitestone's email in order to be updated about what had happened since he was last informed as to the potential inflow of funds and the transactions to be executed thereafter. After those conversations, he knew the salient terms of the First FX Transaction and that a commission at a rate of approximately 0.55% of the principal sum converted into US Dollars was earned by BJB. He also knew that if Mr Merinson was to be paid a one-off retrocession amounting to 80% of the net income earned by BJB, that is, an amount of approximately $1.87m or 0.44% of the principal sum converted, BJB would retain a sum which represented 0.11% of the principal sum converted. He also knew that Julius Baer was to receive custody fees at the annual rate of 0.2% of the principal sum held and transaction fees of 0.125% per annum.

498. Mr Seiler knew that Mr Merinson, an existing customer of Julius Baer, was the registered Finder on the Yukos accounts but was not aware that he was in the employ of any Yukos entity. He had been told that Mr Merinson was the introducer on the Yukos Capital account, his role being to advise Yukos Capital on where to place its money and accordingly may well have been described as a consultant. He also knew that Mr Merinson had requested that his commission payment be described as an "investment capital gain".

499. Mr Seiler did know, however, that Compliance had been looking into the arrangements and that Mr Baumgartner had described the transaction as "plausible." Mr Seiler therefore knew that Compliance had not expressed any reservations about the arrangements. He had not seen the note prepared by Ms Senn-Sutter or the emails exchanged between Mr Baumgartner and Ms Thomson Bielmann or between Mrs Whitestone and Ms Thomson Bielmann referred to at [476] or [479] above. Neither Compliance nor BJB Legal had given any indication that they considered the request for the reference "Investment Capital Gain" to be suspicious. Mr Seiler knew that Compliance had advised how the issue should be dealt with.

500. As regards Mr Raitzin, he did not approve the First FX transaction in advance. He had the same information as Mr Seiler had regarding the transaction following receipt of Mrs Whitestone's email of 16 August 2010.

501. Also in common with Mr Seiler, he had not seen Ms Senn-Sutter's note or its references therein to Mr Merinson's role as the CFO of Yukos Capital and the Veto Letter. It was therefore clear that both BJB's Business & Operational Risk Department and Compliance had considerably more information regarding Mr Merinson's background than either Mr Seiler or Mr Raitzin had at this stage. It is therefore clear that Compliance had considerable information regarding the connection between Mr Merinson and Yukos but did not seek to probe those matters any further or consider whether those connections made it unsuitable for Mr Merinson to be registered as a Finder on the Yukos accounts and be paid a large commission as a result.

502. We consider later the extent to which cumulatively the various pieces of information that each of the Applicants knew following completion of the First FX Transaction and the payment of the First Commission Payment should have given rise to suspicion on their part, but at this point we focus on the "Investment Capital Gain" reference.

503. As far as Mrs Whitestone is concerned, the Authority rejects Mrs Whitestone's evidence that she understood Mr Merinson's request to be motivated by his desire to ensure that the sums would not be taxed as employment income in the Netherlands. Mr George submitted that her position is inconsistent with her own case that she understood the commission payment to Mr Merinson to be some form of incentivisation payment, where a payment of that kind would represent employment income and she omitted to disclose that fact in her email to Mr Nikolov on 19 August 2010 when she raised the question as to whether the reference was permitted. Mr George submitted that it should be inferred that Mrs Whitestone was fully aware that not only was the payment not an "investment capital gain" but was also an incentivisation payment and therefore employment income. Consequently, Mr George submits, it was obvious to Mrs Whitestone's that the request was suspicious.

504. We reject those submissions for the following reasons.

505. As we have found, at the time Mrs Whitestone was an inexperienced Relationship Manager and we can assume that her knowledge of international tax matters was somewhat limited. The fact that she raised the issue at all with her superiors, indicated that the reference "Investment Capital Gain" was not something that could be taken at face value and would have to be considered by those who are more expert than her. Accordingly, in our view she took the right action by escalating the issue appropriately through her email to Mr Nikolov. The latter, who was far more experienced than Mrs Whitestone, in fact indicated initially that the request might be possible. It was then escalated to a senior figure within BJB Legal.

506. Had Mrs Whitestone believed that the request was obviously suspicious, then the obvious thing to do would be to say nothing at all at this stage, wait for the payment to be approved and then engineer the payment reference when the payment was made. It was agreed without any further debate that the payment would be described as a "retrocession". Mrs Whitestone's reaction, namely that the payment should be accompanied by a letter confirming that "the payment is not employment income" appears to us to demonstrate that the concern was that Mr Merinson was not to be regarded as an employee of Julius Baer and therefore payment was not being paid to him in his capacity as an employee of Julius Baer. This is also consistent with the way that she expressed the request in her original email to Mr Nikolov.

507. In our view, it was probable that Ms Bohn saw it that way and that the question as to whether it was to be regarded as employment income in the Netherlands as a result of his employment with Yukos International was in our view not in Mrs Whitestone's mind at the time that she was considering the issue. In those circumstances, the omission of any reference to the payment being an incentivisation payment was understandable.

508. As far as Mr Seiler is concerned, we accept Mr Strong's submission that the concern was not to have the payment treated as a capital gain, but rather to ensure it was not treated as

employment income, which Mr Seiler understood it was not, being a retrocession payment made by Julius Baer because of Mr Merinson's status as a Finder. Mr Seiler had no information about Mr Merinson's employment status in the Netherlands, so there is no reason why he should have been concerned about the question as to whether it was to be taxed as employment income in that jurisdiction. There was also no reason for Mr Seiler to question the view taken by BJB Legal. We do not consider, contrary to the submission of the Authority, that even if Mr Merinson's request had been declined, Mr Seiler should have been raising concerns about the honesty and probity of Mr Merinson for seeking a false reference.

509. With the benefit of hindsight, Mr Seiler accepts that he could have asked why Mr Merinson had requested this reference, but at the time he thought that the request was being dealt with by the right people in Legal and Compliance. We accept that in the circumstances that was a reasonable attitude to take at the time.

510. As far as Mr Raitzin is concerned, the Authority contends that Mr Raitzin approved the payment well aware that the request for the reference "Investment Capital Gain" was an attempt by Mr Merinson to disguise the true nature of the payment.

511. Mr Raitzin candidly accepted that looking at the reference now, the payment clearly did not represent a capital gain and therefore it was obviously false. Therefore, we accept that in common with Mr Seiler, this was a matter that should have prompted further investigation at the time, but, also in common with Mr Seiler he relied on the fact that it was addressed by BJB Legal and Compliance.

512. We therefore consider that Mr Raitzin did not appreciate the significance of the request at the time that it was made. Again, in common with Mr Seiler, Mr Raitzin understood that Mr Merinson was making clear that the payment was not referable to any employment relationship with Julius Baer and sought a payment reference that confirmed this.

513. It is important to look at the circumstances as they appeared to Mr Raitzin at the time. We do not accept the Authority's case that Mr Raitzin should nonetheless have been concerned by the request, even though BJB Legal and the Group Head of Compliance had already given their comments without suggesting this should have raised wider concerns**.** We accept that in 2010, clients and business introducers used to make common and unremarkable requests for tax efficient treatment and consequently Mr Raitzin did not therefore see anything particularly concerning in this at the time.

514. We accept that Mr Raitzin took comfort from the approval by the legal department, and in particular Ms Bohn, the head of the legal team which dealt with private banking. Mr Raitzin knew her well since she had worked on the US tax disclosure. Ms Bohn did not consider the request to be fraudulent, but rather mistaken. As we have said, it was clear from the text of Mrs Whitestone's email that what Mr Merinson was really concerned about was not being caught by employment taxation rates which was a reasonable concern because Mr Merinson was not an employee of Julius Baer.

515. Neither do we accept that Mr Merinson's request for an incorrect reference (presumably, on the Authority's case, to avoid tax) must have triggered suspicions that he was involved in more serious wrongdoing of a completely different nature: namely, fraudulently conspiring with Mr Feldman to steal millions of dollars from a company with which he was associated. As Mr Strong submitted, it is common sense that a person having done something wrong does not justify suspecting them of committing a different, unrelated wrong.

516. Mrs Whitestone's recording of the agreement by Mr Merinson that he was going to share his retrocession payment with Mr Feldman is, as she accepts, difficult for her to explain. We accept that neither Mr Raitzin or Mr Seiler were aware of this information and, if they had

been, it would have raised a red flag with them because it would have made Mr Feldman's approval of the payment of the retrocession to Mr Merinson worthless.

517. We therefore need to understand why Mrs Whitestone did not, as she contends, recognise this fact as a red flag.

518. Mrs Whitestone has accepted that this information was likely to have been given at the 17 August 2010 meeting at which she was present and that she provided the information in some form to Ms Denman to record in the contact report accordingly. That being so, the Authority contends that Mrs Whitestone must have actively registered this information, recognised its significance, and then deliberately and consciously concealed it on an ongoing basis in order to stop Compliance or her senior managers investigating and potentially stopping the arrangements – which she wished to avoid.

519. Mrs Whitestone was asked by the Tribunal why she did not, as she contended, pick up the significance of the information that Mr Merinson intended to share his commission with Mr Feldman. She replied that looking at the issue now "it does seem ridiculous" but explained it on the basis that she did not have the management support that she needed and was out of her depth. It was at a time when she was coming under increasing pressure from Mr Campeanu and looking back, feels that she "just wasn't quite good enough"…"I wasn't quite competent enough" …

520. Under cross examination, Mrs Whitestone says she has no recollection of making the entry in the MyCRM Report. The meeting of 17 August 2010 followed a highly pressurised week of work during which she had had little sleep, with her young assistant and a junior investment adviser, Mr Porter being on holiday. She believes that she simply does not remember being given the information but, if that is the case, she accepts it was a massive mistake. It is possible that she wrote the entry or provided the information to Ms Denman to put into the contact report. She rejects the allegation that she deliberately concealed the information by putting it in a place where it is unlikely to be found. If she was the sort of person who would have done that she could have just pretended that nobody told her the information and was not aware of it. The actual payment of the share of the commission did not happen for another 8 months. She made the point that by recording the information on MyCRM she was doing so knowing the system was being monitored by others. She has no explanation as to why the information was not contained in any of her emails when in fact she cannot remember being told the information.

521. Mr George submitted that Mrs Whitestone's position that she simply has no recollection of knowing that Mr Merinson intended to transfer a large part of his commission to Mr Feldman is unreal and incredible. He submits that information of that kind would be highly pertinent to her understanding of the relationship between Mr Merinson and Mr Feldman, as the two individuals with whom she had contact on her largest account. On her own evidence, since it would involve a person with signing authority in respect of the Yukos account receiving part of a Finder's fee, it would have been a "clear conflict of interest".

522. We have found that in the particular circumstances that Mrs Whitestone found herself at the time, under considerable pressure, with limited life experience and, we believe, identified by the very plausible Mr Feldman and Mr Merinson to be sufficiently gullible to be taken in by their plan, we accept that she did not give any proper attention to the significance of the information that she was provided at the time it was given and subsequently gave it no further thought. This was against the background of a plan that had been approved by Mr Feldman as the sole director of Yukos Capital and Yukos Capital was the client. We accept Mrs Whitestone's evidence that Mr Merinson and Mr Feldman had assured her that other senior members of the Yukos Group were aware of the arrangement and supported it and that she had

not been asked by them not to disclose the arrangement to others higher up the Yukos structure. She trusted Mr Feldman and, as we have found, had no reason to doubt him bearing in mind his background. In the circumstances, she paid no attention to what to more experienced and less trusting executives would have appeared suspicious. As Mrs Whitestone herself said, we find it difficult to believe she would have caused the entry to be made if she felt that anything untoward was going on. If she was suspicious of the arrangement and wanted it hidden, the easy thing to do was to keep it off the system and the likelihood is that nobody would have discovered that she had been told the information.

523. We have seen that she was open in her recording of Mr Merinson's employment by Yukos International and the fact that he was also the CFO of Yukos Capital. When Compliance and Legal did get involved, for instance when the "Investment Capital Gain" issue was raised, she accepted the advice given without question.

524. We do not accept that she hid the information in a way that it would not be easily found. That would have been a very high-risk strategy, bearing in mind the evidence shows that MyCRM could easily be accessed by her superiors and by Compliance. In fact, at the very time that the information was recorded, 19 August 2010, Compliance were looking into the matter in detail and Mrs Whitestone was in correspondence with Ms Thomson Bielmann, answering the questions she had on the arrangements in the light of Ms Senn-Sutter's note. Therefore, recording the information on MyCRM at that particular time is inconsistent with a strategy to conceal the information from others higher up in the Julius Baer Group.

525. The contact report showing this information was not in the possession of the Authority at the time she was interviewed by the Authority in October 2016. At that time, the Authority had a copy of the payment instruction by which money was transferred from Mr Merinson's account to Mr Feldman as part of the commission sharing arrangement. Mrs Whitestone was not given that document in advance of her interview, but it was produced to her towards the end of her interview and she was asked if she was aware of the arrangement. From her reaction to it, as demonstrated by the interview transcript, she seemed generally surprised, remarking that "I feel like a bit of an idiot". Again, it would have been a dangerous strategy for Mrs Whitestone to have denied knowledge of the arrangement if she was aware that she had recorded it on a contact note on MyCRM.

526. Accordingly, although it would have been obvious to a reasonably competent Relationship Manager that there was a clear conflict of interest in the arrangements, in our view Mrs Whitestone did not recognise the significance of the information at the time that it was recorded on the contact note.

527. We now turn to the question as to whether, as the Authority contended, unusually high commission rates were achieved on the First FX Transaction resulting in commission payments to Mr Merinson and fees to Julius Baer that were far in excess of the standard rates, a matter which the Authority says should have given rise to suspicion on the part of each of the Applicants.

528. The Authority's position, as regards Mrs Whitestone can be summarised as follows:

(1) The difference between the exchange rate charged to Yukos Capital and the average market rate achieved by BJB resulted in a commission rate of approximately 0.55% of the principal sum converted: approximately 11 times the standard commission rate for a transaction of this size. This was an obvious red flag for Mrs Whitestone.

(2) Although Mrs Whitestone's evidence is that she did not know there were standard FX commission rates at Julius Baer and contends that this is why she was not aware of this obvious red flag, she accepts that she knew that, absent any Finder and Finder's fee,

the commission charged to Yukos Capital would have been lower by the amount of the payment to Mr Merinson. She also knew that Yukos would only be aware of the rates that it was charged by the bank and would not see the rates at which the bank had actually transacted (and therefore the size of the commission).

(3) There was no commercial rationale for the trading strategy adopted which was explained by Mrs Whitestone as guiding the client to "get the best possible rate and thereby maximise the commission" and to ensure that "the rate charged to [Yukos Capital] was above the worst rate for the day so that the spread between that and the rate at which Julius Baer transacted would cover both the commission required by Julius Baer and a further commission payment". The Authority submits that the only impact of improving the rate at which the bank transacted is to increase its commission (and thereby increase the commission payment to be paid to Mr Merinson). There was no benefit of such a trading approach to Yukos, as the client, and Mrs Whitestone's suggestion that the parties' interests were "aligned" is therefore obviously wrong. The purpose and effect of the trading strategy was instead to disguise the commission rates from any person auditing Yukos Capital's accounts.

(4) In the absence of any documentary evidence, the Tribunal is invited to reject Mrs Whitestone's attempt to attribute the trading strategy to Mr Narrandes. The trading strategy as described in Mrs Whitestone's email of 16 August 2010 was highly suspicious, as were the trading conditions that it necessitated (where, in order to effect the strategy, Mr Taylor was required to remain in JBI's offices overnight with both Mr Feldman and Mr Merinson present).

(5) Mrs Whitestone's case that the bank charged lower ongoing banking fees because it was agreed that investment advisory fees would be set at nil is wrong. The Authority contends the true position is as set out at (6) and (7) below.

(6) The JBI operations procedure manual states as follows "Standard fees are available on IntraBaer for both Discretionary Management as well as Advisory. Julius Baer does not offer separate fees for custody as standard nor does it offer Cash Management as standard. Fees for Custody and Cash are the same as for Advisory Services". The standard (combined) fee charged for investment advisory and custody fees was approximately 20 bps, and not 50 bps, as Mrs Whitestone alleges. In addition, there would be a fee for each transaction undertaken on the portfolio, amounting to the equivalent of 12.5 bps on the value of the portfolio per annum.

(7) The Authority's position is supported by the fees charged in respect of the Yukos account, before Mr Merinson was registered as a finder and started receiving commission. For example, the records in relation to Yukos Hydrocarbons in May 2009 show an annual fee of 0.2% "to be applied for the standard banking services" (i.e. 20 bps).

529. As far as Mr Seiler and Mr Raitzin are concerned, the Authority's case is that both the inflated amount of the commission for the FX Transaction and the trading strategy adopted, as described in Mrs Whitestone's email of 16 August 2010 should have been obvious red flags for Mr Raitzin and Mr Seiler, to whom Mrs Whitestone's 16 August email was sent, in particular in light of their extensive experience in the banking industry.

530. It is important to put ourselves in the shoes of Mr Raitzin and Mr Seiler as at the time that they received Mrs Whitestone's email and assess, without the benefit of hindsight, how the commission arrangements and the proposal to pay the large one-off retrocession to Mr

Merinson would have appeared to them with the knowledge that we have found that they had at the time that they received this email. In making that assessment we also need to bear in mind that because of their respective roles in relation to the approval of the arrangements the key issue for them was whether they made commercial sense for Julius Baer. We also need to bear in mind that both Mr Raitzin and Mr Seiler knew that Compliance had been reviewing the arrangements.

531. Of course, the trading strategy was effective in disguising from Yukos the fact that Mr Merinson had been paid a large retrocession out of monies received by Yukos from the Dutch litigation. The only person within Yukos who knew that was Mr Feldman. Anybody at Yukos reviewing the documentation relating to the FX Transaction would have seen that the transaction had been effected in a number of tranches at market rates, although not necessarily at the best available rate on the day and with such a large sum to be converted it is no surprise that the transaction was effected in a number of tranches.

532. Whether the trading strategy was designed to ensure that the commission rates would be disguised from auditors or anyone else investigating the transaction on behalf of the bank, as Mr Raitzin explained in his evidence, it appears to us that there is nothing wrong with 10 portions of the transaction to be booked as one with the bank keeping records of each one of the transactions, with such records being available to either the client or an audit team wanting to review the documents. In that regard, the following records would, as was apparent from the evidence that was before us, have been held by Julius Baer:

(1) Written instructions from Mr Feldman setting out the rates obtained on each of the traded tranches.

(2) Written email confirmation from Mr Feldman that the rate achieved was in accordance with his instructions (in circumstances where Mr Feldman was physically present throughout the trading and authorised each transaction personally). Mrs Whitestone informed Mr Raitzin and others by email that the commissions charged were "as instructed by the client" and that she had "signed and emailed instruction from the sole director", ensuring that the transactions were properly documented and recorded.

(3) Computerised trading records expressly recording the rate achieved by BJB, the amount of commission taken, the rate received by the client and that the transaction was booked as an average of 10 individual transactions. BJB maintained full records of the rate applied and the commissions.

533. Mrs Whitestone's email of 16 August 2010 would have conveyed that the client, in the person of Mr Feldman, approved the transaction and the arrangement with the introducer, Mr Merinson.

534. As regards the reference in Mrs Whitestone's email to "guiding them to get the best possible rate and thereby maximise the commission", we accept, as submitted by Mr Strong, that getting the best rate possible was obviously in the client's interests. We accept that the bank's and the customer's interests were aligned. Since Julius Baer's commission was a percentage of the dollar amount, the best rate for the client would also maximise Julius Baer's commission. Indeed, Mr Porter agreed in cross-examination that his description in his second witness statement, which described the strategy as highly unusual, was likely a misunderstanding.

535. In the absence of any documentary evidence, and our previous findings that Mr Seiler had not approved the trading arrangements in advance, we can only infer that the trading strategy was instigated by Mr Feldman and Mr Merinson in order to facilitate the payment of the large retrocession to Mr Merinson whilst at the same time ensuring that the overall rate of

exchange for the sums converted was not out of line with the market rate. As we have said, it was in the interests of Mr Feldman and Mr Merinson to adopt that strategy because it appears they wished to disguise from Yukos the fact of the large retrocession being paid to Mr Merinson.

536. However, even though unusual, we see no reason why such a strategy should not have been adopted in circumstances where, legitimately, the client, wished to reward an employee of an associated company who had successfully arranged for a private bank to take on the business concerned, in circumstances where Yukos may have difficulty in obtaining the services of a private bank at reasonable cost, bearing in mind the risks that handling a relationship with Yukos involved, as we have previously mentioned. Therefore, assuming the client had properly given its informed consent to the arrangements, it seems to us there is nothing inherently uncommercial in the client agreeing that in effect a percentage of the principal sums which it was seeking to deposit were paid as a reward to the employee for finding a bank who was willing to accept the deposit and convert it into US dollars.

537. Indeed, as Mr Jaffey submitted, the arrangement between a Finder and a Swiss bank is in many cases like that of a financial adviser and a product manufacturer where it has been common practice for the adviser to be remunerated by a retrocession of some of the initial commissions charged by the bank. In other words, part of the remuneration that would otherwise be earned by the bank is ceded to the financial adviser as a reward for making the introduction. It is a price to be paid by the bank for obtaining the new business and there is nothing wrong as long as there is adequate and proper disclosure and the client gives its fully informed consent. As Mr Jaffey starkly put it, Yukos were paying fees and commissions at a market rate and in exchange received banking services and investment advice which were not easily or widely available to them.

538. There was also clearly a commercial rationale for Julius Baer for accepting the business. It seeks to expand its business by attracting new assets that will pay a reasonable rate of return and it was common at this time for the bank to use Finders to facilitate the obtaining of new funds to be managed who would be remunerated by a commission.

539. As regards the amount of the commission retained by BJB after the payment of the retrocession, at 11bps there is no doubt that by reference to BJB's standard commission rates, it was a very large commission, taken in isolation. We were shown the standard FX margin grid applied by Julius Baer in both London and Switzerland. The grids show that the larger the sum converted the lower the commission rate, although it does show that the rates were negotiable in respect of very large sums. We accept that if this was a stand-alone FX Transaction the rate charged may well have been somewhere between 0.05% and 0.15% of the principal sum converted.

540. However, as Mrs Whitestone's email of 16 August 2010 demonstrated, the high commission rates were compensated by correspondingly low custody and transaction fees and the absence of any advisory fees. As Mr Bates observed in his evidence, the revenue on the First FX Transaction was significant on that particular trade, but in relation to the ongoing revenue in the context of a return on assets, it was quite low.

541. Mrs Whitestone referred to the remuneration for Julius Baer amounting to 32bps for 2010, which she described as 76.8 bps annualised, bearing in mind the sums were not received until August 2010. However, the overall return for subsequent years of 32 bps would be quite low in the absence of further major inflows. However, Mrs Whitestone indicated in her email

that there was a possibility of an additional US $ 400 million being received in the next 12 months.

542. Therefore, when the 11bps for the foreign exchange transaction is added to transaction fees, overall the remuneration payable to the bank is not out of line with the return it might be expected to earn on a large sum of this kind for a high-risk client.

543. The Authority suggested that the custody fee of 20 bps included investment advice as standard. This is not borne out by the evidence. The Authority relied on the arrangements agreed with Yukos Hydrocarbons where for its fiduciary deposits it was charged only a custody fee of 0.2 %. However, it is clear from the documentation that had Yukos sought to invest its assets beyond cash deposits, it would have been charged both transaction fees and, if advice was sought, investment advisory fees. The evidence shows that where the client wished to invest in liquid assets, of the type that Yukos Capital indicated met its risk profile, then it is likely that the advisory fee would normally be in the region of 0.25%. The evidence shows that Mr Porter advised on the instruments in which the proceeds of the First FX Transaction should be invested and was therefore providing advisory services. These services were provided at no extra charge so in this particular case there was no separate charge for investment advisory services beyond the custody fee but that is clearly not the usual position.

544. Accordingly, the total earnings for this during the first year of the relationship, when the high commission charged for the First FX Transaction is taken together with the custody and transaction fees was between 40 to 45 bps, which appears to us to be a modest sum bearing in mind the high-risk profile of the account, but obviously taking into account the large amount deposited.

545. Mr Raitzin's evidence was that he did not recall reading Mrs Whitestone's email at the time it was received. He said that he would normally rely on those who were below him in the reporting line and their assessment of the position. In this case, as we have seen, the matter was looked into by Mr Nikolov following Mr Raitzin having given his verbal approval to the payment of the First Commission Payment and Mrs Whitestone's email of 19 August 2010, referred to at [472] above.

546. We accept Mr Raitzin's evidence that he did not pay much attention to the email at the time he received it. He had not approved the transaction in advance. His role was to approve the non-standard retrocession payment, but he had not at that stage been asked for approval in that regard. Accordingly, as we have seen, a conference call was arranged with Mrs Whitestone to discuss the matter. As we have also found, Mr Raitzin was given a satisfactory explanation of why payment of the retrocession was appropriate.

547. We have no evidence of whether the trading strategy for the First FX Transaction was discussed in any detail, but we accept, that had it been discussed, it is likely that Mr Raitzin would have been satisfied with the overall remuneration to be earned by the bank from the arrangements, as described above. With the benefit of hindsight, Mr Raitzin should probably have paid more attention to the trading arrangements and satisfied himself as to their propriety. However, he did ask Mrs Whitestone to raise the matter with Mr Nikolov who, together with Compliance, did look at the arrangements in more detail and did not raise any concerns. In those circumstances, it seems likely that Mr Raitzin paid no further attention to the matter until the email exchange that followed Mrs Whitestone's email of 19 August 2010, as described above. Thereafter, as we have observed, it is likely in our view that Mr Raitzin relied on the statement from Mr Baumgartner that the transaction was known to Compliance and "plausible"

and therefore made no further enquiries of his own in relation to the matter before his "fait accompli" email.

548. Accordingly, we find that Mr Raitzin did not consider that the trading strategy and the amount of the commission for the First FX Transaction were suspicious.

549. As regards Mr Seiler, we accept that he had no detailed information about exactly how the commission had been generated, other than that Mr Taylor had worked hard through the night to exploit exchange rate movements. He knew from Mrs Whitestone's email of 16 August 2010 that the monies had been converted in 10 tranches and the client had been charged a single rate, and that the client was "very happy with the service". He also knew that the sole director of Yukos Capital, Mr Feldman had approved the arrangement. He did not know the full position regarding Mr Merinson's connection to Yukos.

550. Accordingly, in our view it would not appear to Mr Seiler that the trading strategy would mean the size of the commission was obscured in Yukos Capital's records. With the benefit of hindsight, Mr Seiler accepts that the amount of the commission was very high for a foreign exchange transaction of this size. He accepts that he should have questioned that aspect of the transaction, but, in common with Mr Raitzin, he knew that others were looking at the transaction, particularly Compliance, and he himself had some comfort from his conversation with Mr Gerber. Therefore, whilst Mr Seiler would, in common with Mr Raitzin, have seen that the size of the retrocession payment was not in excess of the usual limit applied to net new money and would have seen that the overall fees to be charged to the client during the first year of the relationship were not excessive, he did not probe the matter any further.

551. Mrs Whitestone was of course in possession of more information than that held by Mr Seiler and Mr Raitzin. However, we have accepted her evidence she was naïve and effectively duped by Mr Feldman and Mr Merinson. Mrs Whitestone had little experience of FX trading and we accept that she was unaware of the standard commission rates applicable at the time. The standard rate cards referred to above were not found until they were disclosed in 2020 so it is highly likely that they were not readily available at the time. In common with Mr Raitzin and Mr Seiler, we accept Mrs Whitestone's evidence that as far as she understood it, the overall arrangements represented significant reductions in the bank's overall fees which needed to be taken into account when considering the commission charged on the FX trade. Likewise, consistent with Mr Raitzin's explanation, Mrs Whitestone explained clearly that the strategy of Mr Taylor guiding the client to get the possible rate and thereby maximise the commission effectively aligned the position of the client and the introducer.

552. Our findings set out at [494] to [551] above lead us to conclude that none of the Applicants considered by the time Mr Raitzin had approved the First Commission Payment that either the First FX Transaction or the First Commission Payment were suspicious.

553. Taking the position of Mrs Whitestone first, although we have found that she did not obtain the advance approval of either Mr Raitzin or Mr Seiler, in our view it is likely that her line manager, Mr Campeanu, was aware of the transaction in advance and clearly did not object to it.

554. Despite Mrs Whitestone's knowledge of the connection between Mr Merinson and Yukos and her recording of the proposal by Mr Feldman to share his commission with Mr Feldman, we conclude that it did not occur to Mrs Whitestone there was a risk of conflict between Yukos on the one hand and Mr Merinson and Mr Feldman on the other. Due to her naïveté and inexperience and the apparent strong credentials of Mr Feldman she did not consider that there was anything suspicious about the arrangements. She took Mr Feldman on

trust and considered, naïvely as its transpired, that his approval as the sole director of Yukos was sufficient in the circumstances. Neither, for the reasons that we have set out above, did Mrs Whitestone appreciate the significance of what she was told about the commission sharing arrangements.

555. As far as the "investment capital gain" issue is concerned, in our view she was open about the issue and took appropriate steps in raising the issue with Mr Nikolov who subsequently referred the matter to BJB Legal. Mrs Whitestone readily accepted the outcome of that exercise.

556. With respect to the size of the retrocession payment to be made to Mr Merinson and the rationale for it, we have explained the commercial benefit to Julius Baer in Finder's arrangements, and we have accepted Mrs Whitestone's explanation as to what she was told about the rationale for Yukos wishing to remunerate Mr Merinson in this way. We have explained how such arrangements would be perfectly proper if preceded by fully informed consent of the client concerned. The payment of Mr Merinson's retrocession required Mr Raitzin's approval because it did not accord with the terms of the standard Finder's agreement that Mr Merinson had entered into but it was not an unusually high percentage figure, bearing in mind the bank's standard limits for Finder's fees in respect of net new money, even if in absolute terms the payment was a large amount. Consequently, if the rationale for the payment was plausible, the amount of the payment was not in itself such as to raise suspicions.

557. For the reasons we have given, it would not have appeared to Mrs Whitestone that the commission was inappropriately disguised or the overall fees to be charged to the client were excessive.

558. We accept, however, that if all of these pieces of information were put together and considered as a whole by a reasonably competent and experienced Relationship Manager they would have raised suspicions that the Relationship Manager concerned should have probed further. Our conclusion is, however, that they did not raise suspicions with Mrs Whitestone. As she readily accepts, she was out of her depth and had inadequate management support. She candidly admitted that "maybe I wasn't good enough".

559. Mrs Whitestone was not alone in not picking up on the Relevant Risks. It is apparent from our findings set out above that BJB Compliance had much of the information known to Mrs Whitestone or the means of finding it out if they had probed further on BJB's systems and, in particular, what was recorded on MyCRM. In particular, BJB Compliance knew that despite a continuing close connection with Yukos Capital Mr Merinson had been registered as a Finder in circumstances where both Mr Seiler and Mr Raitzin, both experienced bankers, had said that such a connection would, if they had known about it, raised suspicions. Compliance had the means of knowledge of the trading strategy and the size of the FX commission. They were aware of the suggestion that the retrocession payment be incorrectly described as an investment capital gain. Despite this, Mr Baumgartner was able to advise Mr Raitzin that the transaction was known to Compliance and was "plausible".

560. The fact that BJB Compliance saw no red flags supports our conclusion that the much less experienced and expert Mrs Whitestone also failed to do so.

561. We come to the same conclusions in relation to Mr Seiler and Mr Raitzin.

562. We have concluded that neither Mr Raitzin nor Mr Seiler approved the First FX Transaction in advance, including the proposal to make the First Commission Payment. They had much less information regarding the matter as was available to BJB Compliance at the relevant time. In particular:

(1) They did not know the close connection between Mr Merinson and Yukos Capital and that he was not in reality a typical Finder, such as a genuine third-party consultant.

(2) They did not know of the intention of Mr Merinson to share his commission with Mr Feldman.

(3) The "investment capital gain" issue was investigated by BJB Legal and dealt with appropriately.

(4) The fact that BJB Compliance had described the transaction as "plausible" would be sufficient to give Mr Seiler and Mr Raitzin comfort that there were no suspicions of a misappropriation risk in the arrangements.

(5) The fee structure had a clear commercial rationale.

563. Therefore, on the basis of what Mr Raitzin knew at the relevant time (as opposed to what might have been known if the arrangements had been investigated more diligently) the commercial decision to make the First Commission Payment, knowing that there was a pre-existing obligation to do so and knowing that Compliance had described the transaction as plausible appeared to Mr Raitzin at the time to be reasonable in the circumstances.

564. As far as Mr Seiler is concerned, he realised that the retrocession arrangement Mrs Whitestone had negotiated with Mr Merinson was unusual and he spoke to Mr Gerber to seek confirmation that the arrangement was in order. He received some comfort following the conversation.

565. As regards the First Commission Payment, as we have found, Mr Raitzin's approval was required for non-standard retrocessions. It was Mr Raitzin's decision not to object to the payment to Mr Merinson after the event. As Mr Strong submitted, it did not occur to Mr Seiler that the retrocession payment might involve any impropriety, Mr Raitzin raised no concerns, and Mr Seiler accordingly had no reason to question Mr Raitzin's decision. In common with Mr Raitzin, he took comfort from the fact that Compliance appeared to have looked at the relevant issues and had concluded that the transaction was "plausible".

August/September 2010: BJB Compliance Request for Confirmation Letters from Mr Feldman

566. On 26 August 2010, Ms Thomson Bielmann sent an email to Ms Senn-Sutter (copying Mr Baumgartner) in which she asked what was expected from BJB Compliance in relation to a meeting about Yukos "next week". Ms Senn-Sutter responded the same day stating that she wished to discuss "the issues around instructions/transaction documentation/role of D.M./conflict of interest/risk monitoring (crossborder)".

567. Subsequently, Ms Thomson Bielmann emailed Mrs Whitestone, copying Mr Baumgartner, on 1 September 2010, requesting clarification of a couple of points ahead of a meeting with Business Risk Management colleagues on 3 September 2010. In particular she said:

> "DM is acting as finder on the accounts and receives fees accordingly. You also informed us that he is Financial Director for Yukos International. Is there an agreement between Yukos Capital and DM that he may receive these finder's fees? This needs to be clarified for conflict of interest issues…"

568. As Mr Strong observed, it is notable that, despite there being ongoing discussions seeking clarification regarding conflict of interest issues, Ms Thomson Bielmann does not appear to have thought it necessary to stop the payment to Mr Merinson or to question the First FX Transaction. On the contrary, it appears that she was happy for Julius Baer's relationship with Yukos to continue, her email also referring to the fact that she was trying to expedite the opening of the proposed Fair Oaks account with BJB Bahamas.

569. It appears that Mrs Whitestone had a discussion with Ms Thomson Bielmann following which she was requested to ask Mr Feldman to sign two letters, the first of which contained a written confirmation that he was happy for Mr Merinson to receive the one-off 80% retrocession and 25% in respect of future transactions on the Yukos Capital account and the second of which contained a confirmation that both Mr Feldman and Mr Misamore, a director of Yukos Hydrocarbons, the parent company of Fair Oaks, were happy for Mr Merinson to receive a 25% Finder's fee for future transactions on the Fair Oaks account.

570. On 3 September 2010, Ms Thomson Bielmann asked Mrs Whitestone (copying Mr Baumgartner and Mr Nikolov) for a Yukos corporate structure to identify from whom confirmation should be obtained in respect to addressing "an issue raised by Business Risk Management (BRM), namely clarifying that potential conflicts of interest for the finder's fee payment to Dmitry are known and accepted by the relevant Yukos entity." This was provided on 8 September 2010.

571. As Mr Strong submitted, what these documents show is that although Ms Thomson Bielmann (and Mr Baumgartner) had Mr Merinson's employment status specifically drawn to their attention at the time of the First Commission Payment, they appear to have regarded any potential risks arising from this, including the conflict of interest which was specifically raised by Ms Senn-Sutter and discussed, as something which could be properly addressed by confirmation that Yukos (through Mr Feldman) was content with the arrangement. That supports a conclusion that a risk of wrongdoing on the part of Mr Feldman and Mr Merinson was not obvious at that time, and not evident from the information Mr Seiler and Mr Raitzin had at the time. It is also noted that payment to Mr Merinson was not made conditional upon obtaining the letters referred to at [569] above.

572. The Authority observed that at no point in the relevant correspondence did Mrs Whitestone inform BJB Compliance of Mr Merinson's intention to share commission paid to him with Mr Feldman and thus Mrs Whitestone was aware that this meant that Mr Feldman's confirmation would not resolve BJB Compliance's conflict of interest concerns. In view of our finding that Mrs Whitestone was not aware of the significance of the commission sharing arrangements, we find that Mrs Whitestone did not give any consideration at the time to whether this was something that she should have disclosed to Ms Thomson Bielmann.

573. On 3 September 2010 a letter was sent to Mr Merinson, signed by Mr Seiler and Mr Nikolov, confirming that the First Commission Payment had been paid to Mr Merinson's account with BJB Singapore, noting that the payment represented a retrocession rather than employment income. The letter confirmed that contrary to the terms of Mr Merinson's Finder's agreement, the payment represented "a one-off payment and no further payment at all will become due with respect to the specific client introduced." Accordingly, this letter in effect amounted to an amendment of the existing Finder's agreement, effective in writing, and replacing the existing remuneration arrangements with the agreement to pay the one-off retrocession.

October/ November 2010: proposals for the Second FX Transaction and the amendment of Mr Merinson's Finder's agreement

574. On 14 October 2010, Mrs Whitestone met with Mr Feldman and Mr Merinson. The contact report for that meeting records a strong prospect of a further inflow of funds of approximately USD 400 million, which Yukos expected to receive from ongoing litigation.

575. The note records that Yukos Capital currently had USD 372 million on time deposit on which "we are charging a 12 basis point custody fee." Mrs Whitestone was mistaken in this respect; as referred to at [417] above, in her email of 16 August 2010 Mrs Whitestone had recorded that it had been agreed that Yukos Capital would be charged at 20 bps for custody.

576. Despite the letter of 3 September 2010 referred to at [563] above, the contact note records that Mrs Whitestone would "try to increase [Mr Merinson's] finder's fee contract to 35%... and [to] keep the window open for him to receive 70-PERCENT – of the revenues for four large transactions until the end of October 2011".

577. Mrs Whitestone was clear in her evidence that she did not consider the proposed retrocession was to be limited to new inflows of money. We note at this point that there is no positive statement to that effect, but the contact note does not positively exclude it. We return later to the question as to what Mrs Whitestone actually believed at the time in the light of what Mr Raitzin, Mr Seiler and others were told at the time that approval was sought for the payment of these additional retrocessions.

578. It is common ground between Mr Raitzin and Mrs Whitestone that they spoke briefly and informally (probably in the corridor) while Mr Raitzin was in London on 14 October 2010. There is a dispute as to what was said.

579. Mrs Whitestone's evidence is that she explained the position in detail to Mr Raitzin – covering all the main points raised in the contact note referred to above and that Mr Raitzin then gave his verbal approval, but asked her to put the proposal in writing. Included in the information that Mrs Whitestone says she discussed with Mr Raitzin is the fact that the additional commission payments to Mr Merinson may not be in respect of new inflows of money, but rather on existing assets under management.

580. Mr Raitzin's evidence was that, while he recalled the encounter, it was "very brief". Mr Raitzin suggests that, for the most part, Mrs Whitestone wished to tell him "how hard she was working, that she had a strong pipeline, most likely referring to Yukos" and that, in return, he told her to keep up the good work (and, perhaps, to speak to Mr Courrier, as a "a specialist in finders"). He suggests he was trying to "politely brush her off". Mr Raitzin, therefore, has no recollection of Mrs Whitestone explaining the new arrangements that were proposed in respect of Yukos and says that he did not give any pre-approvals. He said that "I don't approve corridor procedures…".

581. We prefer Mr Raitzin's evidence on this point.

582. First, we think it is likely that had Mr Raitzin given detailed approvals, including approvals for future retrocessions to be paid on existing assets held by Julius Baer then this would have been recorded in the contact note of the meeting that Mrs Whitestone held with Mr Merinson and Mr Feldman on the same day.

583. Secondly, it was not clear at this point that there would be further transactions in relation to the assets already held in respect of which a retrocession would be paid. The contact note does not record any discussion about a proposed transaction in that regard and it was not until November 2010 that it became apparent that the Second FX Transaction would be effected and discussions took place and Mr Feldman raised the possibility of paying a retrocession to Mr Merinson in respect of that transaction.

584. Thirdly, as submitted by Mr Jaffey it would be inconsistent with Mr Raitzin's established working practice for him to approve this sort of arrangement, without seeing anything in writing, and without taking the views of those below him in the hierarchy.

585. Fourthly, Mrs Whitestone accepted in her evidence that the meeting "wasn't a planned booked meeting" and it "wouldn't have been a super long conversation". It is inherently unlikely that the proposals for both the updated Finder's arrangements and/or a proposed further FX transaction could have been adequately explained and approved in this brief discussion.

586. Fifthly, the way the position was subsequently explained by Mrs Whitestone in her email to Mr Courrier on 25 October 2010, as referred to in more detail below, indicates that she expected that formal approval would be necessary. She stated in that email that Mr Raitzin gave the impression that he "would respond positively to my request very quickly".

587. Under cross-examination, Mrs Whitestone was willing to accept that what had in fact happened was that Mr Raitzin had not provided approval. She said that she did not know how much attention Mr Raitzin was paying to what she was saying and confirmed that he asked her to write out what she was saying in an email to him and that he would provide his approval very quickly in response.

588. We think it is more likely than not that Mr Raitzin gave Mrs Whitestone polite and positive encouragement and warm noises about the proposals which Mrs Whitestone has now interpreted many years after the event as amounting to an approval, subject to her putting the matter formally through the proper channels.

589. On 15 October 2010, Mrs Whitestone sent an email to Mr Raitzin, copying Mr Seiler and Ms Denman, in which she specifically sought approval from Mr Raitzin of proposed revisions to Mr Merinson's Finder's agreement. She asked Mr Raitzin to confirm that he was in agreement with the principle of granting Mr Merinson a "35% finder contract excluding any revenues where we are making a one-off payment to the finder for large transactions". The use of the word "confirm" indicates Mrs Whitestone thought that Mr Raitzin had during their conversation in London at least indicated a positive reaction to her proposals. Mrs Whitestone explained that Mr Feldman and Mr Merinson had told her that Yukos Capital expected to receive approximately USD 400 million from four court cases, of which up to USD 50 million might be transferred away to a Yukos Hydrocarbons account with BJB Singapore. In addition, she noted:

> "Currently, they have USD372mil on time deposit on which we are charging a 12 basis point custody fee. […] I agreed with them that I would try to increase Dima's finder's fee contract to 35% (currently at 25%) and keep the window open for him to receive 70% of the revenues for four-large transactions until the end of October 2011, as long as we can start charging 12 basis points on uninvested assets (i.e. the USD 372mil deposit)… This would mean that if/when Yukos Capital SaRL wins all four law suits, upon each inflow we would be able to do large FX deals or CoY investments which would immediately earn the bank up to 15 basis points, while up to 35 basis points would be paid to Dima. The funds would then remain with us for at least 3 years charging even for custody of non-invested assets."

590. Mrs Whitestone repeated the same mistake she did in her contact note, as described above, regarding the current level of custody fees being charged. Mrs Whitestone's email is confusing in relation to custody fees, saying both that 12bps was being and was not being charged on the time deposit. It may be that she assumed that as the monies were being held on time deposit rather than being invested, custody was being charged at a lower rate.

591. Ms Tiffany Jones of BJB Bahamas pointed out to Mrs Whitestone shortly after this email that Yukos Capital and Fair Oaks were then being charged a custody fee of 20 basis points on all assets held with Julius Baer, including the time deposit, as set out in her email of 16 August 2010.

592. Mrs Whitestone's email was the first time Mr Seiler learnt of a proposal to revise the arrangements with Yukos and Mr Merinson. It is common ground that it was Mr Raitzin's approval that was required as this was a proposal for non-standard remuneration for Mr Merinson, but in accordance with his usual practice, Mr Raitzin would ask the opinion of others

with relevant expertise, in particular Mr Seiler as Market Head and Mr Courrier as head of Finders before giving his approval.

593. We accept that it is likely that Mrs Whitestone did not intend to preclude the granting of retrocessions in respect of assets which were already held by Yukos but she admitted that she did not do a good job of setting out the proposals she wanted approved accurately. We accept that the objective meaning of Mrs Whitestone's email was that the retrocessions would be limited to new money and accordingly we consider that the recipients, including Mr Raitzin and Mr Seiler, would have read the email in that way.

594. In particular, the way the penultimate sentence of the email reads, as set out at [589] above with its use of the words "if/when" indicate that it is the "inflows" which give rise to the possibility of Mr Merinson receiving a further 70% retrocession. In cross-examination, Mrs Whitestone accepted that, although she had not intended this to be the case.

595. In response, on 18 October 2010, Mr Raitzin emailed Mr Seiler and Mr Courrier stating only: "your recommendation should be prior". It was therefore clear that Mr Raitzin wanted to have input from both Mr Seiler and Mr Courrier before deciding whether to approve the proposal. Mr Seiler accepted that this meant Mr Raitzin wanted Mr Seiler and Mr Courrier to work together to produce a recommendation. Mr Raitzin was travelling that week (which was the week of his birthday) and therefore we accept that he was not able to engage in close analysis of the proposal. Mr Seiler also accepted that Mr Raitzin would accept a recommendation that he was happy with.

596. On 22 October 2010, Mr Courrier sent an email to Mrs Whitestone, copying in Mr Raitzin, Mr Seiler and Mr Fellay. Mr Courrier's email recorded that he had spoken to Mr Seiler and that Mrs Whitestone's proposal required approval from (i) Market Head, insofar as she sought to reduce custody fees and (ii) Mr Raitzin, as regards the proposed increase in commission to Mr Merinson, albeit that Mr Courrier anticipated that Mr Raitzin would make his decision on the recommendation of Mr Seiler and himself. Mr Courrier therefore requested a business case from Mrs Whitestone.

597. Mrs Whitestone responded to Mr Courrier on 25 October 2010 rather testily. Her email was also sent to Mr Seiler and Mr Fellay. She was clearly irritated that her original proposal, which she thought had been approved by Mr Raitzin in principle when they met in London and had been set out in detail in an email a week before Mr Courrier's response, had not yet been signed off. Her email noted that she was "aware that [she required] Gustavo's approval, which is why [she] explained the situation to him in detail when he was in London". It went on: "[Mr Raitzin] gave me the impression that he understood the scenario and would respond positively to my request very quickly", and that she was not therefore expecting to have to justify the request "to so many people" again.

598. Mrs Whitestone nonetheless went on to set out the detail of the proposal. She explained, for example, that "the Yukos group of companies is currently reconciling their fee levels with all the various banks and [she knew] that all the accounts with UBS and Clariden Leu are already set at 12 basis points custody fees on all assets", and that Mr Merinson already had a Finder's agreement with Clariden which paid him "35% of all net revenues". She therefore said that if Julius Baer wished to retain the existing funds and secure further inflows it needed to be competitive with the other banks and that she had indicated to Yukos that she would try to match Clariden's terms. As Mr Strong submitted, the commercial rationale for the new arrangements was therefore clear; Julius Baer would need to pay more to Mr Merinson as the introducer who had influence over where Yukos Capital placed its funds or the existing funds might be transferred to a different bank. Whether the revised arrangements would be better or worse than the existing arrangement from Julius Baer's perspective would depend on whether

the additional monies came in (which Mrs Whitestone presented as the purpose of the proposal) and for how long they remained with the bank. In our view, those commercial considerations would be at the forefront of Mr Raitzin's and Mr Seiler's mind when considering the proposals.

599. Mrs Whitestone's email went on to explain that Yukos expected further inflows of USD 450 million and that, under her proposal, Julius Baer would be "charging 12 basis point custody on all assets (even uninvested)", 35% of which would be paid annually to Mr Merinson. The email also records Mrs Whitestone's proposal for further "one-off" retrocessions on four tranches of monies, where there would be "an opportunity to do one-off high revenue-yielding transactions… upon each inflow". As with her email on 15 October 2010, therefore, Mrs Whitestone's email was likely to be read as indicating that the further retrocession payments to Mr Merinson would be charged in respect of new monies.

600. The proposal to reduce the custody fees to 12 bps had in fact already been implemented. In an email dated 14 October 2010, that is the day she met Mr Merinson and Mr Feldman, Mrs Whitestone asked Ms Jones of BJB to put in place the 12bps custody fee on non-invested assets with effect from 1 October 2010. At that stage, Mrs Whitestone mistakenly believed that she was putting in place an additional charge, but when Ms Jones informed Mrs Whitestone in response that the current charges were 20bps for custody which was charged on the total assets (both cash and securities) and asked her whether the custody fee should change to 12bps as from 1 October 2010, Mrs Whitestone responded by asking Ms Jones to amend the custody fee to 12bps on the total assets held. Mrs Whitestone accepted that she did not go back to Mr Raitzin to correct the error in her email which would have given the impression that custody fees were not currently being charged on uninvested assets but explained that on the basis that she was focusing on the business case that she was asked to put forward. We do not think that Mr Raitzin, Mr Courrier or Mr Seiler would have been misled by this error in that it was clear from the proposal going forward that a custody fee of only 12bps would be charged on all assets, whether cash or securities.

601. Mr Raitzin responded the same day by email saying,"I'm on vacation this week, but discussed the issue with Thomas prior to giving my no objection."

602. There is a dispute as to whether Mr Raitzin had in effect in this email given his approval to the proposals without having received input from Mr Seiler and Mr Courrier. Mr Raitzin initially gave evidence to the effect that the word "discussed" was a typo and that he meant to say "discuss", that is he intended to have a discussion with Mr Seiler before giving his approval.

603. Mr Seiler responded to Mrs Whitestone's email saying that he would discuss it with her when he was in London on "Wednesday" (i.e., 27 October 2010). Mr Seiler's recall of why he wished to speak to Mrs Whitestone, as set out in his witness statement, was that he wanted to consider whether Julius Baer should extend its relationship with Yukos, and he was unclear about how the commission of 35% of revenues would work alongside one-off retrocessions. He recalls telling Mrs Whitestone that she should revert in advance of a specific transaction with an explanation of how the retrocession arrangement she proposed would apply, and that she should obtain approval from Mr Raitzin before any transaction was carried out.

604. Mr Seiler believes that he discussed this approach with Mr Raitzin before he spoke with Mrs Whitestone. Mr Seiler recalls that Mr Raitzin was positive about expanding the relationship with Yukos, and Mr Raitzin confirmed that he was generally in favour of accepting more assets from Yukos.

605. Mr Raitzin now accepts that he did have a conversation with Mr Seiler on the evening of 25 October 2010 and accordingly in our view it is more likely than not that Mr Raitzin's email was sent after that conversation during which he and Mr Seiler agreed that the relationship with Yukos should be expanded, and more assets accepted. Bearing in mind Mr Raitzin was on

holiday we doubt that the conversation discussed the details contained in Mrs Whitestone's email in any depth and it was left that Mr Seiler should continue the discussions with Mrs Whitestone. Nevertheless, in our view Mr Raitzin's email to Mrs Whitestone must be taken to be his approval of Mrs Whitestone's business case for developing the relationship and that in so doing he was, as he was required to do, approving amendments to the contractual arrangements for rewarding Mr Merinson under the terms of his Finder's agreement.

606. Mrs Whitestone certainly took it that way. She responded to Mr Raitzin the next day, 26 October 2010, thanking Mr Raitzin saying that she will "discuss further with Thomas when he is in London tomorrow and then start to get all the paperwork done." It is clear from this email therefore that Mrs Whitestone knew that Mr Seiler would also have to be happy with the proposals before matters could proceed.

607. Although generally Mr Seiler took the position during his evidence that he could remember little from his conversations with Mrs Whitestone and others or the emails that he received at this time, in this instance, as summarised at [603] above, Mr Seiler appears to have remembered in some detail what he was going to discuss with Mrs Whitestone and, as detailed at [608] below, what he did subsequently discuss with her.

608. Mr Seiler's recollection is that, in his discussion with Mrs Whitestone on 27 October 2010, he told her that Mr Raitzin was broadly supportive of more business with Yukos, but she still required Mr Raitzin's approval before any transaction occurred on which Mr Merinson would be paid a one-off retrocession. He says that he impressed upon Mrs Whitestone the need to get prior approvals before making payments to avoid any more "fait accompli". He also suggests that, during the course of the meeting, they agreed that the further retrocessions could only be used on new inflows.

609. Mrs Whitestone's evidence is that, during her meeting with Mr Seiler on 27 October 2010, he gave his "verbal approval" of her proposal. Mrs Whitestone also believes that, as a result of their discussions in the meeting or more generally, Mr Seiler was aware that the proposed commission payments to Mr Merinson might be charged in respect of transactions carried out with existing assets under management and that the retrocession payments would be captured in the commission spread.

610. The next day Mr Seiler sent Mrs Whitestone an email as a reply to her email of 25 October 2010 which simply said," I approve the next steps of the relationship."

611. Mr Seiler contends that this email did not constitute approval of any particular transaction or retrocession payment, none having been identified. He says the "next steps" were the expansion of the relationship with Yukos subject to Mr Raitzin's approval prior to any transaction on which a one-off retrocession would be paid. He reiterated that under Julius Baer's policies, it was Mr Raitzin, not Mr Seiler, who was responsible for approving retrocession arrangements. Irrespective of whether he supported the proposal in principle, he contends that he could not, and did not approve the proposals, let alone approve of Mrs Whitestone carrying out any transaction without the specifics of any such transaction first being put to Mr Raitzin.

612. As regards what was said between Mrs Whitestone and Mr Seiler at their meeting on 27 October 2010, in our view in their evidence both of them were engaging in "litigation wishful thinking". We think it is unlikely that either Mrs Whitestone or Mr Seiler will have remembered with any clarity precisely what was discussed at that meeting many years ago. In the light of the litigation, they will both understandably be wishing to advance a version of what may have been discussed which will put their own case in a positive light. Accordingly, what they are saying now is clearly a reconstruction based around what was said in the various emails which are very sparse in detail.

613. Accordingly, we cannot say with any certainty what was actually discussed. We do, however, consider that taking account of the respective responsibilities of Mr Seiler and Mr Raitzin that Mr Seiler would have seen it as his role, as Market Head, to consider whether in broad terms the proposal to take more assets from Yukos on the basis of the expected return to Julius Baer after the proposed retrocession payments were made to Mr Merinson made commercial sense. That is the input that Mr Raitzin would have expected to have received from Mr Seiler before he gave his approval, as he was required to do, to the amendments to the Finder's agreement. It is clear that following his discussions with Mrs Whitestone, Mr Seiler was satisfied in that regard. Beyond that we cannot say much more about what was discussed.

614. In particular, we cannot say whether or not Mr Seiler was told that the retrocessions could be applied to existing assets and, if so, whether that registered with him. We have already found that Mrs Whitestone believed her proposals envisaged that such payments could be made but that would not appear to be the case to Mr Seiler or Mr Raitzin when they read the proposals. We think it is more likely than not that Mr Raitzin and Mr Seiler gave their respective approvals on the basis that it was envisaged that the retrocessions would only be paid in respect of new inflows as a natural meaning of Mrs Whitestone's emails would suggest, and accordingly we consider that on balance Mrs Whitestone did not say anything to the contrary at her meeting with Mr Seiler, although she may have considered that it was taken as read.

615. Neither can we say with any certainty that Mr Seiler did emphasise to Mrs Whitestone that she must obtain advance specific approval for each transaction and go through the appropriate reporting lines. We have previously referred to the fact that Mr Seiler was non-confrontational in his approach and that Mr Raitzin was critical of him for that. If something was said, and we do not rule it out, it was probably said in a very low-key manner. It probably did not register with Mrs Whitestone that she was being admonished.

616. Nevertheless, we do consider that the terms of Mr Seiler's email of 28 October 2010 are consistent with him approving the arrangements in principle rather than specifically any particular transaction or the specific amendments to the Finder's agreement proposed. The email is ambiguous, and Mr Seiler should have made it clear to what he was actually giving his approval. He accepted as much in his oral evidence. That may be a result of his less than precise use of the English language, which is of course not his first language. He is right that whether to approve the amendments to the Finder's agreement and any payment of retrocessions beyond the standard arrangements was a matter for Mr Raitzin. On the other hand, Mr Raitzin had made it clear that he wished to have Mr Seiler's and Mr Courrier's views on the matter before he gave his approval.

617. A further difficulty is that Mr Raitzin muddied the waters somewhat by purporting to give his approval before, as he knew, Mr Seiler had had his discussion with Mrs Whitestone. That was unsatisfactory, but we think it occurred that way because Mr Raitzin was on vacation and therefore was content to give his approval on the basis that others would examine the merits of the proposals in his absence. In effect, the approval was conditional upon Mr Seiler himself being satisfied in respect of matters for which he had responsibility as Market Head – notably whether the net income for Julius Baer made commercial sense.

618. Accordingly, we interpret Mr Seiler's email as approving Mrs Whitestone's business case. In doing so he said nothing that would lead Mr Raitzin to believe that he should not approve the amendments. It is clear that the revised arrangements went forward on the basis that they had been reviewed by Mr Seiler and Mr Courrier and Mr Raitzin's own acceptance of the business case following his discussion with Mr Seiler before he sent his "no objection" email.

619. Mrs Whitestone sent an email to Mr Feldman on 28 October 2010 in which she said:

> "I have this morning received all the preliminary approvals for the terms that we previously discussed… Also, no further renegotiation of any terms (fees (etc) would be accepted, apart from relating to large inflows."

620. In our view, the use of the word "preliminary" in this email and the reference to fees being negotiable in relation to large inflows, indicates that Mrs Whitestone understood that terms relating to particular transactions may have to be approved on a case-by-case basis, thus supporting Mr Seiler's case on this point.

621. Mr Courrier responded to Mr Seiler's email on the same day, copying Mrs Whitestone, Mr Raitzin and Mr Fellay, stating that BJB Bahamas would proceed "according to your decision as required at Market Head level." Mr Courrier asked to be provided with a copy of the Finder's agreement to reflect the increased rates when concluded. We think in this context Mr Courrier could only be referring to the rate from 25% to 35% as envisaged in Mrs Whitestone's email of 15 October 2010. It is to be noted that in that email Mrs Whitestone referred to the further one-off retrocessions to be "left open" as a possibility, this is relevant when considering the question as to whether the revised Finder's agreement should have referred to the one-off retrocessions.

622. Also on 28 October 2010, Mrs Whitestone emailed Mr Spadaro, copied to Mr Raitzin and Mr Seiler. Her email asked him to prepare a new Finder's agreement for Mr Merinson "giving him 35% of the bank's net revenues rather than 25%" – noting that the increase had been "approved by Thomas Seiler and Gustavo Raitzin".

623. In the light of those factual findings, we turn to the question as to whether any of the Applicants were aware of any of the Relevant Risks in relation to the arrangements leading up to the execution of the revised Finder's agreement.

624. As regards Mrs Whitestone, the Authority's case is that there is no legitimate basis for the omission of substantial payments by a bank to a Finder from its compulsory Finder's agreement and, moreover, that Mrs Whitestone was well aware of this at the relevant time. The obvious reason for the omission is, instead, that the (very unusual) payments would have been viewed as suspicious and would therefore have prompted unwanted questions and investigations that might have jeopardised the proposed arrangements with Yukos. In those circumstances, Mrs Whitestone deliberately opted to close her eyes to the risks arising from the omission of the 'one-off' payments from the new Finder's agreement.

625. Mrs Whitestone rejects that allegation. Her purported explanation for that is that the change from 25% to 35% ongoing commission was the "only difference that [she] understood [she] needed to get the finder agreement changed for". Nor, in any event, the Authority submits, could Mrs Whitestone possibly have believed that the only "amendment" to the Finder's agreement required was the change in the ongoing rate of commission, where the original Finder's agreement could not possibly include the details of the four "one-off" retrocessions now proposed (there being no mention of any such retrocessions at the time that Mr Campeanu arranged for the preparation of the original Finder's documentation).

626. The Authority has not satisfied us that Mrs Whitestone was aware of anything suspicious about the arrangements for the payment of four further retrocessions not being documented in the revised Finder's agreement.

627. In our view, the evidence shows that it was not the practice at Julius Baer for deviations from the standard arrangements for remuneration of Finders to be recorded within the terms of the agreement itself. As we found at [405] and [406] above, Mr Courrier was content in January 2011 with arrangements whereby the agreement to pay three further retrocessions was agreed verbally. Similarly, when Mr Weidmann observed that a special arrangement agreed by Mr

Raitzin was necessary to pay Mr Merinson one-off retrocessions on the First FX Transaction, none of the recipients of Mr Weidmann's email, as described at [488] above, made the point that the matter should be recorded in writing in the Finder's agreement.

628. Mrs Whitestone had not seen those emails, and none of those looking at the issue at the time of the payment of the First Commission Payment raised the matter as an issue with her.

629. Furthermore, no objection was raised by Mr Spadaro when he was asked to put together the documentation for the revised arrangements and Mrs Whitestone's request, simply to deal with the increase in the annual payments was consistent with what we have said about the policy not appearing to require one-off retrocessions to be dealt with in the standard agreement. Furthermore, there were no specific transactions to which the payments could relate at that time. All of this leads to the conclusion that it was envisaged that the particular arrangements for each specific transaction would be agreed and approved by the relevant persons at the time that the relevant transaction was executed, as transpired to be the case with the Second Commission Payment, as discussed below.

630. In those circumstances, in our view Mrs Whitestone did not seek to conceal the arrangements by taking any steps to ensure that the agreement to pay further retrocessions was not documented in the Finder's agreement with Mr Merinson.

631. It was put to Mrs Whitestone that she did not obtain Mr Ketcha's approval to these revised Finder's arrangements (given that he was the other director of Fair Oaks apart from Mr Feldman who was a signatory on the Fair Oaks account and the agreement would now extend to payments to be made in respect of Fair Oaks as well as Yukos Capital). She accepts that this should have happened but, as Ms Clarke observed, this was not suggested by any of the many people who reviewed and approved the proposals and the transaction and nor was it suggested by Ms Thomson Bielmann in terms of the obtaining of a confirmation letter from Mr Feldman. It was never suggested by Ms Thomson Bielmann that Mr Ketcha should sign this letter, even though Ms Thomson Bielmann knew that he was a co-signatory on the Fair Oaks account. We accept, as Mrs Whitestone said in her witness statement, the fact that Mrs Whitestone regarded Mr Feldman as the most senior of the two would have fed into her thinking at the time.

632. Again, with the benefit of hindsight it appears that these arrangements facilitated the diversion of funds from the Yukos companies to Mr Merinson, however, as we have found, this was not a risk that was apparent to Mrs Whitestone at the time.

633. Mr Seiler was not involved in the preparation of the documentation for the revised Finder's arrangements and we accept that that is not a matter falling within his area of responsibility. Our findings as set out above as to what Mr Seiler had approved in relation to the revised arrangements lead to the conclusion that Mr Seiler did not understand that four one-off retrocessions had been approved. Therefore, we accept Mr Strong's submission that even if he had read the relevant documentation at this time, it would not have been surprising to him that there was no reference to four one-off retrocessions.

634. Accordingly, we find that Mr Seiler had no suspicions that the proposed arrangements regarding amendment of Mr Merinson's Finder's arrangements gave rise to any of the Relevant Risks.

635. As regards Mr Raitzin, we accept, as submitted by Mr Jaffey, that Mrs Whitestone's business case as set out in her email of 25 October 2010 is a complete answer to the Authority's suggestion that there was no proper commercial rationale for the revised arrangements.

636. As we have found, Mrs Whitestone was putting forward a reasoned business case from which it would have appeared to Mr Raitzin and the other recipients of the email that the

increased retrocessions were commercially necessary to keep the Yukos funds, because Mr Merinson had influence over where those assets were placed, and he needed to be paid competitively.

637. At the time Mr Raitzin approved that business case, as we have found, he did not know that Mr Merinson was the CFO of Yukos and an employee of Yukos International and that Mr Merinson was intending to share his commission with Mr Feldman.

638. Neither are we critical of Mr Raitzin's failure to identify from Mrs Whitestone's email to Mr Spadaro that the one-off retrocessions would not be included in the revised Finder's agreement. Mr Raitzin fairly said that he could not remember why he did not spot this issue, but the email does not ask for anything to be undocumented and, as we have found, it appears to be the case that it was not the practice to document one-off retrocessions.

The Second FX Transaction

639. On 23 November 2010, Mrs Whitestone had a meeting with Mr Feldman and Mr Merinson. At that meeting, Mrs Whitestone was provided with a letter dated 17 November 2010, which set out the details of an investment policy for Fair Oaks. The policy envisaged investment on an extremely conservative basis in highly liquid and highly rated US government and supra-national securities. The letter also mentioned that Mrs Whitestone would shortly be provided with a forecast of all potential payments and company expenses for the coming 12 months which were to be met out of a cash balance of EUR 50 million so that the sums to be invested would be net of that figure. As the funds were currently held in USD there would clearly need to be a foreign exchange transaction to convert sufficient USD into EUR. The letter was signed both by Mr Feldman and Mr Ketcha, as authorised signatories of Fair Oaks.

640. The investment policy was discussed at this meeting and Mr Merinson signed the amended Finder's agreement. The contact note for the meeting records that Mr Feldman and Mr Merinson were told that the arrangements thereunder were only valid on the understanding that, for each and any of the Yukos accounts: 12bps would be charged on custody fees; 12.5bps would be charged for transaction fees; 0 bps would apply for "exit trade fees" for any treasury portfolio; 12.5 bps would apply to "reinvestment trade fees"; the only outflows allowed were payment of invoices for Yukos Capital or dividend payments to Yukos Hydrocarbons and that there would be opportunities for Mr Merinson to receive a 70% commission on four "large transactions". In that respect, the contact note also records that Mr Feldman had requested if one of the four 70% retrocessions could be used on a conversion of USD 68 million to EUR.

641. Mrs Whitestone's report also records that "this would depend on the range of the EUR/USD rate being large (around 2 cents) over the course of [the] meeting" at which the trading would be done, which was due to take place on the same day. The report continued that this would leave three 70% retrocessions, and that "all three of these can now only be used for new funds". It was therefore clear that the proposed transaction, converting USD 68 million to EUR in respect of which Mr Feldman had requested a 70% commission payment to Mr Merinson, was to be effected using existing assets under management. The anticipated revenues for the bank were stated to be USD 320,000, while the 70% commission payment to Mr Merinson was expected to be in the sum of USD 742,000. The trading was to be done on Fair Oaks' BJB Bahamas account. The purpose of the transaction was to have funds available to pay legal fees.

642. As anticipated, the Second FX Transaction took place on 23 November 2010. By that transaction, USD 68 million was converted to EUR 50,040,473.91. The transaction was executed by BJB at a rate of 1.33855 , but charged to Fair Oaks at a much higher rate of 1.3589 As a result of the trading strategy outlined above, the Second FX Transaction generated commission of 1.56% for Julius Baer – i.e. 156 bps.

643. Similar to the strategy deployed in relation to the First FX Transaction, Fair Oaks was charged what was, in effect, the worst rate of the day. Mrs Whitestone had agreed with Mr Feldman that an intra-day range of two cents in the USD/EUR exchange rate was required before the Second FX Transaction could be executed, ensuring that the gap between the worst rate of the day (which would be the basis for the rate charged to Fair Oaks) and the rate at which the transactions were executed was sufficient to enable the desired level of commission to be charged by Julius Baer .

644. The Second FX Transaction gave rise to a total commission of USD 1,062,000, of which 70% was ultimately paid to Mr Merinson's personal account with BJB Singapore. The remaining 30% was retained by Julius Baer and was equivalent to 0.47% of the principal amount.

645. The Authority's position is that the risk that Mr Merinson and Mr Feldman were, in effect, seeking to line their own pockets was obvious, and that Mrs Whitestone must have been aware of that risk. The Authority relies on the following matters:

(1) The amount of the commission retained by Julius Baer in respect of the transaction alone was approximately nine times the standard FX commission rate that was ordinarily charged by Julius Baer for transactions of this size. The total commission rate charged to Fair Oaks (1.56%) was approximately 30 times higher than Julius Baer's standard FX commission rate for transactions of this size.

(2) The funds used to generate the Second FX Transactions were not new monies, but were, instead, existing assets under management. In those circumstances, the fact that Mr Feldman was not only prepared to grant a commission payment to Mr Merinson – but actively requesting it on his behalf – was inexplicable.

(3) The original justification that Mrs Whitestone had offered for the need for the revised arrangements, namely that they were necessary to stay competitive with other banks such as Clariden, did not justify the making of any large 70% commission payment (as opposed to, for example, an increase in the ordinary ongoing commission levels from 25% to 35%, which Mrs Whitestone contends Clariden gave its finders).

(4) Neither Mr Harlan Malter, who was a Fair Oaks director and co-signatory on the relevant bank account, nor the other two Fair Oaks directors, Mr Ketcha and Mr Cleanthis Georgiades, were informed of the proposed retrocession payments, let alone asked to approve them. That is inexplicable, in particular in the case of Mr Ketcha and Mr Georgiades, where they were resident in Cyprus and not the US, and therefore Mrs Whitestone was free to contact them without restriction.

646. As we have found in relation to the trading strategy and commission arrangements for the First FX Transaction, we find that due to her naïveté and inexperience and the apparent strong credentials of Mr Feldman, Mrs Whitestone did not consider that there was anything suspicious about the Second FX Transaction. We accept Mrs Whitestone's evidence that it appeared to her that there was a plausible commercial rationale for the transaction. In Fair Oaks' letter of 17 November 2010, referred to at [639] above, Mr Ketcha as well as Mr Feldman had signed the letter setting out the investment policy, including a reference of the need for the currency conversion. With the benefit of hindsight, it would clearly have been prudent for Mrs Whitestone to obtain Mr Ketcha's consent to the Second FX Transaction, but in our view it is likely that she did not do so because it was not something that occurred to her in view of the fact that Mr Feldman was the most senior of the signatories and she had no reason not to trust him at this stage. Again, we put down Mrs Whitestone's failure to obtain the consent as another example of her inexperience.

647. Likewise, for the same reasons, we accept that it did not seem to Mrs Whitestone at the time that Mr Feldman was expressing his request regarding the retrocession in a way that suggested to her that he wanted the Second FX Transaction to take place in order to use one of Mr Merinson's retrocessions. Her focus was on the fact that the FX transaction had a plausible rationale. Nothing had changed as far as Mrs Whitestone was concerned regarding the rationale for making a payment to Mr Merinson, namely it was a form of incentivisation. Had she been more experienced, she may well have questioned why it was necessary to make such a large payment so soon after the First Commission Payment, but again, she simply took on trust what Mr Feldman told her.

648. As we have previously found, Mrs Whitestone had little experience of FX trading and we do not consider that anything would have changed since the First FX Transaction in that regard. Therefore, we consider that she would have continued to have thought that the bank's interests and those of the client were aligned and that the amount of the commission from the transaction retained by the bank although large was against a background where the continuing fees paid by the client for custody and the other services provided were themselves significantly less than usual, bearing in mind the nature of the client, as we have previously explained.

649. As far as the payment of a retrocession in respect of a transaction in respect of existing assets is concerned, as we have found at [593] above, it is likely that Mrs Whitestone did not intend to preclude the granting of retrocessions in respect of existing assets when seeking her approval for four further retrocessions in her email of 15 October 2010 and therefore, when effecting the Second FX Transaction, did so on the basis that the payment of a retrocession to Mr Merinson in respect of the transaction was within the scope of the preliminary approvals she had already been given.

650. It is also important to note that none of the other more senior people at Julius Baer who subsequently came to review the terms of the Second FX Transaction in the context of the obtaining of the approvals for the payment of the Second Commission Payment, as discussed below, raised any concerns about the trading strategy or the commission that had been charged.

651. Finally, in our view, had Mrs Whitestone believed that the transaction was suspicious, it is unlikely that she would have been as open as she was about the terms of the transaction when she sought approval for the payment of the Second Commission Payment. It was a high-risk strategy to set out in detail the terms of a transaction believed to be suspicious in the hope that nobody would notice, as opposed to, for example, proceeding on the basis that approval had already been given for the making of the Second Commission Payment on the basis of the previous approvals given by Mr Seiler and Mr Raitzin in response to Mrs Whitestone's business case.

Approval of the Second Commission Payment

652. On 24 November 2010, Mrs Whitestone emailed Mr Seiler and Mr Raitzin, copying Mr Nikolov, requesting approval for the Second Commission Payment (then, a proposed payment of USD 742,000 to Mr Merinson's BJB Singapore account, that sum being 70% of the commission generated by BJB for executing the Second FX Transaction). She mentioned that the retrocession related to a FX transaction executed the day before, that Mr Merinson signed the addendum to his Finder's agreement increasing the rate of his commission to 35% and that both he and Mr Feldman confirmed that they understood that the addendum was only valid on the basis that the conditions set out in Mrs Whitestone's contact note described at [630] above were met. She then wrote:

> "Daniel Feldman asked me if they could utilitise *[sic]* one of the four 70% retrocession transactions for the conversion of USD68mil into EUR. Otherwise, they would simply convert the USD into EUR as and when invoices are received. This also depended on the range of the

> EUR:USD rate being large (around 2 cents) over the course of our meeting today (i.e. from 8am to 6pm UK time). I agreed to this confirming that this would leave them with just three 70% retrocession transactions between now and November 2011 and all three of these can now only be used for new funds (the clients expect two more inflows next year totalling around USD400mil)."

653. It was clear from the reference to the remaining three retrocessions being "now only to be used for new funds" that the Second FX Transaction had been conducted using existing assets. Mrs Whitestone attached various documents to her email, including the contact report for the meeting on 23 November 2010, the Finder's agreement and the email chain within which Mr Seiler had said he approved "the next steps of the relationship". Against that backdrop, Mrs Whitestone invited Mr Seiler and Mr Raitzin to approve the Second Commission Payment as soon as possible. Mr Seiler responded that evening by email, copying Mr Raitzin and Mr Nikolov. He wrote:

> "I am slightly irritated that I always have to approve payments and transactions when they are already executed. Furthermore, if I remember correctly we only agreed on a single one- off payment for 70% retro and never discussed to have such retros 4 times. Based on your input I don't support this set - up (4x70) and this payment. Please explain in detail why we have now this set - up."

654. Mrs Whitestone replied (with Mr Raitzin still in copy) referring to Mr Seiler's email that had been attached to her latest approval request and accordingly she stated that Mr Seiler had approved the payment of four one-off 70% retrocession payments. She went on to say that at the time of that approval, she had envisaged that Julius Baer's revenues from these deals would total less than $ 1 million whereas the latest transaction had generated $320,000 and she had restricted the other three now to new inflows so that she had improved Julius Baer's position from what had previously been approved on 28 October 2010. She also referred to the possibility of inflows of up to $ 400 million with a minimum return on assets of 50 basis points. Rather pointedly, she asked Mr Seiler to "read the email to remind yourself of what has already been approved."

655. In a further email sent by Mrs Whitestone on the same day she said:

> "I appreciate that there is always a lot of info to read for this client - it always takes up a lot of my time and of course your time is more valuable than mine. But I would NEVER agree such terms with a client without having sought your prior approval and the reason why I always send long e-mails and write long contact reports in relation to this client is that I want to ensure that the relationship is conducted with professionalism and absolute clarity. The only amendment I made to the 70% retrocession deals is that the next three can only be executed with new money so that the funds definitely come to us and stay with JB for a minimum of three years…. I have always given plenty of prior warning and sought approval in advance (in this case almost a month)."

656. In our view that email confirms that Mrs Whitestone believed that Mr Seiler had approved the further retrocession payments to Mr Merinson on the basis that they could be used on existing assets.

657. Early the following morning (25 November 2010) Mr Raitzin emailed Mr Seiler from Kyiv, replying to the email chain containing the disagreement between Mrs Whitestone and Mr Seiler, saying "Your jurisdiction and judgment, let me know later". We accept that these emails had arrived in the middle of an exceptionally busy time for Mr Raitzin. He had been asked to go to Kyiv that day to cover an important meeting and give a presentation that, at very short notice, the Chief Executive of BJB had to withdraw from. Mr Raitzin was preparing for that meeting and presentation and travelling when the email arrived. Accordingly, he asked Mr

Seiler to consider the issue. As he said in his cross examination, he was relying on Mr Seiler to look into the matter and advise him what to do.

658. Mr Seiler's evidence as set out in his witness statement was that he "clearly recalled" that he had a conversation with Mr Raitzin in Mr Raitzin's office during which Mr Raitzin indicated that he was taking responsibility for approval of the transaction and that Mr Raitzin was directing Mr Seiler to send an email approving the transaction. That was another example of wishful thinking on Mr Seiler's part and it appeared that he had confused that meeting with the meeting that took place to discuss the First Commission Payment, as referred to at [459] above. As we have said, this is an example of how unreliable memory can be about events that took place many years ago and how the timing of particular events can be conflated with the result that witnesses believe that they can "clearly recall" particular events when in reality they cannot.

659. When Mr Raitzin produced travel documents to show that he was in Kyiv on the day of the conversation Mr Seiler, to his credit, changed his evidence. Mr Seiler now accepts that he was asked to exercise his judgment and tell Mr Raitzin whether he should grant his approval. He accepted that he looked into the transaction, concluded that it was proper (and that he was satisfied his initial concerns had been allayed) and recommended to Mr Raitzin that it be approved, despite his obvious dissatisfaction with the fact that, in his mind the proposal to pay the retrocession had not been approved in advance by Mr Raitzin, as it should have been.

660. It therefore became common ground between Mr Raitzin and Mr Seiler that after Mr Seiler had looked into the transaction, they spoke on the telephone before Mr Seiler sent his email approving the transaction, as referred to at [661] below. Neither Mr Raitzin nor Mr Seiler can remember much detail about what was discussed during the call. Mr Raitzin accepted that he took a commercial decision to approve the payment and because of his working practice as to how he would document his approval, he told Mr Seiler that it would be achieved by Mr Seiler giving his approval followed by Mr Raitzin indicating he had no objection. We accept that evidence and Mr Seiler did not disagree. He said that he gave his judgment on the matter and Mr Raitzin made the decision. That is consistent with how we believe in practice matters of this nature were dealt with as between Mr Seiler and Mr Raitzin.

661. Some three hours after Mr Raitzin's email referred to at [657] above Mr Seiler responded to Mrs Whitestone's original email stating only "I approve". Mr Courrier was copied into that email. Mr Raitzin said that it was possible that that was because he had asked Mr Seiler to ensure Mr Courrier was involved because of his role as head of Finders. It does not appear that Mr Courrier raised any objection to the arrangements, particularly as regards the payment of retrocession to Mr Merinson on existing assets.

662. Mr Raitzin then indicated by email shortly afterwards that he had "no objection*"* to Mr Seiler's decision.

663. It is clear from our previous findings as to the extent of the approvals given by Mr Seiler and Mr Raitzin to Mrs Whitestone's business case in October 2010 that neither Mr Raitzin nor Mr Seiler had approved the specific payment of a retrocession to Mr Merinson in respect of the Second FX Transaction in advance of it having taken place. However, Mrs Whitestone must have believed that notwithstanding the previous approvals given, she still needed specific approval for the payment of the Second Commission Payment from Mr Raitzin before it could be made. That is abundantly clear from the fact that she requested approval in her email of 24 November 2010. That may well have been, bearing in mind our finding that she believed that she had approval for the payment of retrocessions on existing assets, because she was explicitly asking for approval on the basis that the remaining three retrocessions would be limited to payments in respect of new inflows of assets, as referred to at [655] above.

664. The question then arises as to whether either Mr Raitzin or Mr Seiler suspected any impropriety in relation to the Second FX Transaction or was aware of the Relevant Risks in relation to the transaction.

665. The Authority contends that Mrs Whitestone's email of 24 November 2010 raised a number of red flags for both Mr Seiler and Mr Raitzin as follows:

(1) The request for the commission payment to Mr Merinson had once again come from Mr Feldman.

(2) The total commission or spread range was also USD 1.062 million on a USD 68 million FX transaction (i.e. 156 bps), which Mr Seiler agreed was an "absurd" amount for a transaction of this size. That is particularly so where the Second FX Transaction was conducted on existing assets under management.

(3) Whereas the transaction had initially been expected to achieve 50 bps it had in fact generated 156 bps.

(4) The size of the proposed commission payment to Mr Merinson (USD 742,000). In circumstances where the Second FX Transaction was conducted on existing assets, the total commission taken on this transaction – USD 1,062,000 – on a sum of USD 68 million was extraordinarily high (amounting to approximately 156 bps).

(5) Mrs Whitestone's email also recorded that, if Julius Baer was not prepared to permit Mr Merinson to receive a retrocession on the payment actually carried out, that Mr Merinson and Mr Feldman would "just convert the USD into EUR as and when invoices are received" the implication being that the only reason for the currency conversion was to ensure the commission payment to Mr Merinson.

(6) The email also disclosed the "2 cent" trading strategy (for which there was no commercial rationale).

666. The Authority has not satisfied us that we should draw the inference that either Mr Raitzin or Mr Seiler were aware of the Relevant Risks on the basis of the red flags on which the Authority relies, as set out at [665] above.

667. In coming to that conclusion we have endeavoured to put ourselves into the shoes of Mr Raitzin and Mr Seiler to take account of all the circumstances in which they found themselves at the time they had to consider Mrs Whitestone's email.

668. As far as Mr Raitzin is concerned, his mind was obviously focused on what he would consider to be a much more important issue, namely representing the Chief Executive at an important conference in Kyiv. He would only have been able to read Mrs Whitestone's email on his Blackberry and would have no opportunity for considering the matter in any great detail. He was faced with what appeared to be a fractious dispute between Mrs Whitestone and Mr Seiler as to what had previously been agreed. In those circumstances, essentially, he delegated the whole matter to Mr Seiler to deal with and effectively gave his approval on the basis of Mr Seiler's recommendation which was given during their necessarily brief conversation whilst Mr Raitzin was in Kyiv. We therefore consider that he would not have given any meaningful attention to the detail of the matter at all.

669. As we have said, Mr Raitzin had also sought to involve Mr Courrier and he was aware that Mr Nikolov, his "right-hand man" had been copied into the proposals. Mr Nikolov was himself expert on FX transactions.

670. Although neither Mr Seiler nor Mr Raitzin can remember much of the conversation, in our view the most plausible inference to draw from the timing of it and the time between the

various emails is that prior to Mr Seiler discussing the matter with Mr Raitzin he reflected on the response that he received from Mrs Whitestone to his initial email expressing his irritation with what he regarded as another fait accompli in her two emails of 24 November 2010 and came to the conclusion that Mrs Whitestone was right in her protestations that these arrangements had in effect previously been approved and that there was therefore sufficient business case for the payment to be made.

671. In effect, he put his trust in Mrs Whitestone in coming to the conclusion that there was no reason for him not to recommend that Mr Raitzin approve the transaction. We now know that that confidence was misplaced bearing in mind that on the basis of our findings Mrs Whitestone was being duped by Mr Feldman and Mr Merinson, notwithstanding the undoubtedly confident and forceful manner in which she addressed Mr Seiler in her emails, but there was no reason for Mr Seiler, on the basis of what he knew about the arrangements at that time to suspect that in effect a fraud was being perpetrated. The details he was given in Mrs Whitestone's original email requesting approval was consistent with what he previously understood to be the case, namely that Mr Feldman, the duly authorised signatory of the client, had agreed that Mr Merinson should be paid a commission. We do not think that Mr Seiler would have picked up that in fact the Second FX Transaction was effected on the Fair Oaks account rather than Yukos Capital's account, where in the former case Mr Feldman was not the sole signatory. Mrs Whitestone's email did not mention that fact.

672. There is no evidence that Mr Seiler carried out any other investigation into the matter and based his recommendation to Mr Raitzin on anything other than what Mrs Whitestone had told him in her later emails and indeed there would have been little time for him to do so bearing in mind that he gave his approval within 3 hours of Mr Raitzin having asked him to look into the matter.

673. If Mr Seiler had in fact spent more time digesting the implications of the email and probing the matter further, it is quite possible that he would have identified a number of potentially suspicious factors, including those identified by the Authority. Both Mr Seiler and Mr Raitzin accepted that the commission on the transaction was very high. However, we consider that at the time, if they focused on that at all, and without any other concerns about the roles of Mr Merinson and Mr Feldman, they would have had in mind the fact that the relationship only made commercial sense if Julius Baer were able to earn significant commissions from one off transactions, bearing in mind the generally low level of fees that would otherwise be charged for what was a high risk relationship. A cursory review of Mrs Whitestone's email would have revealed that the amount of the retrocession was within the normal limits permitted by BJB's policy.

674. However, they were not alone in not picking up any suspicious factors. As we have mentioned, Mr Nikolov had also been included on Mrs Whitestone's email of 24 November 2010 and he did not question BJB's gross commission, the retrocession, the reference to the 2-cent range, or Mr Feldman's approval of the arrangements. Mr Seiler copied Mr Courrier into the email chain, and he also did not object to the transaction. As Mr Raitzin said in his evidence, he brought Mr Nikolov and Mr Courrier in specifically to scrutinise the arrangements that were proposed and make a recommendation accordingly. It is therefore likely that both Mr Nikolov and Mr Courrier read Mrs Whitestone's email with that in mind and there is no suggestion that either suspected that it indicated any potential wrongdoing on the part of Mr Merinson or Mr Feldman. If these experienced individuals did not notice any impropriety, then there is no reason why Mr Raitzin and Mr Seiler, who we believe paid little attention to the matter beyond the business case for the future expansion of the Yukos business, would have done so.

675. With hindsight, the combination of the high level of commission on the Second FX Transaction and the payment of the retrocession on existing assets should have raised concerns with both Mr Seiler and Mr Raitzin and we believe, bearing in mind their experience, that those factors would have done so had they examined the proposals in proper detail. However, Mr Raitzin relied entirely on Mr Seiler's recommendation, knowing also that Mr Courrier and Mr Nikolov had also been asked to look at the arrangements, and Mr Seiler simply took on trust what Mrs Whitestone told him. Without probing those matters further, from a quick reading of the email both Mr Seiler and Mr Raitzin would have understood that the client had approved the transaction, including the payment of the retrocession.

676. Therefore, as Mr Strong put it, rather than it being more likely than not that Mr Raitzin and Mr Seiler were aware of the Relevant Risks at the time they approved the Second FX Transaction, it is more likely than not that these risks simply did not occur to either of them. Yukos at this time was considered to be on the good side of the battle between itself and the Russian state. Mr Raitzin and Mr Seiler had no reason to doubt Mrs Whitestone's integrity, and she came across as being confident and knowledgeable, although she was in fact being poorly managed and was not streetwise. Both Mr Raitzin and Mr Seiler knew that there were many others of appropriate experience and seniority who did see and review the transactions Mrs Whitestone was effecting and as far as both Mr Raitzin and Mr Seiler were aware, none of these people raised a concern. In those circumstances, neither Mr Raitzin nor Mr Seiler had a special reason to be looking for evidence of fraud and they simply missed it, in common with many others.

Mr Fellay's concerns

677. On 25 November 2010, Mrs Whitestone sent an email to Mr Manuel Fanger (FX Market Advisory, Zurich) with whom she had been in correspondence regarding the Second FX Transaction. Her email records that she had "spoke[n] to an angry compliance man in Nassau last night who was worked up over not having received the average rate at which we booked the USD 68 million because the spread has been booked in Nassau".

678. The "angry compliance man" transpired to be Mr Fellay. What had prompted Mr Fellay's intervention was that Mr Taylor had booked the Second FX Transaction with BJB's desk in Zurich without realising that BJB Bahamas, with whom Fair Oaks' account was held, had its own trading desk and that the trade should have taken place through that desk. Accordingly, the trade had to be rebooked. In addition, Mr Fellay had serious concerns about the Second FX Transaction and the Second Commission Payment. Mr Fellay communicated those concerns, in the first instance, to Mr Courrier in an email dated 25 November 2010 (the "First Fellay Email") in the following terms:

> "Sylvan, I would like you to escalate with [Market Head] and/or [Mr Raitzin] something regarding [Mrs Whitestone] and her contacts. Yesterday, they placed two FX trades for [Fair Oaks]. Somehow they worked out with the dealing room in [Zurich] (by-passing Nassau) a spread of almost 1.5% on a $68 [million] against Euro. According to the revised retro agreement, the finder gets to chose [sic] 4 trades in which he gets a 70% retro. Initially, the trade confirmation came to Nassau with the final price to the client when in fact the spread has to be taken here so we can retrocede via [Zurich] to the finder. Confirmation had to be re-issued after we explained this to [Mrs Whitestone]. I have issues with this. How can such a spread be negotiated from a [sic] ethical standpoint? It also seems that [Mrs Whitestone] is ready to do just about anything for these intermediaries which may put the bank at risk if/when officers of the company look at what is taking place. I firmly believe that the risk/reward for the bank is no longer aligned with the [Relationship Manager] and finder's".

679. Mr Courrier responded by email on the same day, noting that the 70% retrocession had been approved by Mr Seiler and Mr Raitzin; but that he would escalate the rest. Mr Fellay's

response, the following day, raised further concerns in the following terms (the "Second Fellay Email"):

> "I understand that [Mr Raitzin] and [Mr Seiler] authorized these 4 transactions… However, they do not know how these intermediaries are profiting from these. The spread in this case is EUR 760,766! I firmly believe that based on fundamental banking regulations and bank policies a number of violations could be brought, such as our obligation of "Best Execution" "Market Policies and Published Pricing" and "Fiduciary obligations toward the client…
> In my opinion, we have to be cautious as these funds will ultimately be distributed to creditors and shareholders who have been spoiled and lost already a lot of money. These funds will only partially cover the losses suffered. As such we cannot exclude at a later date to be audited by an independent party (a liquidator for instance) to see how the money was managed and handled over the period in which it was in our custody…
> Last but not least, [Mrs Whitestone] in an email to other people… was very "critical" of the intervention of the "compliance officer" in Nassau not realizing what my real position is… I was telling her that (a) it was wrong of them to have by-passed Nassau to trade and (b) the confirmation received was the price for the client and did not show the bank price. She did not even know that the spread had to be booked in Nassau! I just google the finder and in LinkedIn, his profile says he's manager at [Yukos International]. I will check what the finder agreement says.
>
> I will propose the following course of action:
> 1) I will spend some time looking at the complete transactions to ensure that we have adequate instruction from authorized officers as I believe now we only have emails from the [Relationship Manager]
>
> 2) Go to legal and market [Zurich] to examine (a) how can a trade on such a large transaction agree to apply such a spread and (b) by giving more details to legal on the finder agreement, the right to pick 4 specific transactions, the spread, the 70% retro on this transaction etc.
>
> 3) you may want to speak to [Mrs Whitestone] to let her know about the course of action that we are taking. She should explain with more details the relationship she has with these people and who are the real "forces" in the driver seat.
>
> Personally, I think she is over her head with this relationship and does not see the potential legal & reputation risk on these accounts, but rather sees the $$$ [new net money] and so forth."

680. It is therefore clear from his emails that, Mr Fellay was concerned about the prospect of a conflict of interest and that the transactions may not be in the best interests of Yukos' shareholders, as the ultimate beneficial owners of the monies invested with Julius Baer.

681. As Mr Fellay confirmed in his cross examination, he was initially alerted to the transaction by the fact that the bank's gross commission on the trades had been booked to BJB Zurich, with the effect that BJB Bahamas was being asked to pay Mr Merinson 70% of a commission it had not itself received. In the First Fellay Email he thought that the FX trade and commission had been negotiated entirely by "intermediaries", and he was concerned that Julius Baer could be "at risk if/when officers of the company look at what is taking place". On that basis, Mr Fellay understandably thought, as he said in his cross examination, that no authorised person had issued client instructions or approved Mr Merinson's retrocessions.

682. Before sending the Second Fellay Email Mr Fellay had discovered that Mr Merinson's LinkedIn profile said that he was a manager at Yukos International. He therefore understood that Mr Merinson was a Yukos employee, which heightened his concerns. As he said he would,

in the Second Fellay Email he then looked at the details of the Second FX Transaction but having read through the documents contained in the Yukos file at BJB Bahamas, he did not raise any concern in respect of: (i) the request for the payment to Mr Merinson being made by Mr Feldman; (ii) that the commission originally proposed was 1.2%, of which 1% would be paid to Mr Merinson; or (iii), that the execution of the Second FX Transaction depended on the range of EUR/USD being around 2 cents. Nor did he identify that the Second FX Transaction might have been structured in such a way as to disguise from Yukos the payments to Mr Merinson (i.e. that the trading approach was suspicious), or that there was a risk that Mr Feldman might be receiving some of the monies paid to Mr Merinson. As Mr Strong observed, Mr Fellay identified none of these risks despite the fact that he was alert to a possibility that there was potential wrongdoing and therefore forensically scrutinised the documents with a view to unearthing anything improper. As he said in cross-examination he was focusing on the question as to whether the transactions were properly authorised.

683. What may have contributed to this was the fact that Mr Fellay modified his opinion of Mrs Whitestone following, as he agreed was the case, his relationship with her getting off on the "wrong foot" as a result of his somewhat angry initial telephone call and the concerns he expressed about her in his emails. As we have previously mentioned, he said in his cross-examination that he subsequently came to like her and that she would go to him for advice. He formed the view that she was someone who was acting in good faith. We have also previously referred to Mr Fellay's assessment that Mrs Whitestone was out of her depth in dealing with the relationship with Yukos and Mr Campeanu was not to be regarded as a suitable person to act as a line manager and mentor for Mrs Whitestone.

684. On 30 November 2010, Mrs Whitestone emailed Ms Tiffany Jones of BJB Bahamas seeking confirmation of the precise value of Mr Merinson's commission to "start the process of getting [the sum] transferred to Zurich for payment of retrocession to Dmitri Merinson". On the same day Mr Fellay sent an email to Mrs Whitestone seeking an instruction signed "by authorised officer of the company for this FX transaction" saying that was necessary given that it was "unusual" and "above market practice".

685. In response by email on the same day, Mrs Whitestone referred Mr Fellay to the investment policy for the Fair Oaks account which she said was "signed by both directors", and her contact reports. There was an error in that statement because in fact Fair Oaks had four directors although instructions could be given by two of them. Mrs Whitestone's email also stated that while "Daniel Feldman [would] anyway sign a confirmation that he is happy with the FX rate the next time [Mrs Whitestone saw] him", it was "very important that [the Bank did] not have correspondence with the clients while they [were] in the US".

686. In the same email, Mrs Whitestone referred to the retrocession being a one-off payment as approved on 28 October 2010 by Mr Courrier and Mr Raitzin. Accordingly, later on 30 November Mr Fellay emailed Mr Courrier asking him to approve the payment because the one-off retrocessions had been approved by Mr Courrier and Mr Raitzin. He also asked Ms Jones to look at the investment policy referred to by Mrs Whitestone.

687. Mr Fellay, in a subsequent email to Mr Courrier on the same day, noted that he was not prepared to endorse any transaction on the basis of Mrs Whitestone's contact report(s). Mr Fellay also said that "[Mrs Whitestone could] not continue to give instructions on the premise that [the bank could not] correspond with the signatories while in the US", noting that it was important to establish how to handle "this and [Mrs Whitestone]".

688. Mr Fellay had requested in his various emails that Mr Courrier discuss the issues he had raised with Mr Raitzin or Mr Seiler. In fact, Mr Courrier did not communicate with Mr Seiler

at all regarding the transactions until a meeting they both had with Mr Raitzin on 13 December 2010, as discussed below. Mr Seiler had not had sight of Mr Fellay's emails at this time.

The Second Commission payment to Mr Merinson and the proposed "framework"

689. On 6 December 2010, Ms Thomson Bielmann emailed Mrs Whitestone confirming the need to obtain "signed confirmation by Daniel Feldmann [sic] stating that he is in agreement with the payment of retrocessions to [Mr Merinson]". The email refers to an earlier call on the same day and notes that "from [their] discussions, [they] would not obtain the confirmation from [Mr] Misamore (spelling?) due to his residence". Ms Thomson Bielmann anticipated that the document would not be signed until mid-February 2011.

690. On 10 December 2010, Mrs Whitestone sought confirmation from Mr Nikolov on when the Second Commission Payment would be made. In response, on 13 December 2010, Mr Nikolov sought the assistance of Mr Fellay, who informed him by email that the payment was "withheld until [Mr Courrier] has the chance to discuss with" Mr Seiler and/or Mr Raitzin in light of the "very important issue[s]" Mr Fellay had raised.

691. On 13 December 2010, a meeting was held between Mr Raitzin, Mr Seiler and Mr Courrier to discuss the matter. There is no written record of this meeting and Mr Raitzin and Mr Seiler were unable to provide much detail as to what was discussed. Accordingly, we need to draw inferences from the contemporary documents as to what is likely to have occurred. Both Mr Raitzin and Mr Seiler said that Mr Courrier did not mention the specific concerns raised by Mr Fellay. Mr Seiler's recollection is that he took a back seat in the meeting. We accept that is consistent with him not having had any involvement in the matter for three weeks. Mr Raitzin's evidence in his cross-examination was as follows:

> "Mr Courrier was a not specific on the concerns. He told me Jean Marc [Fellay] has some concerns, and I asked him, "Can you make sure you address all of those concerns?" He was – did not go into the detail, and I said, "Make sure you address those concerns and that you copy me, so that Mr Seiler sees that he has to do and put a framework and address whatever are the concerns of Mr Fellay."

692. Mr Raitzin went on to say that he instructed Mr Courrier to address all of the concerns to the satisfaction of Mr Fellay, and write to Mr Seiler, copying Mr Raitzin, "saying that I am the one giving the instructions to regularise all of the concerns that Mr Fellay has brought up to you".

693. The outcome of the meeting was that the paperwork for the payment to Mr Merinson would be prepared, and a memorandum was in due course prepared and signed by Mr Raitzin, as discussed below. It is therefore clear that at least, Mr Raitzin and Mr Seiler were content for the payment to be made. At first sight, it seems surprising that if Mr Raitzin is correct, neither Mr Seiler nor Mr Raitzin were concerned to understand the detail of the concerns raised by Mr Fellay. However, we have concluded that is consistent with the manner in which they dealt with issues of this kind. Essentially, Mr Raitzin delegated the issue to Mr Courrier and his only interest was to understand that whatever concerns Mr Fellay had raised were addressed. This is also consistent with the fact that there is no suggestion that either Mr Seiler or Mr Raitzin had seen Mr Fellay's emails. Without seeing those emails it is perfectly plausible that neither Mr Raitzin nor Mr Seiler were aware at that time that Mr Fellay had raised questions about the size of the FX margin, the size of the retrocession, or about Mr Merinson's employment status.

694. We think it is likely that the discussion primarily dealt with how Mrs Whitestone was to be managed going forward to ensure that further transactions were not executed without prior approval and that there was no focus on the propriety of the commission payment or the terms of the Second FX Transaction. As far as the approval of the payment of the Second Commission Payment was concerned, it appears from the documents that the concern was that this was

properly authorised as far as Julius Baer was concerned bearing in mind that the payment was to be made not by BJB as envisaged by Mr Merinson's Finder's agreement but by BJB Bahamas with whom the assets were held. That explains the need for a memorandum to that effect to be prepared, as discussed at [702] below.

695. This is consistent with the fact that Mr Courrier's reaction to Mr Fellay's concerns was somewhat low key. He did not express any views in response but rather responded by providing reassurance to Mr Fellay that the payment to Mr Merinson had been approved and that he would escalate the other points in Mr Fellay's email. This indicates that Mr Courrier did not see the payment of the retrocession as being an issue and accordingly may well not have raised that as an issue with Mr Raitzin and Mr Seiler at the meeting. Neither does it appear that Mr Courrier raised Mr Fellay's concerns with anyone within Julius Baer during the two weeks before he spoke with Mr Raitzin.

696. We do of course have no direct evidence from Mr Courrier himself. However, in response to questions asked of him by FINMA in 2016, he referred only to two elements being raised and discussed with Mr Raitzin, namely "Request to get corroborating documentation related to legitimacy of payment from someone hierarchically above the finder" and an "Accounting/technical issue". He also said to FINMA that Mr Fellay and himself were not happy about "the situation of fait accompli" which again was an internal issue. It does not therefore appear that Mr Courrier raised any issues concerning the transaction itself.

697. Importantly, Mr Raitzin and Mr Fellay both gave evidence that later, in 2014, Mr Raitzin complained to Mr Fellay that he had not brought his concerns to him directly. Mr Fellay confirmed that he believed Mr Raitzin when he said in 2014 that he had been unaware of the concerns in 2010. It appears to us that Mr Raitzin's regret that Mr Fellay did not speak to him directly was because he was not made aware of the specifics of Mr Fellay's concerns by Mr Courrier at the time.

698. On 14 December 2010, Mr Courrier sent an email to Mrs Whitestone, copying Mr Seiler. The email stated that Mr Courrier had, following a conversation with Mr Raitzin and Mr Seiler the previous day, requested that BJB Bahamas prepare the necessary paperwork for the Second Commission Payment, but noted that he would need "signed documents" from Mr Raitzin as "Chairman of the Board" (that is the Board of BJB Bahamas) to make the payment. Mrs Whitestone's response was that she understood the need for further paperwork for "such unusual transactions (especially with high-profile clients)". She also noted that she had spoken to Mr Nikolov the previous day and they had agreed that they should "set out a framework for the three future retrocessions (regarding the type of transaction, revenue size)". Mr Courrier confirmed that this was "exactly what [he] wanted to propose".

699. On 17 December 2010, in accordance with the instructions that he been given by Mr Raitzin, Mr Courrier wrote to Mr Seiler, copying Mr Nikolov and Mr Raitzin. The email stated that Mr Raitzin had "told [Mr Courrier] that [Mr Seiler had] to define an acceptable framework for [Mrs Whitestone] to operate" the Yukos account. He suggested that the framework include various elements, including that: (i) there should be a signature from someone above Mr Merinson to ensure transparency of the retrocession; (ii) transaction orders and instructions should be properly documented and signed by the client; (iii) Mr Seiler should "define [an] acceptable spread" in respect of the 'one off' retrocessions to Mr Merinson, based on transaction size and product; and (iv) there should be no further changes in pricing or in the retrocession conditions without Mr Seiler's approval, with withdrawals over a certain amount also to be reported to him. The email also stated that the relationship was under compliance review through Ms Thomson Bielmann.

700. It is also relevant that Mr Courrier explained in his email that the proposed framework "should avoid situations of "fait accompli". This observation, and his statement in an email he sent to Mr Fellay on the same day which also forwarded his email to Mr Seiler to the effect that the proposed framework "will ensure that Louise operates within a defined and controlled framework" is further confirmation that the arrangements to be put in place were primarily for internal management reasons.

701. Mr Fellay responded, describing the proposals as a "start". He later told FINMA that as a result of the framework put in place by Mr Raitzin "in the end I'm almost positive". As we have said, his relationship with Mrs Whitestone improved and he ultimately found he liked and respected her, believing she had acted in good faith, even if out of her depth on her own with this relationship.

702. On 21 December 2010, Mr Courrier emailed Mr Raitzin, copying Mr Seiler and Mr Nikolov. His email attached a draft "Information Memorandum to the Board", the purpose of which was to provide formal, written approval of the payment of the Second Commission Payment to Mr Merinson. The draft memorandum stated that Mr Seiler had "pre-approved" that payment as "Market Head" of Central and Eastern Europe and Russia. Mr Courrier also noted that Mrs Whitestone was pushing for payment of the Second Commission Payment and sought Mr Raitzin's approval as "Chairman of the Board".

703. Mr Raitzin authorised Mr Courrier to sign this document (a board resolution) without reading it. On that basis, he did not notice that the document suggested that the payments had been recorded in a signed contract, which was not the case. We would not have expected Mr Raitzin to have paid much attention to that document and that he would have relied on Mr Courrier having ensured that the document was in order before it was presented to Mr Raitzin for his signature. Mr Courrier was aware that the one-off retrocessions had only been approved verbally and recorded in Mrs Whitestone's contact note.

704. Mr Courrier's email also noted that he had asked Mr Seiler to "provide [him/Mr Raitzin] and [Mrs Whitestone] with an acceptable framework to operate" the Yukos relationship in the future, which Mr Seiler was to implement on his return from his vacation "early next year". As set out above, Mr Seiler was copied into that correspondence.

705. In an email dated 22 December 2010 Mr Raitzin responded to Mr Courrier, copying Mr Seiler, stating that he also provided his "no objection" for the Second Commission Payment, thereby authorising a payment of CHF 786,387.44 from BJB Bahamas to BJB Switzerland, which was then paid to Mr Merinson's account with BJB Singapore.

706. The Authority is critical of both Mr Raitzin and Mr Seiler in approving the making of the Second Commission Payment prior to the framework referred to above being put in place. However, we accept Mr Strong's submissions that the Second Commission Payment, and Mr Raitzin's approval of it on 22 December 2010, was not contingent upon the framework referred to by Mr Courrier being put in place, as Mr Raitzin accepted during cross-examination.

707. As mentioned above, what was agreed was that proper paperwork was put in place before the payment could be made. On the basis that we have accepted Mr Raitzin and Mr Seiler's evidence that no concerns were raised at the meeting on 13 December 2010 regarding the points made by Mr Fellay as to the propriety of the Second FX Transaction or the Second Commission Payment, neither Mr Seiler nor Mr Raitzin had any information beyond what they knew before that time as to the detail of these transactions which would give rise to concerns as to whether the Second Commission Payment should be made. If Mr Courrier had concerns in that respect, we think it is implausible that he would not have told Mr Seiler and Mr Raitzin of that fact at the meeting. Furthermore, Mr Nikolov had been made aware of the issues raised by Mr Fellay and had not raised any concerns to Mr Raitzin.

708. Although Mr Raitzin and Mr Seiler can be criticised for not having probed in more detail as to what Mr Fellay's concerns were, on the basis of what they knew at the time (as opposed to what perhaps they ought to have known) they were not aware of specific concerns that meant that the Second Commission Payment should not be made.

709. Mr Raitzin accepted that he took a commercial decision that the payment could be made without the framework having first been put in place. As he explained when asked why he did not object to the payment being made until he was satisfied that the issues had been addressed:

> "At that point, I made a commercial judgment on the basis that there were -- that I think I had in mind the 400 million of net new money that were promised and that I had -- in the transferring process of the region and the market to Mr Rossi, we had already been talking about what is in the pipeline, what are the concerns I should be looking at or what are the observations, and that I understood that irritating the finder that was promising that he was going to bring 400 million, so I make that commercial judgment…"

710. Further, it does not appear that Mr Courrier believed that Mr Raitzin's authorisation of the payment was conditional. On 14 December 2010 he understood that Mr Raitzin had requested that the paperwork for the payment to be made was to be prepared, with Finance "to proceed as soon as paper is signed". Furthermore, when requesting Mr Raitzin's signature for approval of the payment on 21 December 2010, Mr Courrier expressly noted that this was "in order to proceed", observing that Mrs Whitestone was "pushing for at least a payment before Christmas to the finder" with the memorandum which was signed expressing that CHF 710,823.90 was to be paid to Mr Merinson "by year end 2010".

711. We therefore accept that Mr Seiler was not requested to put the framework in place prior to the payment to Mr Merinson. The understanding was, as expressly set out by Mr Courrier in his email of 21 December 2010, that the framework was not expected until "early next year" because Mr Seiler was, as Mr Raitzin knew, on holiday**.** Mr Raitzin was expressly told this and then approved the payment the following day. Mr Seiler had no role in the approval of the payment; Mr Raitzin's email of 22 December 2010 confirms that Mr Seiler, the Market Head, had not approved the Second Commission Payment because Mr Raitzin said "Last time it comes to my approval without Market Head approval."

712. Accordingly, as submitted by Mr Strong, on the basis of the information provided to Mr Seiler, there was no need for him to take any steps to prevent the payment prior to the framework being put in place.

713. As regards the framework proposed by Mr Courrier, in our view it addressed the concerns raised by Mr Fellay. In particular it provided for:

(1) a signature from someone above Mr Merinson to ensure transparency of the retrocession agreement, in order to address the concern about the conflict of interests;

(2) transactions to be properly documented and signed by the client, addressing Mr Fellay's specific concern about that point; and

(3) a defined acceptable spread range to be put in place for the one-off payments, to address Mr Fellay's concern about the size of the commission.

714. As to the question as to whether Mr Seiler took steps to implement this framework following his return to the office in the New Year, it is clear, as discussed below, that a conference call took place on 5 January 2011 in which Mr Seiler participated, discussing the one-off retrocession arrangements set out in Mrs Whitestone's email of 24 November 2010 which Mr Raitzin had approved. Mr Seiler's understanding was that written approval from an officer of Yukos was being obtained, and (as set out below) he liaised with BJB Compliance

regarding this and was informed when written approval in terms satisfactory to BJB were obtained. Further, the conference call on 5 January 2011 discussed the one-off retrocession arrangements set out in Mrs Whitestone's email of 24 November 2010 which Mr Raitzin had approved. Mr Courrier asked Mr Fellay to prepare an agreement to document the arrangements with Mr Merinson, which he did. As far as an acceptable spread range is concerned, we accept that was a matter to be discussed in the context of the particular transactions that were proposed and which, under the framework, would require prior approval.

Preparation of a Finder's agreement for Mr Merinson with BJB Bahamas

715. On 5 January 2011 a conference call took place involving Mrs Whitestone, Mr Courrier, Mr Schwarz (who had replaced Mr Benischke as Mr Seiler's Chief of Staff) and Mr Seiler. The following day (6 January 2011), Mr Courrier emailed Mr Fellay as follows:

> "As follow up of a conf call held yesterday with Louise, we will offer the Finder to have a finder agreement with Nassau. Louise is meeting them at 2:30 pm TODAY UK time. Can you please issue a finder agreement with terms defined in the attached appendix. Please note that additionally to terms defined in this appendix, it was agreed VERBALLY to accept three further 70% retrocession transactions between now and 23/11/11 and all three of these can now only be used for new funds (the clients expect two more inflows next year totalling around USD400mil) for transactions where the price/rate booked to the client is at least better than the worst rate/price of the day."

716. As we have previously observed, this email indicates that Mr Courrier, as Head of Finders, was content for the arrangements for the payment of the three one-off retrocessions not to be formally documented.

717. The email went on to set out the arrangements that had been agreed for the future one-off retrocessions. These essentially were the same as those proposed by Mrs Whitestone in October 2010 save that the client had to receive a price which was at least as good as the worst price in the market on the day of the transaction (a strategy that had been applied to both the First and Second FX transactions). Mr Courrier and Mr Fellay were therefore aware of this information and did not raise any concerns. Indeed, in his cross examination, Mr Fellay confirmed that this was not a red flag to him.

718. Mr Fellay drew up a Finder's agreement in response. A signed and scanned agreement was sent as an attachment to an email to Mr Courrier and Mrs Whitestone with a request that it be signed by the finder.

719. We accept that Mr Seiler had no role in relation to the negotiation of the new Finder's arrangements. It was agreed in the conference call on 5 January 2011 that the Finder's agreement with BJB Bahamas should be prepared in respect of the arrangements which Mr Raitzin had approved and Mr Fellay and Mr Courrier took responsibility for that, as set out above. Neither Mr Seiler nor Mrs Whitestone were copied in on Mr Courrier's email, as set out at [715] above.

720. Therefore, in our view no criticisms are to be made against Mrs Whitestone or Mr Seiler as to the manner in which this agreement was drawn up.

Mr Merinson's request to amend the Finder's agreement

721. On 7 January 2011, Mrs Whitestone met with Mr Merinson and discussed, among other things, Mr Merinson entering into the Finder's agreement with BJB Bahamas referred to above. The contact report for that meeting records a request from Mr Merinson regarding certain wording of the agreement, which (as drafted) stated that "at the request of a client, the Bank may inform them directly of the remuneration paid to the Finder". Mr Merinson's concern, according to the file note, was that the wording was "general" and could result in information

being disclosed “incorrectly”. Mrs Whitestone recorded that Mr Merinson confirmed that he would be happy with the agreement if the wording was amended so that ““client” mean[t] “Daniel Feldman”, as director of both clients introduced by the Finder”.

722. Mrs Whitestone’s contact report also recorded that she “very much doubted that JB Compliance would agree to this”. She did, however, make a handwritten amendment to the draft agreement in the requested terms and added her signature to that addition, saying in her contact note that she told Mr Merinson that she would let him know whether this addition would actually be acknowledged by the bank.

723. Following that meeting Mrs Whitestone emailed Ms Thomson Bielmann, copying Mr Fellay, on 19 January 2011 in the following terms:

> “Dmitry Merinson signed the attached agreement but has asked me not to submit it until I have clarified a couple of issues: -
> The first is the sentence under clause 3 "At the request of a client, the Bank may inform them directly of the remuneration paid to the Finder". Since this wording is very general, Dmitri is concerned that information could be disclosed incorrectly. He said he would be happy if I can add to this “only where the "client" means “Daniel Feldman", as director of both clients introduced by the Finder”. This client group is extremely sensitive about banks disclosing information and I think this is a fair request. I have already handwritten this phrase onto the contracts which he signed and signed next to the addition but I need you to confirm that the addition will be acknowledged.”

724. It is therefore clear from this email that Mrs Whitestone was perfectly open as to the terms of Mr Merinson’s request and what she had done in terms of making the handwritten amendment and signing it. Furthermore, a few minutes after sending this email, Mrs Whitestone sent Ms Thomson Bielmann a further email seeking to arrange a meeting between Ms Thomson Bielmann, Mr Feldman and Mr Merinson, in order “for them to provide you with information directly”.

725. As Ms Clarke observed, the wording that Mr Merinson took exception to could conceivably be read as permitting Julius Baer to disclose information to any of its clients, even a client who has not been introduced by the Finder. It is undoubtedly the case that the intention of the wording was to permit disclosure only to clients in respect of whom commissions would be payable to the Finder, but even if that wording was read as being restricted only to clients introduced by the Finder, the width of the wording could permit the bank to disclose fees payable in respect of the introduction of one client to a different client introduced by the Finder. Accordingly, it would not be unusual for a Finder or his lawyers concerned about confidentiality to request an amendment to make it clear that the narrow interpretation was what was intended.

726. Of course, Mr Merinson’s suggested amendment went further than was necessary to achieve that objective in that it restricted disclosure to Mr Feldman in his capacity as a director of the two clients who had been introduced. Mrs Whitestone accepted in her cross examination that with the benefit of hindsight Mr Merinson was trying to limit disclosure to Mr Feldman in order to prevent others within the Yukos Group knowing what was going on, but at the time she interpreted Mr Merinson’s request as arising out of concern that he did not wish the arrangement to be disclosed outside of the Yukos Group.

727. Neither Mr Fellay nor BJB Compliance were willing to approve Mr Merinson’s request. In Mr Fellay’s case, he informed Mrs Whitestone of this in an email dated 19 January 2011 in which he explained that the bank could not limit disclosure to “one person”, particularly where Fair Oaks had (i) “joint signatories” (i.e. where both Mr Feldman and Mr Ketcha were

signatories on the account), and (ii) two additional directors who, as directors, had a right to information under Fair Oaks' Articles of Association. Ms Thomson Bielmann confirmed the position of Compliance in an email to both Mr Seiler and Mr Campeanu with a copy to Mr Baumgartner on 24 January 2011. She said:

> "Louise has requested a change to the wording of the JBBT agreement. Currently, this reads in section 3, second paragraph: "At the request of a client, the Bank may inform them directly of the remuneration paid to the Finder". Louise would like this changed to read "only were the "client" means Daniel Feldman. We cannot agree to this amendment as we feel it is mandatory that the agreement is transparently disclosed. We would however accept the wording "at the request of an introduced client. ..." to make the meaning more precise. This issue is still pending; we will be communicating this to Louise today."

728. Ms Thomson Bielmann also raised the possibility that Mrs Whitestone's bonus might be postponed pending completion of the Finder's agreement with the approved wording and provision of the confirmation from Mr Feldman.

729. As Ms Clarke observed, Ms Thomson Bielmann had recognised the defect in the original drafting. Ms Thomson Bielmann also confirmed that Compliance had requested official confirmation from Mr Feldman that he was aware of the Finder's arrangements, which as we have previously mentioned, she anticipated they would have in February 2011; and that "ideally" this would also be signed by Mr Misamore, but that this may not be possible where he was a US resident.

730. Mr Seiler's unchallenged evidence was that he understood Ms Thomson Bielmann to be stating that, although Mr Misamore's confirmation was desirable, it was not essential.

731. Ms Thomson Bielmann's email to Mr Seiler and Mr Campeanu also set out the amounts paid to Mr Merinson and the net revenues for Julius Baer on the First and Second FX Transactions. She had therefore obtained the details of the Second FX Transaction by this stage, and considered the margin taken on both transactions. She did not say that BJB Compliance regarded the payments to Mr Merinson as indicating any impropriety. In suggesting Mrs Whitestone's bonus be postponed she was relying solely on the need to obtain Mr Merinson's agreement to the alteration of the Finder's Agreement in accordance with BJB Compliance's proposed wording and the confirmation from Mr Feldman to which she referred.

732. As Mr Strong observed, when Mr Seiler first heard of the request to amend the wording of the Finder's Agreement when he received Ms Thomson Bielmann's email of 24 January 2011, he was simultaneously informed that BJB Compliance had considered it and were proposing alternative wording to ensure the arrangement was "transparently disclosed". As Mr Strong also observed, there was nothing in Ms Thomson Bielmann's email to suggest that she or Mr Baumgartner regarded the request as indicating potential wrongdoing on the part of Mr Merinson, even though the requested wording could not be accepted. We accept that Ms Thomson Bielmann and Mr Baumgartner were the appropriate people to consider this request and there was no reason for Mr Seiler to object to their suggested wording or consider the request suspicious.

733. Furthermore, it was clear that Mr Fellay, who of course alone among those who were involved had reviewed the whole Yukos file in the context of him raising his original concerns, considered that, if BJB Compliance were content with the revised wording, then the request had been satisfactorily dealt with and there was nothing more to do, as he confirmed in his cross examination. He confirmed that the reason for that conclusion was that it was clear that Mr Merinson's remuneration could be disclosed to officers of the relevant clients.

734. Mr Schwarz, who had been asked by Mr Seiler to take matters forward, followed up on the issues with Mr Campeanu by email on 28 January 2011, asking whether progress had been

made on the outstanding matters and asking Mr Campeanu's recommendation and decision regarding the suggestion to postpone Mrs Whitestone's bonus. Mr Campeanu replied:

> "If I will have reason to doubt that Louise and her client will not do the right thing right after our conversation on Monday, I will support the suggested line of action".

735. Mr Seiler responded, "That's the way we should move on. Cheers Thomas".

736. On 31 January 2011 Mrs Whitestone emailed Ms Thomson Bielmann expressing her agreement to the amended wording, stating that she presumed that she could add this in by hand unless instructed otherwise and that she would let Mr Merinson know about this wording in her next meeting with him. She also informed Mr Fellay that she would do that at the same time, spelling out that the amendment would be made by her changing in her handwriting the words "a client" with "an introduced client" and signing next to the addition.

737. Mr Campeanu followed up with Mr Seiler and Mr Schwarz by email on 31 January 2011 and reported that he had had a "lengthy discussion" with Mrs Whitestone and had reviewed the correspondence and Mrs Whitestone's file notes and concluded that there was no question of impropriety. He stated:

> "i can at this point find no reason to believe that there is anything underhand or improper going on, neither do i have any reason to believe that the bahamas contract will not be signed by the client as requested, by the february deadline."

738. Mr Seiler's position is that in the light of that assurance, which Mr Seiler understood had been provided following detailed discussion between Mrs Whitestone and Mr Campeanu and a full review of the file, there was nothing further for Mr Seiler to do at this stage.

739. On 1 February 2011, Mrs Whitestone sent an email to Ms Thomson Bielmann, copied to Mr Baumgartner, Mr Campeanu and Mr Seiler. In this email Mrs Whitestone explained that Mr Merinson was happy with the revised wording for the Finder's agreement, which had been approved by BJB Compliance, and that he had flown over to meet Mrs Whitestone that day and had signed the agreement. Mrs Whitestone said that she would be sending the agreement that Mr Merinson had signed to BJB Bahamas. The clear implication was that the amended agreement included Mr Merinson's acceptance of the wording approved by Compliance regarding disclosure of the arrangements to Yukos.

740. There is, however, a dispute as to whether Mrs Whitestone left Mr Merinson with a copy of the agreement showing Mrs Whitestone's original handwritten annotations which Compliance had not accepted.

741. Mrs Whitestone denied this saying that since the contracts had not yet been signed by BJB Bahamas, they would have to go back to it for its signature and if the amendments were not accepted, then the bank would not sign the contract.

742. The Authority relies on an email from Mr Bates sent to various recipients within Julius Baer on 12 December 2012 which refers to his meeting with Mr Merinson on 11 December 2012. That email makes no reference to Mr Merinson having shown him or provided him with a copy of an agreement with the handwritten addition, but it does say:

> "He alluded to his finder agreement and made it very clear that it was confidential…..He stated that (as hand written in his agreement) the only person we should talk about it with was Daniel Feldman."

743. Mr Bates in his Witness Statement stated that he "believes" that Mr Merinson showed him "a copy of his finder's agreement which seemed to have been written over, as my note suggests. Given the passage of time however, I cannot now be completely certain."

744. In view of the passage of time, and the lack of a reference in Mr Bates's email to him having actually seen the Finder's agreement with the oral and written annotation, the Authority has not satisfied us on the balance of probabilities that Mrs Whitestone had provided a copy of the agreement with her original handwritten annotation to Mr Merinson. It is of course quite possible that Mr Merinson was being disingenuous in referring to the original handwritten annotation that Mrs Whitestone made, concealing the fact that it had been superseded by subsequent events.

745. Furthermore, Mrs Whitestone's email of 1 February 2011 stated that she was sending the agreement with the handwritten amendment approved by Compliance to the Bahamas. Mrs Whitestone was not challenged as to whether that in fact happened and no copy of the agreement was before us in evidence. In the circumstances, we infer that Mrs Whitestone did in fact send the agreement containing the approved wording to the Bahamas. Although Mr Fellay was not asked any questions on this issue, bearing in mind his conscientious approach to these matters we would have expected that Mr Fellay would have followed up with Mrs Whitestone had the agreement never arrived.

746. That being the case, even if contrary to our findings, Mrs Whitestone had given a copy of the agreement with her original annotations to Mr Merinson, as far as the bank was concerned under the terms of the agreement that Mr Merinson did eventually sign, BJB Bahamas was able to make full disclosure of the retrocession arrangements to any authorised officer of the relevant Yukos companies.

747. Therefore, although Mrs Whitestone may well have been naïve in not recognising that Mr Merinson's original request that the agreement should not be disclosed to anyone other than Mr Feldman was an attempt to hide from Yukos that payments were being made to Mr Merinson, she was perfectly open about the matter with Compliance, raised it appropriately as an issue with them, and then complied with Compliance's request to amend the agreement in a manner which Compliance felt to be acceptable. Again, none of the other more experienced recipients who saw the original request raised any concerns about it and it did not prompt them to make any further enquiries as to whether it cast any doubt on the propriety of the arrangements.

748. We come to the same conclusion in relation to Mr Seiler's awareness of the matter. In common with the other recipients, he did not recognise any risk and we accept his evidence that he would have taken comfort from the fact that the matter was being appropriately looked at by Compliance, advice was given as to how the issue should be dealt with and that there was therefore nothing further for him to do. Following the receipt of Mrs Whitestone's email of 1 February 2011, which stated that Mr Merinson was happy with the amendments approved by Compliance, we accept that Mr Seiler had no reason to believe that Mr Merinson was objecting to his retrocessions being disclosed to anyone at the relevant Yukos companies.

Mr Feldman's request for a commitment to confidentiality

749. On 31 January 2011, Mrs Whitestone emailed Mr Feldman reminding him that the confirmation letters referred to at [689] above still needed to be signed.

750. On 1 February 2011, Mrs Whitestone emailed Ms Thomson Bielmann (copying Mr Baumgartner, Mr Campeanu and Mr Seiler), to inform them that the confirmation letters had been "amended to reflect the increased retrocession percentage (on 23rd November 2010 Dmitri Merinson signed the 35% appendix to his existing Finder Agreement with JB ZH which currently governs the relationship)" and of Mr Feldman's request for the following sentence to be added:

> "I sign on the understanding that you will be providing me with confirmation of Julius Baer's commitment to confidentiality."

751. The explanation provided for this request was that Mr Feldman was extremely concerned by the WikiLeaks information that he has read in the media and he wanted a confirmation from Julius Baer that the bank would take responsibility if any information or documentation regarding the Yukos related accounts was leaked via Wikileaks or any other channel. Mrs Whitestone also said that Mr Feldman had a concern that BJB Bahamas was not bound by Swiss confidentiality laws and he wanted reassurance that disclosure to third parties is out of the question.

752. Ms Thomson Bielmann replied to all stating that this would have to be addressed by the Legal Department, writing:

> "Any confirmation such as the client is requesting below would have to be assessed by our Legal department and realistically I do not think we can obtain this before you send these letters to Dmitri tomorrow".

753. On 7 February 2011, Ms Thomson Bielmann provided Mr Seiler and Mr Schwarz with a memorandum ("the 7 February Memorandum") regarding Yukos and Mr Merinson. Mrs Whitestone did not see this memorandum.

754. The 7 February Memorandum memo states (amongst other things) that:

> "a major issue concerns retrocession payments made to Dmitry Merinson (DM), who acts as registered finder on all the Yukos related accounts. According to information provided by the Relationship Manager (Louise Whitestone, JB International, London), DM works as Financial Director at Yukos International UK B.V, a Dutch company within the Yukos group structure and indirectly the 100% shareholder of Yukos Capital SaRL. DM does not have signing power on any of the group's company or bank accounts but is, according to the RM "heavily involved in choosing which banks should hold funds awarded to subsidiary companies of Yukos International UK BV".

755. The 7 February Memorandum listed a number of Compliance issues, which included: (i) the potential conflict of interest arising from Mr Merinson's Finder's arrangements, given his role(s) at Yukos; and (ii) the fact that Mr Feldman had recently made his signature on documents approving those Finder's arrangements conditional on the inclusion of a "commitment to confidentiality". In such circumstances, Ms Thomson Bielmann recommended that Julius Baer consider obtaining "additional comfort from a superior group entity" that it was aware of the Finder's arrangements. The memorandum also refers to the fact that Mr Courrier had reported that BJB had agreed verbally to accept three further 70% retrocessions.

756. In response to the 7 February Memorandum, on 14 February 2011, and following a conference call with Mrs Whitestone, Mr Schwarz emailed Mr Baumgartner and Ms Thomson Bielmann. The email stated that Mr Merinson "does not hold any official position at Yukos Capital, does not get any salary but can be considered (and compared to JB terms) to an "external employee" which we also use to define e.g. consultants". Mr Schwarz's email also referred to the fact that Yukos Capital's parent company does not conduct any daily operations but its sole purpose was to protect the investments held at Yukos Capital and Mr Feldman was representing those interests, hence it was felt a further signature on the Yukos account would "not add any value but rather irritate further".

757. The letters requiring Mr Feldman's confirmation of the Finder's arrangements with Mr Merinson were sent to him by Mrs Whitestone on 9 February 2011. Those letters were signed by Mr Feldman at a meeting on 24 February 2011, and sent by Mrs Whitestone to Ms Thomson Bielmann and Mr Seiler. Both letters – which respectively confirm (i) the First Commission

Payment and increased (35%) ongoing commission payable to him in respect of the Yukos Capital account and (ii) the 35% ongoing commission payable to Mr Merinson in respect of the Fair Oaks account – included the confidentiality commitment requested by Mr Feldman.

758. The second letter was provided on behalf of Fair Oaks. It was signed only by Mr Feldman, who stated in the letter that "both I and Harlan Malter are happy" with the payment of commission to Mr Merinson.

759. The Authority raises a number of concerns relating to the issues arising out of the 7 February Memorandum and the signing of the confirmation letters as follows:

(1) Whilst the Authority accepts Mrs Whitestone's evidence that she did not tell Mr Seiler or Mr Schwarz on the conference call or otherwise that Mr Merinson was an "external employee", the term used by Mr Schwarz in his email referred to at [756] above, that does not explain why Mrs Whitestone did not (if she did not) provide Mr Schwarz with a complete picture of Mr Merinson's position at Yukos, including that he was CFO of Yukos Capital and was employed and paid by Yukos International (as the 100% owner of Yukos Capital).

(2) Mr Seiler's evidence that he accepted (without question) an explanation that Mr Merinson was not employed by Yukos from Mrs Whitestone is not credible, where he had received evidence suggesting the opposite only a week before from Compliance in the 7 February Memorandum. Alternatively, Mr Seiler appears to have deliberately avoided asking questions as regards Mr Merinson's role at Yukos International so as to avoid further concerns from Compliance.

(3) Mrs Whitestone's evidence is that she originally agreed with Mr Feldman that, in respect of the Fair Oaks account, he would get Mr Malter to sign the letter and that she originally prepared a draft letter which included a line for his signature; but that (i) Mr Feldman did not see Mr Malter in the weeks preceding their meeting and (ii) Ms Thomson Bielmann "was not bothered" whether he signed.

(4) That evidence is difficult to reconcile with Mrs Whitestone's purported understanding that she did not actually require a second signature and the clear concerns that Ms Thomson Bielmann had recorded in the 7 February Memorandum that she considered that "additional comfort" should be considered in respect of the signatories on the Yukos account. Nor is it supported by the contemporaneous documents. In any event, the fact that Mr Feldman was unable or unwilling to provide a second signature was an obvious red flag to Mrs Whitestone that the Finder's arrangements were not known amongst the directors of Fair Oaks – all the more so if, as she contends, Mr Feldman had agreed to obtain Mr Malter's signature.

(5) As for Mr Seiler, his position that he was not involved in the preparation of these letters is inexplicable where obtaining a second signature / higher approval for the Yukos accounts was one of the key suggestions for the proposed framework that he was tasked with implementing.

760. As regards what was said on the conference call regarding Mr Merinson's employment status, Mrs Whitestone's recollection is that that Mr Merinson had an employment contract with Yukos International but also worked in an unofficial capacity with Yukos Capital. As Ms Clarke observed, that is consistent with what was said in the 7 February Memorandum. She said that the reference to "external employee" is an expression she had not heard before and she thought it was internal terminology used by Julius Baer. She said that she would have made it clear that, as she had previously said, that Mr Merinson was the CFO of Yukos Capital but did not have an employment contract with that company, which was why it was written in Mr

Schwarz's email that he did not hold any official position with that company. Accordingly, she said that her understanding of Mr Merinson's employment was exactly what she had previously written to Ms Thomson Bielmann, namely that he was employed as the financial controller and treasurer for Yukos International, but he also had some other roles, including working in an unofficial capacity with Yukos Capital to structure a conservative investment strategy for the company's bankable assets. That was consistent with what she said in her email to Ms Thomson Bielmann, as set out at [462] above.

761. The reality is that neither Mrs Whitestone nor Mr Seiler can reliably recall what was actually said on the conference call. Neither Mr Seiler nor Mrs Whitestone can be criticised for the terminology that Mr Schwarz used in his email and which on an objective reading might be seen to place some distance between Mr Merinson and Yukos Capital. We accept Mrs Whitestone's evidence that the term "external employee" is not one that she would have used, and it is inconsistent with the descriptions she had previously given as to Mr Merinson's role. In our view, it is more likely than not that she provided the explanation set out at [760] above.

762. We have accepted that Mr Seiler had not previously been aware of Mr Merinson's connection with Yukos. The 7 February Memorandum would therefore be the first time that he became aware that Mr Merinson was employed by a company within the Yukos Group. Accordingly, he could not have been aware that information that he was now given as to Mr Merinson's status was untrue or misleading based on any information he had previously received.

763. The matter was now clearly with Compliance bearing in mind that it was Compliance which had raised the concerns in the 7 February Memorandum. They had all the information they needed to investigate the matter further, if necessary in discussion with Mrs Whitestone if they were not satisfied with the explanation that she gave. There is no evidence that they raised any issue with the description given in Mr Schwarz's email, and therefore do not appear to have taken issue with any inconsistency between what was described there and what was contained in the 7 February Memorandum. Accordingly, we see no basis to criticise Mr Seiler as to how he reacted to the information in Mr Schwartz's email.

764. With respect to the confirmation letters, as Mr Strong submitted, Mr Schwarz's comment that obtaining a second signature confirming the retrocession arrangements "would not add any value" is further evidence that no one at that time thought that Mr Feldman was in breach of his duties towards Yukos, and there is no record of BJB Compliance raising an issue about this. In the circumstances no criticism can be made of Mr Seiler for not doing so either.

765. As to the request for the commitment to confidentiality, we accept that it did not occur to Mr Seiler that Mr Merinson's request was an attempt to disguise the retrocession arrangements and that he was entitled to rely on BJB Legal and Compliance, who had the same information as he did.

766. With respect to the suggestion that the letter pertaining to Fair Oaks' account should have been signed by Mr Malter as well as Mr Feldman because the latter was not the sole director of, or sole signatory for, Fair Oaks the evidence is that it was never intended or suggested that Mr Malter should sign the letter. In this regard as submitted by Mr Strong:

(1) There is no suggestion from the wording of the letter that it was intended that Mr Malter would sign it. As is clear from its terms, Mr Feldman was to sign on behalf of them both. That language was present from the first draft, prepared by Mrs Whitestone on 1 September 2010, the only change being that originally the letter had referred to Mr Misamore (a director of Yukos Hydrocarbons, but not Fair Oaks) rather than Mr Malter.

(2) None of the contemporaneous documents referring to the letter contemplate anyone other than Mr Feldman signing. Mr Schwarz's email of 14 February 2011 itself shows that that the letters had been sent "for DF to sign", and the comment that a request for signature from anyone else "would not add any value but rather irritate further" only makes sense if the expectation was that only Mr Feldman was going to sign.

(3) Although Ms Thomson Bielmann thought it would be desirable to have Mr Misamore sign, she never required that there be a second signature on the letter, still less that Mr Malter sign.

767. Furthermore, there is no evidence that Mr Seiler was told that Mr Malter was to sign any letter. He understood that BJB Compliance were satisfied with the letter. Although the obtaining of the letters was something that Mr Seiler was charged with pursuant to the terms of the framework that he was obliged to implement in accordance with Mr Raitzin's instructions, it was clear that Compliance had taken over the supervision of this being achieved, as it clearly was. The manner in which the letter was to be signed was an operational matter and not a matter that we would expect Mr Seiler to have become involved with. Similarly, Mr Fellay confirmed that, if Compliance did not raise any questions over the signature obtained not being satisfactory, he would not have felt a need to check that they had done their job properly.

768. In conclusion, we are not satisfied that either Mr Seiler or Mrs Whitestone were aware that the request for confidentiality was an attempt to disguise the arrangements. As Mr Strong submitted:

(1) There was nothing odd about a Russian client, particularly one opposed to the Russian state, being extremely concerned about confidentiality. Mr Feldman's request was not that he was asking for any information to be kept confidential from others at Yukos, as opposed to from third parties.

(2) Furthermore, BJB Compliance and Legal were both aware of Mr Feldman's request and their reaction indicates that they did not suspect that it might be an attempt to hide Mr Merinson's Finder's fees from anyone at Yukos and that they did not suspect that he might be in breach of his duties to Yukos.

Payments from Mr Merinson to Mr Feldman

769. On 7 April 2011, Mrs Whitestone's assistant, Ms Denman sent an email to Ms Serena May Lin Aw of BJB Singapore, copying Mrs Whitestone, and enclosing what she described as "two urgent transfer instructions". The first was described as a "transfer for the purchase of real estate", while the second was said to provide "private financing for [Mr Feldman's] real estate project". The latter was described as a "private agreement between friends", and it was therefore said that there was no contractual document relating to it. Ms Aw was told that, if she required further information, she should action the (urgent) transaction and the information could be provided thereafter. The email finished by saying "as discussed with Louise, you have confirmed to us that the overdraft interest will be "compressed" and the client will not be charged whilst the funds are tied up on time deposit."

770. The total amount, which was made on 8 April 2011 from Mr Merinson's personal account and records its beneficiary as "Daniel Feldman", was for USD 1,262,451. That was exactly 50% of the commission fees paid to Mr Merinson by Julius Baer in the First and Second Commission Payments. In reality, the payment represented Mr Feldman's share of Mr Merinson's commission, as recorded in the August 2010 MyCRM Report**.**

771. At the time of these events, Mrs Whitestone was in Moscow and was unable to read attachments on her Blackberry. After returning from Moscow she went to Peru, where she had little to no access to email, and did not return to the office until 3 May 2011. We accept that she received over 100 emails per day and was not permitted to take a laptop with her on a business trip or on holiday.

772. Although she was copied in on the email from Ms Denman to Ms Aw, her evidence was that she does not recall opening it or reading the attachment, either at the time she received it or on her return from Moscow. She did not respond to the email. The subject line of the email refers only to the account number. There was nothing about the email to indicate that she needed to read it. We accept that whilst in Moscow she would undertake back-to-back meetings and also client entertainment which meant that there would be limited opportunity to review what was in her inbox so that she could probably only deal with expressly urgent matters requiring her specific attention, which this email did not.

773. The evidence shows that by this time Mrs Whitestone's relationship with Mr Campeanu had deteriorated to the extent that they appeared hardly to be on speaking terms. That had affected her health and workplace stress appeared to be affecting her performance.

774. In the absence of any evidence from Mr Campeanu and Ms Denman, it is not clear how it came about that Mr Campeanu approved the transfer, as is clearly indicated to be the case by his signature on the transfer instructions. It may well be that Ms Denman went directly to Mr Campeanu in Mrs Whitestone's absence in Moscow and asked him to approve the transfer. In those circumstances we cannot safely draw an inference that Mrs Whitestone knew in advance about the proposed transfer to Mr Merinson and asked Ms Denman to arrange for Mr Campeanu to approve it. It is equally likely that the request came in Mrs Whitestone's absence and Ms Denman, knowing that Mrs Whitestone was on a business trip, approached Mr Campeanu directly and asked him to approve it. Bearing in mind the fractious nature of the relationship between Mrs Whitestone and Mr Campeanu at this stage, this is a quite likely scenario. There is also no evidence that Mr Campeanu subsequently raised the matter with either Mrs Whitestone or indeed anyone else at Julius Baer.

775. In terms of what Mrs Whitestone knew in advance, she said in her cross examination that she could remember Mr Merinson telling her that he was going to make a loan to a friend but was not aware that that friend was Mr Feldman.

776. As we have found at [525] above, Mrs Whitestone was not given a copy of this transfer instruction until the end of her interview with the Authority in October 2016 and that she seemed genuinely surprised when receiving it remarking that "she felt like a bit of an idiot". She expressed similar sentiments when cross-examined by Mr Jaffey on this point, saying that when questioned on the issue during her later deposition in the US proceedings taken against Mr Feldman that the fact that the payments were expressed to be by way of loan was perhaps a "lower level of fraud". We do not consider, contrary to the submission of Mr George, that Mrs Whitestone was commenting on what she believed at the time of the transfer, but rather what she thought at the time that she was asked about the documentation at the time of her deposition at which point of course it had become apparent to Mrs Whitestone that a fraud on Yukos had been committed.

777. Mrs Whitestone does recall a discussion with Ms Aw about compressing the interest on Mr Merinson's personal account, because Mr Merinson needed to break his deposit early as the completion date on his UK property purchase was before the maturity of the deposit. However, she accepts that it is possible that she is confusing this recollection with another time as Mr Merinson did later transfer funds for the purchase of property in London. She has no recollection of Mr Merinson discussing the purchase of property in New York and in particular

she has no recollection of being informed that he was going to make any kind of payment or loan to Mr Feldman.

778. Ms Denman filed the email and attachments in MyCRM on 8 April 2011. Mrs Whitestone's evidence was that when she was on a business trip or long holiday, Ms Denman managed her inbox by filing away emails that had been dealt with.

779. Taking all of this evidence into consideration, we do not consider that Mrs Whitestone paid any attention to the email or its attachments either whilst she was in Moscow or after her return to the office. While she did give evidence to the effect that she would go through emails that had arrived during her absence from the office on a business trip on her return in our view it is plausible, bearing in mind the fact that the email had been moved into MyCRM by Ms Denman, that the email was no longer in Mrs Whitestone's inbox on her return and accordingly she did not read it at that time.

780. We have also recorded the genuine surprise when she first saw the documents and our findings that the significance of the proposal to share commission, which she recorded in August 2010 had not been apparent to her.

781. We therefore conclude that the Authority has not satisfied us on the balance of probabilities that Mrs Whitestone was aware of the transfer that was made to Mr Feldman on Mr Campeanu's instructions either at the time it was made or subsequently on her return to the office from her business trip in Moscow.

The Third FX Transaction and the Third Commission Payment

782. Both Mr Seiler and Mrs Whitestone contend that the Tribunal has no jurisdiction to consider the Third FX Transaction and the Third Commission Payment.

783. We have decided, for the reasons set out in the Appendix to this decision, that we should not permit the Authority to rely on its allegations in relation to this transaction.

784. Accordingly, we say no more about the Third FX Transaction and the Third Commission Payment in this decision.

Mr Campeanu's email of 30 November 2012 and Mr Seiler's response

785. On 28 November 2012, Mrs Whitestone's employment with JBI ended.

786. Two days later, on 30 November 2012, Mr Campeanu sent an email to JBI Compliance and Ms Thomson Bielmann detailing potentially suspicious activities involving Mrs Whitestone, Mr Merinson and Mr Feldman. We have referred to this email previously at [101] to [103] above, but for convenience repeat the points that were raised in it as follows:

787. The email stated that Mrs Whitestone "proposed a non-standard [Finder's] agreement for [Mr Merinson] in order to bring this business to [Julius Baer] (approx. USD400 million)". The email explained that:

> (1) the agreement with Mr Merinson involved Julius Baer paying 80% of its revenues from profits on introduced accounts to Mr Merinson when "our and industry standard is 25%".
>
> (2) Mr Merinson had been paid around USD 2 million "on the back of a series of large, one-off FX transactions for which [Julius Baer] took non-standard commission".
>
> (3) Mr Feldman (as opposed to anyone else within Yukos) had signed letters requested by BJB Compliance confirming that Yukos had no objections to Mr Merinson receiving Finder's fees.

(4) Mr Feldman had subsequently received a USD 500,000 loan payment from Mr Merinson from his personal account at Julius Baer.

(5) Mr Merinson had alleged to Mr Campeanu "that inside his company there are suspicions that he received a retro payment from [Julius Baer] and that this is a serious problem".

788. Mr Campeanu went on to say in his email that he suspected that:

(1) The payments to Mr Merinson and his Finder's agreement with BJB were in conflict with "our, Yukos's rules and legal requirements in the UK and [Switzerland]".

(2) Mr Feldman had a conflict of interest in the matter and his authorisation of Julius Baer's arrangements with Mr Merinson was "invalid".

(3) The payment to Mr Merinson and his Finder's agreement with BJB were not known to Yukos and that Mr Merinson was taking steps to attempt to hide the arrangements.

The email concluded:

> "I suspect that once DM's deal with JB is found out, we could be open to legal action from Yukos and in breach of FSA and FINMA regulations and potentially the UK Bribery Act 2010 …"

789. Earlier in the email, Mr Campeanu said that he had refused to endorse the deal and "was actively circumvented on this subsequently by [Mrs Whitestone] and my line manager (records will show I had no communications whatsoever)." He also said that he was overruled, and the deal was authorised by Mr Seiler.

790. The email was immediately forwarded to senior management at both JBI and BJB, including Mr Seiler who was asked by Mr Baumgartner to comment on it. Mr Seiler's immediate response, by email, was to say, "I have no clue what's going on again."

791. On 5 December 2012, Mr Seiler provided his comments by email to Mr Baumgartner. The Authority contends that this email contained a number of inaccurate and/or misleading statements.

792. In summary:

(1) In respect of the retrocession payments, Mr Seiler stated that instead of offering 1.5% under the new net money model, "we agreed on retros on FX deals" and that both London Compliance and the CEO in London had confirmed that "everything was in order".

The Authority says that what Mr Seiler's email did not explain, however, was that (on his evidence) he had no knowledge of the structure of the retrocession arrangements (i.e. the one-off payment structure) until well after all the relevant FX trades, none of which were pre-approved.

(2) In respect of the retrocession agreement, Mr Seiler stated that this was approved by "Compliance and Region Head". Mr Seiler also stated that his recollection was that Mr Merinson was "at that time not [an] employee at Yukos".

However, the Authority says that Mr Seiler did not disclose the fact that, as he knew, there was no written agreement supporting any of the "one off" retrocessions. Mr Seiler's explanation, that he did not know whether the retrocessions were recorded in the agreement, is a vice and not a virtue for him: if Mr Seiler did not know whether the retrocession payments were recorded in the Finder's agreement(s), he had no basis for suggesting that Compliance had approved those agreements. As Mr Seiler knew,

including from the 7 February Memorandum specifically prepared for him by Compliance, the statement that Mr Merinson was not an employee at Yukos was untrue.

(3) Mr Seiler's email also states that "nevertheless we asked for an additional signature … after the first FX deal happened", referring to the fact that Compliance created a letter which was given to Yukos for signature and that he had received confirmation from Compliance that the records were up-to-date.

However, the Authority says that Mr Seiler's email did not specify from whom that additional signature was obtained; but, in circumstances where Mr Campeanu had alleged that Mr Feldman had received a large kick-back as a result of the Finder's arrangements, and that his signature was invalid, it was implicit in Mr Seiler's email that the additional signature was from someone other than Mr Feldman. No reasonable reader would interpret Mr Seiler's email as suggesting that they simply obtained further signatures from Mr Feldman, as he suggests was his intention. Mr Seiler knew that no signature was ever obtained (from Mr Feldman or anyone else) for the Second Commission Payment. The letter prepared by Mrs Whitestone and signed by Mr Feldman, instead, only approved the increase in the rate of ongoing commission, from 25 to 35%.

793. As Mr Strong submitted, it is necessary to consider the context in which Mr Seiler, as he stated in his witness statement, (and a reasonable person in Mr Seiler's position) would have understood it. In that regard, we accept the following submissions made by Mr Strong:

(1) Mr Campeanu's working relationship with Mrs Whitestone was fractious. For example, on 4 January 2012, Mr Campeanu told Ms Smith, JBI's Head of Human Resources, that he was "completely fed up" and that he "refuse[d] to work with this woman [Mrs Whitestone] ever again". As Mr Seiler was aware, relations between Mrs Whitestone and Mr Campeanu only got worse thereafter.

(2) Mr Seiler believed that Mr Campeanu's antagonism towards Mrs Whitestone was, at least in part, due to the Yukos accounts for which Mrs Whitestone was the relationship manager generating much higher remuneration than his Yukos Hydrocarbons account did for him. Mr Seiler understood that Mr Campeanu thought that he should be given greater credit and financial reward.

(3) As Mr Seiler was aware, Mr Campeanu wanted to take over Mrs Whitestone's relationship with Yukos. The day after Mrs Whitestone was put on paid leave on 8 November 2012 prior to her employment ceasing, Mr Campeanu met Mr Merinson and told him that he "would be from now on the main point of contact".

(4) Mr Merinson did not want that and, as he said in his witness statement, Mr Seiler believed that, by 30 November 2012, Mr Campeanu had concluded that he would not be able to take over the account.

(5) Mr Campeanu did not raise anything at all about the Yukos relationship in the context of the arrangements agreed for Mrs Whitestone to leave her employment.

(6) Mr Campeanu had said nothing to indicate to Mr Seiler that he was not supportive of the Yukos relationship or that he harboured any of the concerns set out in his 30 November 2012 email. As Mr Seiler said in his email of 5 December 2012, "I can't remember that [Mr Campeanu] was against this relationship or deal… No issues or objections were raised whatsoever by [Mr Campeanu] when we let [Mrs Whitestone] go and [Mr Campeanu] was thinking that he would get the accounts."

794. As we have previously observed and as Mr Seiler knew, Mr Campeanu's email made a number of incorrect or misleading statements as identified by Mr Strong as follows:

(1) Mr Campeanu stated, "Carolyn [Thomson Bielmann] stipulated to me as team head in writing that we would need the written acknowledgement of the CEO of the Yukos group, Bruce Misamore in order to comply with policy and regulations and avoid a conflict of interest." In fact, what Ms Thomson Bielmann had told Mr Campeanu in writing on 24 January 2011 (and Mr Seiler was copied to the email) was that BJB Compliance had requested "official confirmation from Daniel Feldman that he is aware of the retrocession/finder's agreement", and that ideally this would come from Mr Misamore, but as he was a US resident, they realised this was not possible.

(2) He also stated, "I refused to endorse this deal and was actively circumvented on this subsequently by LW and my line manager (records will show I had no communications whatsoever)", and "I was overruled and the deal was authorised by Thomas Seiler". As Mr Seiler knew and as the Authority accepts, Mr Campeanu had numerous communications regarding, and positively supported, the retrocession arrangements. As for the "email, detailing [his] objections" which Mr Campeanu said was on file with Denise Smith in JBI's HR Department, as the Authority has accepted, there is no evidence such an email was ever sent.

(3) Mr Campeanu's statement that "the following has come to my attention […] Daniel Feldman received a USD500,000 loan payment from DM from his personal a/c at JB" was entirely misleading because unbeknown to Mr Seiler, it was Mr Campeanu himself that signed the transfer in April 2011.

795. Against that background, we turn to consider whether or not the statements in Mr Seiler's email of 5 December 2012 were, as the Authority contends, inaccurate and/or misleading.

796. As regards the first statement relied on by the Authority regarding the approval of the First Commission Payment, as set out at [792 (1)] above, in our view, there was nothing misleading in Mr Seiler failing to disclose that none of the transactions had been pre-approved. Mr Baumgartner was copied to Mr Raitzin's "fait accompli" email referred to at [489] above and therefore was fully aware of how the transaction and payment to Mr Merinson had come to be approved. Compliance were therefore not misled; they were aware that the payment had been approved after the event.

797. As regards the second statement with which the Authority takes issue, regarding the approval of the retrocession agreement and the disclosure regarding Mr Merinson's employment status:

(1) As explained at [208] above, arrangements with new Finders for JBI had to be vetted by JBI Compliance before being passed for approval to the CEO or other senior managers in London. In the absence of evidence as to whether this in fact occurred, we are prepared to accept Mr Seiler's evidence that this was required and that he believed at the time that JBI Compliance would have reviewed the arrangements.

(2) Mr Seiler's understanding is consistent with the evidence of Mr Bates, who confirmed that, irrespective of whether someone in JBI actually looked at the arrangements with Mr Merinson, those arrangements should have been approved by JBI Compliance and local management, and in particular, that "any commissions that were outside the norm should have been discussed at local level".

(3) As we have found, it was at the time the invariable practice at Julius Baer for one-off retrocessions not to be recorded in a written agreement and accordingly there was nothing misleading about Mr Seiler saying that the arrangements had been agreed. As Mr Strong observed, an agreement of this kind does not have to be in writing.

(4) As we found at [430] above, Mr Seiler recalls that he personally asked Mr Gerber whether the arrangements with Mr Merinson were in order and Mr Gerber assured him they were. It is also notable that Mr Baumgartner received Mr Seiler's email stating that "[t]he Retro agreement was approved by Compliance" and did not object or say that this was incorrect.

(5) We have found that when he received the 7 February Memorandum, that was the first time Mr Seiler became aware that Mr Merinson was employed in the Yukos Group. Mr Seiler's evidence and cross-examination was that he believed that he was told something different during the conference call with Mrs Whitestone and others following the 7 February Memorandum and Mr Schwarz's subsequent email muddied the waters with reference to Mr Merinson being an "external employee", that is akin to a consultant. In those circumstances, we do not consider Mr Seiler was making a statement which he believed to be inaccurate. In any event, by this time BJB Compliance knew as much about Mr Merinson's employment status as Mr Seiler did, so it could not reasonably be said that Mr Baumgartner would reasonably have been misled by Mr Seiler's statement.

798. As regards the final statement with which the Authority takes issue, namely that regarding the second signature, as set out at [792 (3)] above, again we accept Mr Strong's submissions on this point as follows:

(1) It is clear that the "additional signature" to which Mr Seiler was referring here was Mr Feldman's signature on the letters, which was what BJB Compliance had sought and was content with, and which had been received on 24 February 2011. What Mr Seiler meant was that the signature of Mr Feldman on those letters was additional to whatever signature(s) had already been obtained in respect of the execution of the first transaction itself. Mr Seiler was aware that Mr Feldman had previously approved the rates at which the transaction had been effected.

(2) Mr Feldman was the sole director of Yukos Capital and a director of Fair Oaks and, as such, had full authority to consent to payments to third parties on behalf of those companies. Mr Seiler knew that BJB Compliance was satisfied with his signature on both letters. In the circumstances, we accept that Mr Seiler did not focus when writing his email on whether the signature which BJB Compliance had requested was from the same person as had confirmed the execution of the transaction or was from another person.

(3) In any event, Ms Thomson Bielmann had not requested written confirmation from Mr Misamore, as Mr Campeanu incorrectly asserted.

799. Accordingly we conclude that the statements in Mr Seiler's email of 5 December 2012 on which the Authority relies were not inaccurate and/or misleading.

EVALUATION OF THE FACTS

Introduction

800. We now turn to the question as to whether the facts that we have found demonstrate that all or any of the Applicants acted without integrity in relation to the matters pleaded by the Authority, applying the correct legal approach to the question of integrity, as summarised at [41] to [50] above. In that regard, the Authority pleads that each of the Applicants acted without integrity on the basis that they acted recklessly in relation to the various matters on which the Authority relies in its Statement of Case.

801. Accordingly, as described at [43] above, the Authority's case is that the Applicants acted recklessly because they were aware of the Relevant Risks and, viewed objectively, it was

unreasonable for the Applicant concerned to take those risks having regard to the circumstances as the relevant Applicant knew or believed them to be.

802. As set out above, we have rejected the Authority's alternative pleading that as a matter of law recklessness could be established if a reasonable person in the relevant Applicant's position would have been aware of the risk in question, regardless of the Applicant's actual knowledge of the risk concerned. In our view, such a finding would amount to a failure to act without due skill, care and diligence but could not amount to a finding of recklessness, and accordingly not to a finding of acting without integrity on the basis of recklessness, which is the only basis on which the Authority puts its case in these proceedings.

803. We should note that during cross examination it was put to the Applicants that they were at various points acting deliberately with blind-eye knowledge of the Relevant Risks. "Blind eye" knowledge has not been pleaded in this case and accordingly we do not consider the allegations made by the Authority by reference to that standard.

804. We deal with the question by reference, in relation to each Applicant, to the allegations made against them by the Authority as set out in its Statement of Case.

805. We proceed in relation to each allegation made against each of the Applicants by assessing the extent to which the facts that we have found in relation to the allegation concerned demonstrates that the Applicant was aware that if the Applicant concerned proceeded to deal with the matter in question then one or more of the Relevant Risks would occur, and, if so, whether it was unreasonable in the light of the circumstances as the relevant Applicant knew or believed them to be to take the risk in question.

806. The allegations made against each of the Applicants are formulated on the basis that in relation to the matters pleaded the relevant Applicant recklessly failed to have regard to what the Authority says were obvious risks of which the Applicant concerned was aware. Those risks, collectively described as the "Relevant Risks", are for convenience set out again here as follows:

(1) The risk that the Finder's arrangements involved a breach of Mr Merinson's and/or Mr Feldman's duties to the relevant Yukos Group companies, and in particular conflicted with their duties to give disinterested advice to those companies in relation to their choice of which banks to use (the "Conflict of Interest Risk").

(2) The risk that the Finder's arrangements were made in order to facilitate the improper diversion of funds from Yukos Capital or other companies in the Yukos Group to Mr Merinson and, because of the involvement of Mr Feldman, the sole director of Yukos Capital, in approving the Finder's arrangements, potentially to Mr Feldman ("the Misappropriation Risk").

(3) The risk that the Finder's arrangements were not in the interests of those companies (and therefore Mr Feldman's purported approval of those arrangements on those companies' behalf constituted a breach of Mr Feldman's duties to those companies) particularly as the assets of the Yukos Group were to be managed for the surviving corporate structure of Yukos for the benefit of all original shareholders of the Yukos Group.

(4) The risk that there was no proper commercial rationale for any payment to Mr Merinson or for a Finder's agreement with Mr Merinson, which related to the introduction of Yukos Capital or other Yukos Group Companies to Julius Baer.

Mrs Whitestone

The First FX Transaction and the First Commission Payment

807. The allegation has the following elements:

(1) Mrs Whitestone helped to facilitate the First FX Transaction.

(2) The terms of the transaction, which involved an unusually high commission rate and a trading approach which included ensuring that the rate charged to Yukos Capital was just above the worst rate for that day in order to cover the commission required by Julius Baer and a further commission payment that would be made to Mr Merinson as Finder had the effect that the excessive commission rates would be disguised from auditors or anyone else investigating the transaction.

(3) There was no proper commercial rationale for the payment to Mr Merinson.

(4) Mrs Whitestone was informed by Mr Merinson of his intention to share his commission with Mr Feldman but did not inform Compliance or her senior managers of that fact. By omitting to inform Compliance and her senior managers Mrs Whitestone so acted as she was aware that disclosing this information would likely result in the arrangements she had negotiated with Mr Feldman and Mr Merinson being investigated and potentially stopped.

(5) The Authority contends that in facilitating these arrangements and failing to make the disclosures referred to above, Mrs Whitestone failed to have regard to the Relevant Risks, of which she was aware.

808. As we found at [496] above, Mrs Whitestone was aware that Mr Feldman was the sole director of Yukos Capital and that Mr Merinson was employed by Yukos International as Financial Controller and in addition was the CFO of Yukos Capital. She knew all the terms of the FX Transaction which she had been a party to negotiating with Mr Feldman. She also knew that Mr Merinson was proposing to share his commission with Mr Feldman.

809. However, as set out at [552] above, our findings of fact set out at [494] to [551] lead us to conclude that Mrs Whitestone did not consider that either the First FX Transaction or the First Commission Payment were suspicious for the reasons set out at [554] and [556] to [558]. In summary:

(1) Despite Mrs Whitestone's knowledge of the connection between Mr Merinson and Yukos and her recording of the proposal by Mr Merinson to share his commission with Mr Feldman, it did not occur to Mrs Whitestone there was a risk of conflict between Yukos on the one hand and Mr Merinson and Mr Feldman on the other. Due to her naïveté and inexperience and the apparent strong credentials of Mr Feldman she did not consider that there was anything suspicious about the arrangements.

(2) She took Mr Feldman on trust and considered, naïvely as its transpired, that his approval as the sole director of Yukos was sufficient in the circumstances. Neither did Mrs Whitestone appreciate the significance of what she was told about the commission sharing arrangements.

(3) With respect to the size of the retrocession payment to be made to Mr Merinson and the rationale for it, there was a commercial benefit to the bank in the Finder's arrangements and we have accepted Mrs Whitestone's explanation as to what she was told about the rationale for Yukos wishing to remunerate Mr Merinson in this way. Such

arrangements would be perfectly proper if preceded by fully informed consent of the client concerned.

(4) Mr Merinson's retrocession was not an unusually high percentage figure, bearing in mind the bank's standard limits for Finder's fees in respect of net new money, even if in absolute terms the payment was a large amount. Consequently, if the rationale for the payment was plausible, the amount of the payment was not in itself such as to raise suspicions.

(5) It would not have appeared to Mrs Whitestone that the commission was inappropriately disguised or the overall fees to be charged to the client were excessive.

(6) If all of the pieces of information known to Mrs Whitestone were put together and considered as a whole by a reasonably competent and experienced Relationship Manager they would have raised suspicions that the Relationship Manager concerned should have probed further. However, they did not raise suspicions with Mrs Whitestone. As she readily accepts, she was out of her depth and had inadequate management support.

810. These conclusions lead inevitably to a conclusion that the Authority has not made out its case on elements (2), (3) and (4) of its allegation as set out at [807] above. They also lead to the conclusion that Mrs Whitestone was not aware of the Relevant Risks and gave no consideration to them. Consequently, our findings are not sufficient to support a conclusion that Mrs Whitestone acted recklessly in relation to the First FX Transaction and the First Commission Payment as alleged by the Authority.

Reference to the First Commission Payment as "Investment Capital Gain"

811. This allegation has the following elements:

(1) Mrs Whitestone sought approval for a request by Mr Merinson that the First Commission Payment be referenced as "Investment Capital Gain".

(2) Mrs Whitestone was aware this statement would have been untrue and that Mr Merinson knew that this statement would have been untrue.

(3) Mrs Whitestone was aware of, but failed to have regard to, the risk this was an attempt by Mr Merinson to disguise the true nature of the payment.

812. However, as set out at [555] above, Mrs Whitestone was open about the issue and took appropriate steps in raising the issue with Mr Nikolov. She subsequently referred the matter to BJB Legal. Mrs Whitestone readily accepted the outcome of that exercise. In particular, as we found at [505] to [507]:

(1) At the time Mrs Whitestone was an inexperienced Relationship Manager and we can assume that her knowledge of international tax matters was somewhat limited. The fact that she raised the issue at all with her superiors, indicated that the reference "Investment Capital Gain" was not something that could be taken at face value and would have to be considered by those who are more expert than her.

(2) Accordingly, she took the right action by escalating the issue appropriately through her email to Mr Nikolov. The latter, who was far more experienced than Mrs Whitestone, in fact indicated initially that the request might be possible. It was then escalated to a senior figure within BJB Legal.

(3) Had Mrs Whitestone believed that the request was obviously suspicious, then the obvious thing to do would be to say nothing at all at this stage, wait for the payment to be approved and then engineer the payment reference when the payment was made.

(4) It was agreed without any further debate that the payment would be described as a "retrocession". Mrs Whitestone's reaction, namely that the payment should be accompanied by a letter confirming that "the payment is not employment income" demonstrates that the concern was that Mr Merinson was not to be regarded as an employee of Julius Baer and therefore payment was not being made to him in his capacity as an employee of Julius Baer. This is also consistent with the way that she expressed the request in her original email to Mr Nikolov.

(5) It was probable that Ms Bohn of BJB Legal saw it that way and that the question as to whether it was to be regarded as employment income in the Netherlands as a result of his employment with Yukos International was not in Mrs Whitestone's mind at the time that she was considering the issue. In those circumstances, the omission of any reference to the payment being an incentivisation payment was understandable.

813. Our findings demonstrate that Mrs Whitestone did have concerns about whether the statement was true and therefore she asked for advice as to how to deal with the issue. There is insufficient evidence to draw an inference that Mrs Whitestone was aware that the request was an attempt by Mr Merinson to disguise the true nature of the payment. The more likely inference is that this did not occur to her because her concerns focused on the concern that the payment was not considered to be employment income.

814. These findings lead inevitably to a conclusion that the Authority has not made out its case on this allegation as set out at [811] above. They also lead to the conclusion that Mrs Whitestone was not aware of the risk that the request was an attempt by Mr Merinson to disguise the true nature of the payment and gave no consideration to that risk. Consequently, our findings are not sufficient to support a conclusion that Mrs Whitestone acted recklessly in relation to the subject matter of this allegation.

The amendment of Mr Merinson's Finder's agreement

815. This allegation has the following elements:

(1) In October 2010, Mrs Whitestone negotiated and agreed with Mr Feldman and Mr Merinson amendments to the original Finder's arrangements, under which Mr Merinson's Finder's fee was increased from 25% to 35% of net income generated by Julius Baer, and under which he was permitted to receive four additional "one-off" payments, calculated as 70% of Julius Baer's commission on four large transactions, relating to new inflows of funds, to take place by October 2011.

(2) Contrary to the provisions of BJB's Co-operation with Finders Policy, only the increase in Mr Merinson's share of net income was documented. In return, among other things, Yukos' funds were to remain with Julius Baer for at least three years.

(3) There was no proper commercial rationale for these arrangements and Mrs Whitestone recklessly failed to have regard to the Relevant Risks, of which she was aware.

816. At [632] we concluded that with the benefit of hindsight it appears that these arrangements facilitated the diversion of funds from the Yukos companies to Mr Merinson, but this was not a risk that was apparent to Mrs Whitestone at the time. In particular, as we have found at [626] above, Mrs Whitestone was not aware of anything suspicious about the arrangements for the payment of four further retrocessions not being documented in the revised Finder's agreement for the reasons set out at [627] to [630] and [636] above. In summary:

(1) It was not the practice at Julius Baer for deviations from the standard arrangements for remuneration of Finders to be recorded within the terms of the agreement itself. Mr

Courrier was content in January 2011 with arrangements whereby the agreement to pay 3 further retrocessions was agreed verbally. None of those looking at the matter made the point that the matter should be recorded in writing in the Finder's agreement and none of those looking at the issue at the time of the payment of the First Commission Payment raised the matter as an issue with her.

(2) No objection was raised by Mr Spadaro when he was asked to put together the documentation for the revised arrangements and Mrs Whitestone's request, simply to deal with the increase in the annual payments, was consistent with the policy not appearing to require one-off retrocessions to be dealt with in the standard agreement.

(3) Furthermore, there were no specific transactions to which the payments could relate at that time.

(4) Consequently, it was envisaged that the particular arrangements for each specific transaction would be agreed and approved by the relevant persons at the time that the relevant transaction was executed, as transpired to be the case with the Second Commission Payment.

(5) Mrs Whitestone put forward a reasoned business case that the increased retrocessions were commercially necessary to keep the Yukos funds, because Mr Merinson had influence over where those assets were placed and he needed to be paid competitively.

(6) Mrs Whitestone therefore did not seek to conceal the arrangements by taking any steps to ensure that the agreement to pay further retrocessions was not documented in the Finder's agreement with Mr Merinson.

817. These conclusions lead inevitably to a conclusion that the Authority has not made out its case on elements (2) and (3) of its allegation as set out at [815] above. They also lead to the conclusion that Mrs Whitestone was not aware of the Relevant Risks and gave no consideration to them. Consequently, our findings are not sufficient to support a conclusion that Mrs Whitestone acted recklessly in relation to this matter as alleged by the Authority.

The Second FX Transaction and the Second Commission Payment

818. This allegation has the following elements:

(1) In November 2010, Mrs Whitestone helped to facilitate the Second FX Transaction, in which Julius Baer converted approximately USD 68 million of Yukos funds (which formed a portion of the funds converted into USD by the First FX Transaction) into EUR.

(2) In late November 2010, Mrs Whitestone requested approval for the payment of the Second Commission Payment to Mr Merinson.

(3) The trading approach, which mirrored that adopted in the First FX Transaction and was agreed with Mr Feldman, involved a large daily rate range and Fair Oaks paying just above the worst rate available in the market, so that the spread between that and the rate at which Julius Baer transacted would cover both the commission required by Julius Baer and a further commission payment which would be made to Mr Merinson as Finder.

(4) There was no proper commercial rationale for Yukos to adopt such an arrangement.

(5) The transaction took place at a rate approximately 30 times higher than Julius Baer's standard commission rate for transactions of this size.

(6) The commission retained by Julius Baer after the payment of 70% of the commission to Mr Merinson as a retrocession was far in excess of Julius Baer's standard commission on an FX transaction of this size.

(7) Mrs Whitestone recklessly failed to have regard to the Relevant Risks of which she was aware and, in particular, the Misappropriation Risk when facilitating this transaction and seeking approval for the payment of the Second Commission payment.

819. We have found at [646] to [651] as follows:

(1) As found in relation to the trading strategy and commission arrangements for the First FX Transaction, due to her naïveté and inexperience and the apparent strong credentials of Mr Feldman Mrs Whitestone did not consider that there was anything suspicious about the Second FX Transaction.

(2) It appeared to Mrs Whitestone that there was a plausible commercial rationale for the transaction.

(3) With the benefit of hindsight, it would have been prudent for Mrs Whitestone to obtain Mr Ketcha's consent to the Second FX Transaction, but it is likely that she did not do so because it was not something that occurred to her in view of the fact that Mr Feldman was the most senior of the signatories and she had no reason not to trust him at this stage. Mrs Whitestone's failure to obtain the consent was another example of her inexperience.

(4) For the same reasons, it did not seem to Mrs Whitestone at the time that Mr Feldman was expressing his request regarding the retrocession in a way that suggested to her that he wanted the Second FX Transaction to take place in order to use one of Mr Merinson's retrocessions. Her focus was on the fact that the Second FX Transaction had a plausible rationale. Nothing had changed as far as Mrs Whitestone was concerned regarding the rationale for making a payment to Mr Merinson, namely it was a form of incentivisation. Had she been more experienced, she may well have questioned why it was necessary to make such a large payment so soon after the First Commission Payment, but again, she simply took on trust what Mr Feldman told her.

(5) Mrs Whitestone continued to have little experience of FX trading and we do not consider that anything would have changed since the First FX Transaction in that regard.

(6) Therefore, she would have continued to have thought that the bank's interests and those of the client were aligned and that the amount of the commission from the transaction retained by the bank although large was against a background where the continuing fees paid by the client for custody and the other services provided were themselves significantly less than usual, bearing in mind the nature of the client.

(7) Although the retrocession was paid in respect of a transaction in respect of existing assets, it is likely that Mrs Whitestone did not intend to preclude the granting of retrocessions in respect of existing assets when seeking her approval for four further retrocessions in her email of 15 October 2010 and therefore, when effecting the Second FX Transaction, she did so on the basis that the payment of a retrocession to Mr Merinson in respect of the transaction was within the scope of the preliminary approvals she had already been given.

(8) None of the other more senior people at Julius Baer who subsequently came to review the terms of the Second FX Transaction in the context of the obtaining of the approvals for the payment of the Second Commission Payment, raised any concerns about the trading strategy or the commission that had been charged.

(9) If Mrs Whitestone believed that the transaction was suspicious, it is unlikely that she would have been as open as she was about the terms of the transaction when she sought approval for the payment of the Second Commission Payment. It was a high-risk strategy to set out in detail the terms of a transaction believed to be suspicious in the hope that nobody would notice, as opposed to, for example, proceeding on the basis that approval had already been given for the making of the Second Commission Payment on the basis of the previous approvals given by Mr Seiler and Mr Raitzin in response to Mrs Whitestone's business case.

820. These conclusions lead inevitably to a conclusion that the Authority has not made out its case on elements (4) to (7) of its allegation as set out at [818] above. They also lead to the conclusion that Mrs Whitestone was not aware of the Relevant Risks and gave no consideration to them. Consequently, our findings are not sufficient to support a conclusion that Mrs Whitestone acted recklessly in relation to the Second FX Transaction or in seeking approval for the payment of the Second Commission Payment as alleged by the Authority.

Mr Merinson's request to amend the wording of the Finder's agreement.

821. This allegation has the following elements:

(1) Mrs Whitestone sought approval for Mr Merinson's request that a term be included in the new Finder's agreement with BJB Bahamas that the agreement should not be disclosed to anyone other than Mr Feldman.

(2) Mrs Whitestone was aware of, but failed to have regard to, the risk that this was an attempt to hide the fees that had been or would be paid to Mr Merinson, in circumstances where Mrs Whitestone was aware that she knew, and Compliance did not know, that Mr Merinson intended to pay a proportion of the fees he received from Julius Baer to Mr Feldman.

(3) Mrs Whitestone handwrote the amendment requested by Mr Merinson on the relevant contract, signed the amendment, and provided a copy of the amended contract to Mr Merinson despite having received no approval for the amendment from Compliance (and in circumstances where no such approval was ever forthcoming).

(4) In so doing, Mrs Whitestone was aware of, but failed to have regard to, the risk that she was facilitating Mr Merinson's attempts to hide the fees which had been or would be paid to him (a risk that crystallised on 12 December 2012, after Mrs Whitestone had left JBI's employment, when Mr Merinson sought to rely on the contract which Mrs Whitestone had amended and signed).

822. We found at [747] above that:

(1) Although Mrs Whitestone may well have been naïve in not recognising that Mr Merinson's original request that the agreement should not be disclosed to anyone other than Mr Feldman was an attempt to hide from Yukos that payments were being made to Mr Merinson, she was perfectly open about the matter with Compliance, raised it appropriately as an issue with them, and then complied with

Compliance's request to amend the agreement in a manner which Compliance felt to be acceptable.

(2) None of the other more experienced recipients who saw the original request raised any concerns about it and it did not prompt them to make any further enquiries as to whether it cast any doubt on the propriety of the arrangements.

823. Furthermore:

(1) As stated at [744] above, we are not satisfied that Mrs Whitestone had provided a copy of the agreement with her original handwritten annotation to Mr Merinson.

(2) As found at [745] above, Mrs Whitestone did in fact send the agreement containing the wording approved by Compliance to the Bahamas.

(3) Consequently, even if Mrs Whitestone had given a copy of the agreement with her original annotations to Mr Merinson, as far as the bank was concerned under the terms of the agreement that Mr Merinson did eventually sign, BJB Bahamas was able to make full disclosure of the retrocession arrangements to any authorised officer of the relevant Yukos companies.

(4) As mentioned above, we have found that Mrs Whitestone did not appreciate the significance of what she was told regarding Mr Merinson's proposal to share his commission with Mr Feldman.

824. These conclusions lead inevitably to a conclusion that the Authority has not made out its case on elements (2) to (4) of its allegation as set out at [821] above. Consequently, we conclude that Mrs Whitestone was not aware of the risk that in relation to this matter she was facilitating Mr Merinson's attempts to hide the fees which had been or would be paid to him.

Mr Feldman's request for a commitment to confidentiality

825. This allegation has the following elements:

(1) On 1 February 2011, Mrs Whitestone sought BJB Compliance's approval for Mr Feldman's request that draft letters he had been asked to sign confirming that the payments to Mr Merinson were approved, be amended to include the wording "I sign on the understanding that you will be providing me with confirmation of Julius Baer's commitment to confidentiality".

(2) Mrs Whitestone was aware of, but failed to have regard to, the risk that this was an attempt to hide the fees that had been or would be paid to Mr Merinson, in circumstances where Mrs Whitestone was aware that she knew, and Compliance did not know, that Mr Merinson intended to pay a proportion of the fees he received from Julius Baer to Mr Feldman.

(3) On 14 February 2011, in circumstances where senior managers and Compliance were querying with Mrs Whitestone the nature of Mr Merinson's relationship with the Yukos Group in the light of, in particular, the Conflict of Interest Risk, Mrs Whitestone stated that Mr Merinson did not hold any official position at Yukos Capital and did not receive a salary but could be considered an external employee akin to a consultant.

(4) Mrs Whitestone was aware of, but failed to have regard to, the risk that this information was untrue and/or misleading in that either Mrs Whitestone (i) had no proper basis for making the statement; or (ii) (to the extent the statement reflected what Mrs Whitestone had recently been told by Mr Feldman and/or

Mr Merinson) was aware that, in the light of all the previous information she had received about Mr Merinson's role, the statement was implausible and was aware of, but failed to have regard to, the risk that Mr Merinson and/or Mr Feldman were misleading her in order to deflect attention from the Conflict of Interest Risk.

(5) Mrs Whitestone so acted as she was aware that disclosing all relevant knowledge she possessed about Mr Merinson's relationship with the Yukos Group would be likely to result in Compliance and/or her senior managers investigating and potentially stopping the arrangements she had negotiated with Mr Feldman and Mr Merinson and Mrs Whitestone wished to avoid this.

826. As we found at [761] above, Mrs Whitestone did not tell Mr Seiler or Mr Schwarz on a conference call that Mr Merinson was an "external employee" and that the most likely explanation that she gave as to his status was she said that her understanding of Mr Merinson's employment was exactly what she had previously written to Ms Thomson Bielmann, namely that he was employed as the Financial Controller and Treasurer for Yukos International, but he also had some other roles, including working in an unofficial capacity with Yukos Capital to structure a conservative investment strategy for the company's bankable assets.

827. At [778] we concluded that we were not satisfied that either Mr Seiler or Mrs Whitestone were aware that the request for confidentiality was an attempt to disguise the arrangements, having taken into account the following matters:

(1) There was nothing odd about a Russian client, particularly one opposed to the Russian state, being extremely concerned about confidentiality. Mr Feldman's request was not that he was asking for any information to be kept confidential from others at Yukos, as opposed to from third parties.

(2) Furthermore, BJB Compliance and Legal were both aware of Mr Feldman's request and their reaction indicates that they did not suspect that it might be an attempt to hide Mr Merinson's Finder's fees from anyone at Yukos and that they did not suspect that he might be in breach of his duties to Yukos.

828. As mentioned above, we have found that Mrs Whitestone did not appreciate the significance of what she was told regarding Mr Merinson's proposal to share his commission with Mr Feldman.

829. Consequently, we conclude that the Authority has not made out its case on elements (2) to (5) of its allegation as set out at [825] above. These findings also lead to the conclusion that Mrs Whitestone was not aware of the Conflict of Interest Risk when considering Mr Feldman's request. It follows that our findings are not sufficient to support a conclusion that Mrs Whitestone acted recklessly in relation to Mr Feldman's request for a commitment to confidentiality.

Payments from Mr Merinson to Mr Feldman

830. This allegation has the following elements:

(1) On 7 April 2011, Mrs Whitestone's assistant, Ms Denman, arranged for half of the commission received by Mr Merinson to be paid to Mr Feldman. Mrs Whitestone was aware of this payment.

(2) The payment reflected Mr Merinson's intention, made known to Mrs Whitestone on 17 August 2010, to transfer a proportion of his commission to Mr Feldman, and was a crystallisation of the Misappropriation Risk and an

improper diversion of funds from Yukos to Mr Feldman as well as to Mr Merinson.

(3) Mrs Whitestone did not inform Compliance or her senior managers (including Mr Seiler and Mr Raitzin) of the payment and recklessly failed to have regard to the Relevant Risks, of which she was aware and in particular the Misappropriation Risk.

831. We found at [781] above that Mrs Whitestone was not aware of the transfer that was made to Mr Feldman on Mr Campeanu's instructions either at the time it was made or subsequently on her return to the office from her business trip in Moscow.

832. Consequently, we conclude that the Authority has not made out its case on the last sentence of element (1) or elements (2) and (3) of its allegation as set out at [830] above. These findings also lead to the conclusion that Mrs Whitestone was not aware of the Misappropriation Risk at the time this payment was made, through the arrangement made by Ms Denman and approved by Mr Campeanu. It follows that there are no findings to support a conclusion that Mrs Whitestone acted recklessly in relation to the making of this payment.

Conclusions on Mrs Whitestone's integrity

833. We have considered each of the allegations of recklessness made by the Authority against Mrs Whitestone individually and made separate findings in relation to each of them. None of the allegations have in our view been made out.

834. The Authority made the fair point that as well as looking at the allegations individually, we should step back and look at the matter in the round and consider the cumulative effect of the various matters which occurred during the Relevant Period and which the Authority says should have raised suspicions with Mrs Whitestone.

835. We have done so but see no reason to change our conclusions. In our view, the die was cast at the time of the effecting of the First FX Transaction. Mrs Whitestone's state of mind as to the nature of the relationship with Mr Merinson and Mr Feldman was established at that time. Similar issues that may have raised suspicions at the time of the First FX Transaction equally occurred in relation to the later matters but in our view Mrs Whitestone did not deviate from her belief that everything was in order, that Mr Feldman and Mr Merinson were to be trusted and, as we have found, in relation to later matters senior management and Compliance were involved and did not raise concerns that she was not able to allay.

836. It is undoubtedly the case that establishing all the relevant facts as to the nature of the relationship between Mr Merinson and Yukos and the role of Mr Feldman was something of a jigsaw puzzle because of the manner in which the relevant facts were recorded and were dealt with in a somewhat piecemeal fashion. Mrs Whitestone was not particularly careful in the manner in which she recorded the details she was given so that those reviewing the documents may not have fully appreciated the risks that the relationship involved, as it transpired to be the case. As we have found, even an experienced banker such as Mr Fellay was unable to appreciate the full picture immediately when he reviewed the file.

837. We have accepted Mrs Whitestone's own candid acceptance of her competence and capability at the relevant time. We accept that she was naïve, lacking in competence and experience, and that she made errors of judgment. She had inadequate support from her superiors and the management systems and controls in place were, as the Authority has subsequently found, completely inadequate to deal with the situation, particularly guidance as to who qualified as a Finder and how the arrangements were to be documented.

838. Mrs Whitestone also frankly admitted, with the benefit of hindsight and further wisdom and experience, that she was out of her depth, and could have done more to probe Mr Feldman's and Mr Merinson's explanations for various matters. At one stage she described herself as having been a "bit of an idiot". This is a matter of great regret for her and one that she has reflected on considerably over the many intervening years. This, together with the strain of this investigation has caused her considerable anguish.

839. Although Mrs Whitestone has expressed no desire to return to the financial services industry, she provided evidence of the significant steps she has taken to undertake training and improve her knowledge of such issues. She will be much wiser as a result of what she has learned from the experience of these proceedings. We therefore agree with Ms Clarke's assessment that if similar situations were to arise in the future then having had ample time to reflect on how she might have acted differently, it is likely that she would recognise the warning signs and deal with them appropriately.

840. Our evaluation of our factual findings leads to the conclusion that they cannot support any finding of recklessness on Mrs Whitestone's part and accordingly we can make no finding that she lacks integrity. That in turn leads to the conclusion that we must allow her reference, with the consequences set out below.

Mr Seiler

The First FX Transaction and the First Commission Payment

841. The allegation has the following elements:

(1) In July 2010, Mr Seiler approved of Julius Baer entering into Finder's arrangements with Mr Merinson.

(2) Under these arrangements, it was agreed that Mr Merinson would receive a "one-off" payment, totalling around 1% of the total assets on the Yukos Capital account, which could be generated from a large USD/GB CoY on which Julius Baer would apply 1.4% commission, with 70% of this paid to Mr Merinson. In return, Mr Merinson and Mr Feldman would arrange for Yukos Capital to deposit a sum in the region of GBP 280 million to GBP 430 million with Julius Baer, with further substantial funds to follow.

(3) Contrary to the provisions of BJB's Co-operation with Finders Policy, these arrangements were not reflected in Mr Merinson's written Finder's agreement, which instead provided that Mr Merinson would receive the standard Finder's fee of 25% of the net income generated by BJB from clients introduced by Mr Merinson.

(4) In August 2010, the First FX Transaction was carried out, which resulted in a return to Julius Baer which was more than double its standard commission on an FX transaction of this size.

(5) There was no proper commercial rationale for the payment to Mr Merinson.

(6) Mr Seiler approved the First Commission Payment and the arrangements by which the commission was generated in the First FX Transaction.

(7) In approving these arrangements, Mr Seiler recklessly failed to have regard to the Relevant Risks, of which he was aware.

842. We have made the following findings at [497] to [551] above which are relevant to this allegation:

(1) Mr Seiler did not approve the First FX Transaction in advance. He learnt of its terms when he received Mrs Whitestone's email of 16 August 2010.

(2) Mr Seiler knew that Mr Merinson, an existing customer of Julius Baer, was the registered Finder on the Yukos accounts but was not aware that he was in the employment of any Yukos entity.

(3) Mr Seiler knew that Compliance had been looking into the arrangements and that Mr Baumgartner had described the transaction as plausible. Mr Seiler therefore knew that Compliance had not expressed any reservations about the arrangements.

(4) Mrs Whitestone's email of 16 August 2010 would have conveyed that the client, in the person of Mr Feldman, approved the transaction and the arrangement with the introducer, Mr Merinson.

(5) There was a commercial rationale for accepting the business and there was nothing inherently uncommercial in the client agreeing that a percentage of the principal sums which it was seeking to deposit were paid as a reward to its employee for finding a bank which was willing to accept the deposit and convert it into US dollars.

(6) The high commission rates were compensated by correspondingly low custody and transaction fees and the absence of any advisory fees. Overall, the remuneration payable to the bank was not out of line with the return it might be expected to earn on a large sum of this kind for a high-risk client.

(7) Mr Seiler had no detailed information about exactly how the commission had been generated, other than that Mr Taylor had worked hard through the night to exploit exchange rate movements. He also knew that the sole director of Yukos Capital, Mr Feldman, had approved the arrangement. He did not know the full position regarding Mr Merinson's connection to Yukos.

(8) It did not appear to Mr Seiler that the trading strategy would mean the size of the commission was obscured in Yukos Capital's records. He had some comfort from his conversation with Mr Gerber.

(9) Mr Seiler would have seen that the size of the retrocession payment was not in excess of the usual limit applied to net new money and would have seen that the overall fees to be charged to the client during the first year of the relationship were not excessive and he did not probe the matter any further.

(10) Based on those findings, Mr Seiler did not consider that by the time the First Commission Payment had been approved that either the First FX Transaction or the First Commission Payment were suspicious.

843. These findings inevitably lead to the conclusion that Mr Seiler was not aware of the Relevant Risks at the relevant time. It follows that our findings are not sufficient to support a conclusion that Mr Seiler acted recklessly in relation to the First FX Transaction and the First Commission Payment as alleged by the Authority.

Reference to the First Commission Payment as "Investment Capital Gain"

844. This allegation has the following elements:

(1) Mrs Whitestone sought approval for a request by Mr Merinson that the First Commission Payment be referenced as "Investment Capital Gain".

(2) Mr Seiler was aware this statement would have been untrue and that Mr Merinson knew that this statement would have been untrue.

(3) Mr Seiler was aware of, but failed to have regard to, the risk this was an attempt by Mr Merinson to disguise the true nature of the payment.

845. At [508] and [509] we found that:

(1) Mr Seiler would have realised that the purpose of the request was to ensure that the payment was not treated as employment income, which Mr Seiler understood it was not, as it was a retrocession payment made by Julius Baer because of Mr Merinson's status as a finder.

(2) Mr Seiler had no information about Mr Merinson's employment status in the Netherlands, so there is no reason why he should have been concerned about the question as to whether it was to be taxed as employment income in that jurisdiction.

(3) There was no reason for Mr Seiler to question the view taken by BJB Legal.

(4) Even if Mr Merinson's request had been declined, there is no reason why he should have been raising concerns about the honesty and probity of Mr Merinson for seeking a false reference.

(5) With the benefit of hindsight, Mr Seiler accepts that he could have asked why Mr Merinson had requested this reference, but at the time he thought that the request was being dealt with by the right people in Legal and Compliance. In the circumstances that was a reasonable attitude to take at the time.

846. These findings lead to the conclusion that Mr Seiler was not aware of the risk that the request was an attempt by Mr Merinson to disguise the true nature of the payment. It may have been an improper request to seek to have the payment described as an investment capital gain, but that does not mean that as a result Mr Seiler would have been aware that the payment itself was improper. It follows that our findings are not sufficient to support a conclusion that Mr Seiler acted recklessly in relation to the subject matter of this allegation.

The amendment of Mr Merinson's Finder's agreement

847. This allegation has the following elements:

(1) In October 2010, Mr Seiler approved amendments proposed by Mr Merinson and Mr Feldman to the original Finder's arrangements, under which Mr Merinson's Finder's fee was increased from 25% to 35% of net income generated by Julius Baer, and under which he was permitted to receive four additional "one-off" payments, calculated as 70% of Julius Baer's commission on four large transactions, relating to new inflows of funds, to take place by October 2011.

(2) Contrary to the provisions of BJB's Co-operation with Finders Policy, only the increase in Mr Merinson's share of net income was documented. In return, among other things, Yukos' funds were to remain with Julius Baer for at least three years.

(3) There was no proper commercial rationale for these arrangements and Mr Seiler recklessly failed to have regard to the Relevant Risks, of which he was aware.

848. At [633] we found that Mr Seiler was not involved in the preparation of the documentation for the revised Finder's arrangements as that was not a matter falling within his area of responsibility. We also found that at the time this documentation was being prepared Mr Seiler did not understand that four one-off retrocessions had been approved. Therefore, we found that even if he had read the relevant documentation at this time, it would not have been surprising to him that there was no reference to four one-off retrocessions.

849. As referred to at [816 (5)] above, we have found that Mrs Whitestone put forward a reasoned business case that the increased retrocessions were commercially necessary to keep the Yukos funds, because Mr Merinson had influence over where those assets were placed and he needed to be paid competitively.

850. Accordingly, we found at [624] that Mr Seiler had no suspicions that the proposed arrangements regarding amendment of Mr Merinson's Finder's arrangements gave rise to any of the Relevant Risks.

851. Consequently, we conclude that the Authority has not made out its case on elements (2) and (3) of its allegation as set out at [847] above. It follows that our findings are not sufficient to support a conclusion that Mr Seiler acted recklessly in relation to this matter as alleged by the Authority.

The Second FX Transaction and the Second Commission Payment

852. This allegation has the following elements:

(1) In November 2010, the Second FX Transaction, in which Julius Baer converted approximately USD 68 million of Yukos funds (which formed a portion of the funds converted into USD by the First FX Transaction) into EUR was carried out.

(2) Mr Seiler approved the payment of the Second Commission Payment to Mr Merinson and the arrangements by which the commission was generated in the Second FX Transaction.

(3) The trading approach, which mirrored that adopted in the First FX Transaction and was agreed with Mr Feldman, involved a large daily rate range and Fair Oaks paying just above the worst rate available in the market, so that the spread between that and the rate at which Julius Baer transacted would cover both the commission required by Julius Baer and a further commission payment which would be made to Mr Merinson as Finder.

(4) There was no proper commercial rationale for Yukos to adopt such an arrangement.

(5) The transaction took place at a rate approximately 30 times higher than Julius Baer's standard commission rate for transactions of this size.

(6) The commission retained by Julius Baer after the payment of 70% of the commission to Mr Merinson as a retrocession was far in excess of Julius Baer's standard commission on an FX transaction of this size.

(7) Mr Seiler recklessly failed to have regard to the Relevant Risks of which he was aware and in particular the Misappropriation Risk when giving his approvals.

853. Our relevant findings on this allegation are set out at [666] to [676] and can be summarised, as they relate to Mr Seiler, as follows:

(1) The approval of the arrangements was a matter for Mr Raitzin who delegated the whole matter to Mr Seiler to deal with and effectively gave his approval on the basis of

Mr Seiler's recommendation which was given during a brief conversation whilst Mr Raitzin was in Kyiv.

(2) Mr Courrier and Mr Nikolov were copied in on the proposals and Mr Nikolov was himself an expert on FX transactions.

(3) Prior to Mr Seiler discussing the matter with Mr Raitzin he reflected on the response that he received from Mrs Whitestone to his initial email expressing his irritation with what he regarded as another fait accompli in her two emails of 24 November 2010 and came to the conclusion that Mrs Whitestone was right in her protestations that these arrangements had in effect previously been approved and that there was therefore a sufficient business case for the payment to be made.

(4) In effect, Mr Seiler put his trust in Mrs Whitestone in coming to the conclusion that there was no reason for him not to recommend that Mr Raitzin approve the transaction. There was no reason for Mr Seiler, on the basis of what he knew about the arrangements at that time, to believe that in effect a fraud was being perpetrated. The details he was given in Mrs Whitestone's original email requesting approval were consistent with what he previously understood to be the case, namely that Mr Feldman, the duly authorised signatory of the client, had agreed that Mr Merinson should be paid a commission.

(5) Mr Seiler would not have understood that in fact the Second FX Transaction was effected on the Fair Oaks account rather than Yukos Capital's account, where in the former case Mr Feldman was not the sole signatory. Mrs Whitestone's email did not mention that fact.

(6) There is no evidence that Mr Seiler carried out any other investigation into the matter and based his recommendation to Mr Raitzin on anything other than what Mrs Whitestone had told him in her later emails.

(7) If Mr Seiler had in fact spent more time digesting the implications of the email and probing the matter further, it is quite possible that he would have identified a number of potentially suspicious factors, including those identified by the Authority.

(8) Mr Seiler accepted that the commission on the transaction was very high. However, at the time, without any other concerns about the roles of Mr Merinson and Mr Feldman, he would have had in mind the fact that the relationship only made commercial sense if Julius Baer were able to earn significant commissions from one off transactions, bearing in mind the generally low level of fees that would otherwise be charged for what was a high-risk relationship.

(9) A cursory review of Mrs Whitestone's email would have revealed that the amount of the retrocession was within the normal limits permitted by BJB's policy.

(10) Neither Mr Nikolov nor Mr Courrier questioned BJB's gross commission, the retrocession, the reference to the 2-cent range on the transaction, or Mr Feldman's approval of the arrangements. Mr Seiler copied Mr Courrier into the email chain, and he also did not object to the transaction. If these experienced individuals did not notice any impropriety, then there is no reason why Mr Seiler who paid little attention to the matter beyond the business case for the future expansion of the Yukos business, would have done so.

(11) With hindsight, the combination of the high level of commission on the Second FX Transaction and the payment of the retrocession on existing assets should have raised concerns with Mr Seiler and would have done so had he examined the proposals

in proper detail. However, Mr Seiler simply took on trust what Mrs Whitestone told him. Without probing those matters further, from a quick reading of the email Mr Seiler and Mr Raitzin would have understood that the client had approved the transaction, including the payment of the retrocession.

(12) Therefore, rather than it being more likely than not that Mr Seiler was aware of the Relevant Risks at the time he approved the Second FX Transaction, it is more likely than not that these risks simply did not occur to him. Yukos at this time was considered to be on the good side of the battle between itself and the Russian state.

(13) Mr Seiler had no reason to doubt Mrs Whitestone's integrity, and she came across as being confident and knowledgeable, although she was in fact being poorly managed and was not streetwise.

(14) Mr Seiler knew that there were many others of appropriate experience and seniority who did see and review the transactions Mrs Whitestone was effecting and as far as he was aware, none of these people raised a concern. In those circumstances, Mr Seiler had no special reason to be looking for evidence of fraud and he simply missed it, in common with many others.

854. Those findings indicate that Mr Seiler did not exercise due skill, care and diligence in considering the proposals before making his recommendation to Mr Raitzin that the arrangements be approved. However, in our view, the findings are not sufficient to support a conclusion that we should draw an inference that Mr Seiler was aware of the Relevant Risks at the time, as opposed to simply missing them. We accept that those risks would have been obvious to a person of Mr Seiler's experience had he given the proposals more detailed consideration and asked for more information regarding the relationship between Mr Feldman and Mr Merinson. However, he did not and in those circumstances, we accept that the Relevant Risks simply did not occur to him. In the absence of any awareness of the Relevant Risks, Mr Seiler was not aware of a reason for objecting to Mr Raitzin's commercial decision to approve the arrangements.

855. Consequently, we conclude that the Authority has not made out its case that Mr Seiler recklessly failed to have regard to the Relevant Risks and in particular the Misappropriation Risk when making his recommendation to Mr Raitzin that the arrangements should be approved.

The Second Commission Payment and "framework"

856. This allegation has the following elements:

(1) Before the Second Commission Payment was made, Mr Seiler was made aware of concerns that had been raised about the Second FX Transaction by Mr Fellay.

(2) In response to those concerns, Mr Seiler was tasked with putting in place an "acceptable framework" for Mrs Whitestone and the bank to operate in and was asked to "regularise pending issues".

(3) In the premises, the Relevant Risks were specifically drawn to Mr Seiler's attention, but he recklessly (i) did not take any steps to prevent the Second Commission Payment, which was ultimately paid to Mr Merinson on 31 December 2010, and (ii) failed at any time to put in place an appropriate framework to eliminate or mitigate the Relevant Risks.

857. Our relevant findings on this allegation are set out at [688] to [714] and can be summarised, as they relate to Mr Seiler, as follows:

(1) Mr Courrier did not communicate with Mr Seiler at all regarding the transactions until a meeting they both had with Mr Raitzin on 13 December 2010. Mr Seiler had not had sight of Mr Fellay's emails at this time.

(2) The discussion at the meeting held on 13 December 2010 primarily dealt with how Mrs Whitestone was to be managed going forward to ensure that further transactions were not executed without prior approval without any focus on the propriety of the commission payment or the terms of the Second FX Transaction.

(3) The proposed framework stated that it "will ensure that Louise operates within a defined and controlled framework" and this is further confirmation that the arrangements to be put in place were primarily for internal management reasons.

(4) On the basis of our finding that no concerns were raised at the meeting on 13 December 2010 regarding the points made by Mr Fellay as to the propriety of the Second FX Transaction or the Second Commission Payment, Mr Seiler had no information beyond what he knew before that time as to the detail of these transactions which would give rise to concerns as to whether the Second Commission Payment should be made.

(5) Although Mr Seiler may be criticised for not having probed in more detail as to what Mr Fellay's concerns were, on the basis of what he knew at the time he was not aware of specific concerns that meant that the Second Commission Payment should not be made.

(6) Mr Seiler was not requested to put the framework in place prior to the payment to Mr Merinson.

(7) As regards the implementation of the framework following Mr Seiler's return to the office in the New Year, a conference call took place on 5 January 2011 in which Mr Seiler participated, discussing the one-off retrocession arrangements set out in Mrs Whitestone's email of 24 November 2010 which Mr Raitzin had approved. Mr Seiler's understanding was that written approval from an officer of Yukos was being obtained, and he liaised with BJB Compliance regarding this and was informed when written approval in terms satisfactory to BJB were obtained.

(8) Further, the conference call on 5 January 2011 discussed the one-off retrocession arrangements set out in Mrs Whitestone's email of 24 November 2010 which Mr Raitzin had approved. Mr Courrier asked Mr Fellay to prepare an agreement to document the arrangements with Mr Merinson, which he did.

(9) As far as an acceptable spread range is concerned, that was a matter to be discussed in the context of the particular transactions that were proposed and which, under the framework, would require prior approval.

858. Those findings do not provide sufficient evidence to support a conclusion that Mr Seiler was aware of the Relevant Risks at the time the payment of the Second Commission Payment was authorised. As we have found, the Relevant Risks, insofar as they were identified by Mr Fellay, were not brought to his attention at that time. As it is clear that Mr Seiler did take some steps to implement the framework, which, as we have found, was designed to provide a framework for the management of Mrs Whitestone going forward, there is insufficient evidence to support a finding that Mr Seiler recklessly failed to put an appropriate framework in place. However, in our view Mr Seiler can be criticised for failing to probe Mr Fellay as to the detail of the matters in respect of which he had concerns, but not, in our view, on the basis that he did so whilst being aware of the Relevant Risks.

Preparation of a Finder's agreement for Mr Merinson with BJB Bahamas

859. This allegation has the following elements:

(1) Mr Seiler agreed that Mrs Whitestone should negotiate new Finder's arrangements with Mr Merinson, including that Mr Merinson would be entitled to receive 70% of the commission earned on transactions in respect of new inflows of funds, generated through a trading approach that was consistent with that adopted for the First and Second FX Transactions.

(2) In doing so, Mr Seiler recklessly failed to have regard to the Relevant Risks, of which he was aware and in particular the Misappropriation Risk.

860. Our relevant findings on this allegation are set out at [715] to [720] and can be summarised, as they relate to Mr Seiler, as follows:

(1) Mr Courrier and Mr Fellay were aware of the trading approach information and did not raise any concerns. Mr Fellay confirmed that this was not a red flag to him.

(2) Mr Seiler had no role in relation to the negotiation of the new Finder's arrangements. It was agreed in the conference call on 5 January 2011 that the Finder's agreement with BJB Bahamas should be prepared in respect of the arrangements which Mr Raitzin had approved. Mr Fellay and Mr Courrier took responsibility for that, as set out above.

(3) No criticisms are to be made against Mrs Whitestone or Mr Seiler as to the manner in which this agreement was drawn up.

861. Those findings do not provide sufficient evidence to support a conclusion that Mr Seiler was aware of the Relevant Risks at the time this Finder's agreement was being prepared. At this point, Mr Seiler believed that Mr Feldman had validly approved the arrangements and none of the other senior figures involved at Julius Baer raised any concerns in respect of the same information which they possessed.

Mr Merinson's request to amend the wording of the Finder's agreement.

862. This allegation has the following elements:

(1) In January 2011, Mrs Whitestone sought approval for Mr Merinson's request that a term be included in a new Finder's agreement that the agreement should not be disclosed to anyone other than Mr Feldman.

(2) Mr Seiler was aware of, but failed to have regard to, the risk that this was an attempt to hide the fees that had been or would be paid to Mr Merinson.

863. Our relevant findings on this allegation are set out at [721] to [748] and can be summarised, as they relate to Mr Seiler, as follows:

(1) When Mr Seiler first heard of the request to amend the wording of the Finder's Agreement, he was simultaneously informed that BJB Compliance had considered it and were proposing alternative wording to ensure the arrangement was "transparently disclosed".

(2) There was nothing to suggest that either Ms Thomson Bielmann or Mr Baumgartner regarded the request as indicating potential wrongdoing on the part of Mr Merinson, even though the requested wording could not be accepted. Accordingly, there was no reason for Mr Seiler to object to BJB Compliance's suggested wording or consider the request suspicious.

(3) Mr Fellay said that if BJB Compliance were content with the revised wording, then the request had been satisfactorily dealt with and there was nothing more to do.

(4) Mr Campeanu had reported that he had had a "lengthy discussion" with Mrs Whitestone and had reviewed the correspondence and Mrs Whitestone's file notes and concluded that there was no question of impropriety.

(5) In common with the other senior figures who were aware of the request, Mr Seiler did not recognise any risk and he took comfort from the fact that the matter was being appropriately looked at by Compliance, advice was given as to how the issue should be dealt with and that there was therefore nothing further for him to do.

(6) Following the receipt of Mrs Whitestone's email of 1 February 2011, which stated that Mr Merinson was happy with the amendments approved by Compliance, Mr Seiler had no reason to believe that Mr Merinson was objecting to his retrocessions being disclosed to anyone at the relevant Yukos companies.

864. These findings clearly demonstrate that Mr Seiler was not aware that the request was an attempt to hide the fees that had been or would be paid to Mr Merinson. Mr Seiler gave no significant attention to the matter knowing as he did that this was a matter for Compliance to address and deal with. Accordingly, our findings do not provide a basis for a finding that Mr Seiler acted recklessly in relation to this matter.

Mr Feldman's request for a commitment to confidentiality

865. This allegation has the following elements:

(1) In February 2011, Mr Seiler was made aware that Mr Feldman had requested that draft letters he had been asked to sign confirming that the payments to Mr Merinson were approved, be amended to include the wording "I sign on the understanding that you will be providing me with confirmation of Julius Baer's commitment to confidentiality".

(2) Mr Seiler was aware of, but failed to have regard to, the risk that this was an attempt to hide the fees that had been or would be paid to Mr Merinson, in circumstances where Mr Seiler was aware the letters were provided containing such wording and signed only by Mr Feldman notwithstanding the fact Mr Feldman was not the sole director of Fair Oaks and the draft letters were prepared and provided to Mr Feldman on the basis that they would be signed by another director of Fair Oaks, Mr Harlan Malter.

866. Our relevant findings on this allegation are set out at [749] to [768] and can be summarised, as they relate to Mr Seiler, as follows:

(1) No one at that time thought that Mr Feldman was in breach of his duties towards Yukos, and there is no record of BJB Compliance raising an issue about this. In the circumstances no criticism can be made of Mr Seiler for not doing so either.

(2) It did not occur to Mr Seiler that Mr Merinson's request was an attempt to disguise the retrocession arrangements and that he was entitled to rely on BJB Legal and Compliance, who had the same information as he did.

(3) It was never intended or suggested that Mr Malter should sign the letter as a second director of Fair Oaks and there is no evidence that Mr Seiler was told that Mr Malter was to sign any letter.

(4) Mr Seiler understood that BJB Compliance were satisfied with the letter. The manner in which the letter was to be signed was an operational matter and not a matter that we would expect Mr Seiler to have become involved with.

(5) At [768] we concluded that we were not satisfied that Mr Seiler was aware that the request for confidentiality was an attempt to disguise the arrangements, having taken into account the following matters:

(i) There was nothing odd about a Russian client, particularly one opposed to the Russian state, being extremely concerned about confidentiality. Mr Feldman's request was not that he was asking for any information to be kept confidential from others at Yukos, as opposed to from third parties.

(ii) Furthermore, BJB Compliance and Legal were both aware of Mr Feldman's request and their reaction indicates that they did not suspect that it might be an attempt to hide Mr Merinson's Finder's fees from anyone at Yukos and that they did not suspect that he might be in breach of his duties to Yukos.

867. Consequently, we conclude that the Authority has not made out its case on its allegation as set out at [865] above. Our findings are not sufficient to support a conclusion that Mr Seiler was aware of the risk that the request was an attempt to hide the fees that had been or would be paid to Mr Merinson. Accordingly, Mr Seiler did not act recklessly in relation to Mr Feldman's request for a commitment to confidentiality.

Mr Campeanu's email of 30 November 2012 and Mr Seiler's response

868. The allegation is that in December 2012, when asked by BJB Compliance to provide his comments on an email setting out extensive concerns about the arrangements with Mr Merinson, Mr Feldman's involvement in those arrangements, and the payments made pursuant to them, Mr Seiler made inaccurate and/or misleading statements. In doing so, it is alleged that he recklessly failed to have regard to the truth of his statements.

869. Our relevant findings on this allegation are set out at [785] to [799] above. For the reasons stated in relation to each of the statements with which the Authority takes issue we concluded at [799] that none of the statements concerned were inaccurate and/or misleading.

870. Accordingly, the allegation that Mr Seiler recklessly failed to have regard to the truth of the statements must fall away.

Conclusions on Mr Seiler's integrity

871. We have considered each of the allegations of recklessness made by the Authority against Mr Seiler individually and made separate findings in relation to each of them. None of the allegations have in our view been made out.

872. As we have done in relation to the allegations made against Mrs Whitestone we have stepped back and looked at the matter in the round and considered the cumulative effect of the various matters which occurred during the Relevant Period and which the Authority says should have raised suspicions with Mr Seiler.

873. We have done so, but see no reason to change our conclusions.

874. In our view, what emerges from the facts is that Mr Seiler overall was a weak manager. His failings in that regard were exacerbated by the failings in Julius Baer's matrix management structure. Mr Seiler failed to get to grips with a situation which, with the benefit of hindsight, resulted in the duping of an inexperienced Relationship Manager who Mr Seiler placed too much reliance on without further enquiry in circumstances where he did not ensure that her line manager managed her effectively.

875. This situation was combined with the fact that Mr Seiler placed complete reliance on other senior individuals within Julius Baer having considered the information provided to them by Mrs Whitestone, which as we have found, was incomplete but was the same as, or at various points more, than Mr Seiler himself was given.

876. It appears that this reliance was, as it turned out, misplaced, not because it was inappropriate to seek their advice but because those senior individuals also failed to pick up

the Relevant Risks at all stages in the events that we have considered, up to the point at which Mr Campeanu sent his email on 30 November 2012. We think it is most unlikely that all of these individuals were aware of the Relevant Risks and ignored them, as has been alleged against Mr Seiler. If the risks did not occur to them, including a banker as experienced and diligent as Mr Fellay, this leads to the strong inference that they did not occur to Mr Seiler.

877. As we have found in a number of important respects, if there had been a better effort to put all the pieces in the jigsaw together it should have been apparent that the features of the transactions were suspicious and should have been investigated. Mr Seiler must take his share of the blame for this. As we have found, and as he candidly admitted in his evidence, he missed a number of what with hindsight were obvious signs of impropriety and he failed to act with due skill, care and diligence in a number of respects.

878. Mr Seiler also sought in his evidence to distance himself from a number of the decisions taken on the grounds that technically his approval of them was not required. However, the fact was, regardless of the formal position, that he was asked to look at various matters and, probably due to his wide-ranging responsibilities and pressure of work, did not give them the attention they deserved.

879. None of this, however, leads us to the conclusion that at any time during the Relevant Period Mr Seiler acted recklessly. Accordingly, we can make no finding that Mr Seiler lacks integrity. That in turn leads to the conclusion that we must allow his reference, with the consequences set out below.

Mr Raitzin

The First FX Transaction and the First Commission Payment

880. The allegation has the following elements:

> (1) JBI's Co-operation with Finders Policy required contracts with finders to be drawn up in writing and Mr Raitzin had the decision-making authority in relation to the Russia and Eastern European region to agree variations to the standard terms of the agreement with a Finder, in particular "where special commission (higher rates than standard) are granted".
>
> (2) In August 2010, at a time when he was aware that Julius Baer had entered into Finder's arrangements with Mr Merinson in July 2010, Mr Raitzin approved the First Commission Payment, those Finder's arrangements and the arrangements by which the commission was generated in the First FX Transaction, knowing that the relevant rates were "higher than standard" and that the excessive commission rates would be disguised from auditors or anyone else investigating the First FX Transaction.
>
> (3) In giving his approval, Mr Raitzin recklessly failed to have regard to the Relevant Risks, of which he was aware.

881. We have made the following findings at [500] to [551] which are relevant to this allegation:

> (1) Mr Raitzin did not approve the First FX Transaction in advance. He learnt of its terms when he received Mrs Whitestone's email of 16 August 2010.
>
> (2) Mr Raitzin knew that Mr Merinson, an existing customer of Julius Baer, was the registered Finder on the Yukos accounts but was not aware that he was in the employment of any Yukos entity. He did not know that Mr Merinson was not in reality a typical Finder, such as a genuine third-party consultant.

(3) Mr Raitzin knew that Compliance had been looking into the arrangements and that Mr Baumgartner had described the transaction as plausible. Mr Raitzin therefore knew that Compliance had not expressed any reservations about the arrangements.

(4) Mr Raitzin believed the proposal to make the payment to Mr Merinson was a "fait accompli" on the basis that the funds had been accepted, the FX transaction had been booked and the commitment to the Finder to pay a retrocession was binding (at least as he understood it). If Julius Baer reneged on its commitment, the Finder would be perfectly entitled to prevail on the client to move its funds elsewhere on the basis that Julius Baer would not keep to its word. Furthermore, as he said, if that happened Julius Baer would still be facing a claim from Mr Merinson for his commission. Mrs Whitestone had already committed Julius Baer and he made a commercial assessment of the payment. He did so in the knowledge of Mr Baumgartner's email which noted that the transaction was known to Compliance and plausible.

(5) Mrs Whitestone's email of 16 August 2010 would have conveyed that the client, in the person of Mr Feldman, approved the transaction and the arrangement with the introducer, Mr Merinson.

(6) There was a commercial rationale for accepting the business and there was nothing inherently uncommercial in the client agreeing that a percentage of the principal sums which it was seeking to deposit were paid as a reward to an employee for finding a banker who was willing to accept the deposit and convert it into US dollars.

(7) The high commission rates were compensated by correspondingly low custody and transaction fees and the absence of any advisory fees. Overall, the remuneration payable to the bank was not out of line with the return it might be expected to earn on a large sum of this kind for a high-risk client.

(8) There was nothing wrong with 10 portions of the transaction being booked as one with the bank keeping records of each one of the transactions, with such records being available to either the client or an auditor wanting to review the documents. Records of the following matters have been held by Julius Baer:

> (1) Written instructions from Mr Feldman setting out the rates obtained on each of the traded tranches.
>
> (2) Written email confirmation from Mr Feldman that the rate achieved was in accordance with his instructions (in circumstances where Mr Feldman was physically present throughout the trading and authorised each transaction personally). Mrs Whitestone informed Mr Raitzin and others by email that the commissions charged were "as instructed by the client" and that she had "signed and emailed instruction from the sole director", ensuring that the transactions were properly documented and recorded.
>
> (3) Computerised trading records expressly recording the rate achieved by BJB, the amount of commission taken, the rate received by the client and that the transaction was booked as an average of 10 individual transactions. BJB maintained full records of the rate applied and the commissions.

(9) Mr Raitzin did not pay much attention to Mrs Whitestone's email of 16 August 2010 at the time he received it. He would have relied on those who were below him in the reporting line and their assessment of the position. He had not approved the transaction

in advance. His role was to approve the non-standard retrocession payment, but he had not at that stage been asked for approval in that regard. Following a conference call to discuss the matter, Mr Raitzin was given a satisfactory explanation of why payment of the retrocession was appropriate. The matter was looked into by Mr Nikolov following Mr Raitzin having given his verbal approval to the payment of the First Commission Payment and Mrs Whitestone's email of 19 August 2010.

(10) There is no evidence that the trading strategy for the First FX Transaction was discussed in any detail with Mr Raitzin but had it been discussed, it is likely that Mr Raitzin would have been satisfied with the overall remuneration to be earned by the bank from the arrangements.

(11) With the benefit of hindsight, Mr Raitzin should probably have paid more attention to the trading arrangements and satisfied himself as to their propriety. However, he did ask Mrs Whitestone to raise the matter with Mr Nikolov who, together with Compliance, did look at the arrangements in more detail and did not raise any concerns. In those circumstances, it seems likely that Mr Raitzin paid no further attention to the matter until the email exchange that followed Mrs Whitestone's email of 19 August 2010 referred to at [472] above.

(12) Therefore, on the basis of what Mr Raitzin knew at the relevant time (as opposed to what might have been known if the arrangements had been investigated more diligently) the commercial decision not to object to the payment of the First Commission Payment after the event, knowing that there was a pre-existing obligation to do so and knowing that Compliance had described the transaction as plausible appeared to Mr Raitzin at the time to be reasonable in the circumstances.

(13) These findings lead to the conclusion that by the time Mr Raitzin had approved the First Commission Payment he did not believe that either the First FX Transaction or the First Commission Payment were suspicious.

882. These findings inevitably lead to the conclusion that Mr Raitzin was not aware of the Relevant Risks at the relevant time. It follows that our findings are not sufficient to support a conclusion that Mr Raitzin acted recklessly in relation to the First FX Transaction and the First Commission Payment as alleged by the Authority.

Reference to the First Commission Payment as "Investment Capital Gain"

883. This allegation has the following elements:

(1) Mrs Whitestone sought approval for a request by Mr Merinson that the First Commission Payment be referenced as "Investment Capital Gain".

(2) Mr Raitzin was aware this statement would have been untrue and that Mr Merinson knew that this statement would have been untrue.

(3) Mr Raitzin was aware of, but failed to have regard to, the risk this was an attempt by Mr Merinson to disguise the true nature of the payment.

884. At [511] to [515] we found that:

(1) Mr Raitzin candidly accepted that looking at the reference now, the payment clearly did not represent a capital gain and therefore it was obviously false. Therefore, this was a matter that should have prompted further investigation at the time, but Mr Raitzin relied on the fact that it was addressed by BJB Legal and Compliance.

(2) Mr Raitzin did not appreciate the significance of the request at the time that it was made. Mr Raitzin understood that Mr Merinson was making clear that the payment was not referable to any employment relationship with Julius Baer and sought a payment reference that confirmed this.

(3) It is important to look at the circumstances as they appeared to Mr Raitzin at the time. BJB Legal and the Group Head of Compliance had already given their comments without suggesting the request should have raised wider concerns**.** We accept that in 2010 clients and business introducers used to make common and unremarkable requests for tax efficient treatment and consequently Mr Raitzin did not therefore see anything particularly concerning in this at the time.

(4) Mr Raitzin took comfort from the approval by the legal department, and in particular Ms Bohn, the head of the legal team which dealt with private banking. Mr Raitzin knew her well since she had worked on the US tax disclosure. Ms Bohn did not consider the request to be fraudulent, but rather mistaken. It was clear from the text of Mrs Whitestone's email that what Mr Merinson was really concerned about was not being caught by employment taxation rates which was a reasonable concern because Mr Merinson was not an employee of Julius Baer.

(5) Mr Merinson's request for an incorrect reference did not trigger suspicions that he was involved in more serious wrongdoing of a completely different nature: namely, fraudulently conspiring with Mr Feldman to steal millions of dollars from a company with which he was associated. A person having done something wrong does not justify suspecting them of committing a different, unrelated wrong.

885. These findings lead to the conclusion that Mr Raitzin was not aware of the risk that the request was an attempt by Mr Merinson to disguise the true nature of the payment. It may have been an improper request to seek to have the payment described as an investment capital gain, but that does not mean that as a result Mr Raitzin would have been aware that the payment itself was improper. It follows that our findings are not sufficient to support a conclusion that Mr Raitzin acted recklessly in relation to the subject matter of this allegation.

The amendment of Mr Merinson's Finder's agreement

886. This allegation has the following elements:

(1) In October 2010, Mr Raitzin approved amendments proposed by Mr Merinson and Mr Feldman to the original Finder's arrangements, under which Mr Merinson's Finder's fee was increased from 25% to 35% of net income generated by Julius Baer, and under which he was permitted to receive four additional "one-off" payments, calculated as 70% of Julius Baer's commission on four large transactions, relating to new inflows of funds, to take place by October 2011.

(2) Only the increase in Mr Merinson's share of net income was documented. In return, among other things, Yukos' funds were to remain with Julius Baer for at least three years.

(3) There was no proper commercial rationale for these arrangements, the proposed rates and payments were "higher than standard" and in approving them Mr Raitzin recklessly failed to have regard to the Relevant Risks, of which he was aware.

887. At [635] we found that Mrs Whitestone's business case as set out in her email of 25 October 2010 is a complete answer to the Authority's suggestion that there was no proper commercial rationale for the revised arrangements.

888. At [637] we found that at the time Mr Raitzin approved that business case, he did not know that Mr Merinson was the CFO of Yukos and an employee of Yukos International and that Mr Merinson was intending to share his commission with Mr Feldman.

889. At [638] we found that although Mr Raitzin failed to identify from Mrs Whitestone's email to Mr Spadaro that the one-off retrocessions would not be included in the revised Finder's agreement and Mr Raitzin fairly said that he could not remember why he did not spot this issue, the email did not ask for anything to be undocumented and it appears to be the case that it was not the practice to document one-off retrocessions.

890. Consequently, we conclude that the Authority has not made out its case on elements (2) and (3) of its allegation as set out at [886] above. It follows that our findings are not sufficient to support a conclusion that Mr Raitzin acted recklessly in relation to this matter as alleged by the Authority.

The Second FX Transaction and the Second Commission Payment

891. This allegation has the following elements:

> (1) In November 2010, the Second FX Transaction, in which Julius Baer converted approximately USD 68 million of Yukos funds (which formed a portion of the funds converted into USD by the First FX Transaction) into EUR was carried out.
>
> (2) The trading approach, which mirrored that adopted in the First FX Transaction and was agreed with Mr Feldman, involved a large daily rate range and Fair Oaks paying just above the worst rate available in the market, so that the spread between that and the rate at which Julius Baer transacted would cover both the commission required by Julius Baer and a further commission payment which would be made to Mr Merinson as Finder but the excessive commission rates would be disguised from auditors or anyone else investigating the Second FX Transaction.
>
> (3) There was no proper commercial rationale for Yukos to adopt such an arrangement.
>
> (4) The transaction took place at a rate approximately 30 times higher than Julius Baer's standard commission rate for transactions of this size.
>
> (5) The commission retained by Julius Baer after the payment of 70% of the commission to Mr Merinson as a retrocession was far in excess of Julius Baer's standard commission on an FX transaction of this size.
>
> (6) Mr Raitzin approved the payment of the Second Commission Payment to Mr Merinson and the arrangements by which the commission was generated in the Second FX Transaction.
>
> (7) In giving his approval Mr Raitzin recklessly failed to have regard to the Relevant Risks of which he was aware and in particular the Misappropriation Risk.

892. Our relevant findings on this allegation are set out at [666] to [676] and can be summarised, as they relate to Mr Raitzin, as follows:

> (1) At the time, Mr Raitzin's mind was focused on what he would consider to be a much more important issue, namely representing the Chief Executive at an important conference in Kyiv. He would only have been able to read Mrs

Whitestone's email on his Blackberry and would have had no opportunity for considering the matter in any great detail.

(2) He delegated the whole matter to Mr Seiler to deal with and effectively gave his approval on the basis of Mr Seiler's recommendation which was given during a brief conversation whilst Mr Raitzin was in Kyiv.

(3) Mr Raitzin sought to involve Mr Courrier and he was aware that his "right hand man", Mr Nikolov, was copied in on the proposals. Mr Nikolov was himself an expert on FX transactions.

(4) Although Mr Raitzin accepted that the commission on the transaction was very high, at the time, without any other concerns about the roles of Mr Merinson and Mr Feldman, he would have had in mind the fact that the relationship only made commercial sense if Julius Baer were able to earn significant commissions from one off transactions, bearing in mind the generally low level of fees that would otherwise be charged for what was a high risk relationship.

(5) A cursory review of Mrs Whitestone's email would have revealed that the amount of the retrocession was within the normal limits permitted by BJB's policy.

(6) Neither Mr Nikolov nor Mr Courrier questioned BJB's gross commission, the retrocession, the reference to the 2-cent range on the transaction, or Mr Feldman's approval of the arrangements. If these experienced individuals did not notice any impropriety, then there is no reason why Mr Raitzin, who paid little attention to the matter beyond the business case for the future expansion of the Yukos business would have done so.

(7) With hindsight, the combination of the high level of commission on the Second FX Transaction and the payment of the retrocession on existing assets should have raised concerns with Mr Raitzin and would have done so had he examined the proposals in proper detail. However, Mr Raitzin relied entirely on Mr Seiler's recommendation, knowing that Mr Courrier and Mr Nikolov had also been asked to look at the arrangements.

(8) Without probing those matters further, from a quick reading of the email Mr Raitzin would have understood that the client had approved the transaction, including the payment of the retrocession.

(9) Therefore, rather than it being more likely than not that Mr Raitzin was aware of the Relevant Risks at the time he approved the Second FX Transaction, it is more likely than not that these risks simply did not occur to him. Yukos at this time was considered to be on the good side of the battle between itself and the Russian state.

(10) Mr Raitzin had no reason to doubt Mrs Whitestone's integrity, and she came across as being confident and knowledgeable, although she was in fact being poorly managed and was not streetwise.

(11) Mr Raitzin knew that there were many others of appropriate experience and seniority who did see and review the transactions Mrs Whitestone was effecting and as far as he was aware, none of these people raised a concern. In those circumstances, Mr Raitzin had no special reason to be looking for evidence of fraud and he simply missed it, in common with many others.

893. Those findings indicate that Mr Raitzin did not give detailed consideration to the proposals, which he might have done had he not been fully immersed in other matters at the time the issue arose. In the circumstances, the decision to delegate the matter to Mr Seiler and involve other senior employees, namely Mr Courrier and Mr Nikolov is clear evidence of him acting with integrity and having the matter looked into before he gave his approval.

894. Consequently, the findings do not provide sufficient evidence to support a conclusion that we should draw an inference that Mr Raitzin was aware of the Relevant Risks at the time he dealt with the matter. As Mr Raitzin readily accepted, a closer examination of the relevant documents at the time may well have revealed to him concerns that needed to be investigated. However, for the reasons we have explained, Mr Raitzin did not and in those circumstances we accept that he did not become aware of the Relevant Risks at the time he gave the matter his limited attention.

895. In the absence of any awareness of the Relevant Risks, and on the basis of Mr Seiler's recommendation to approve the payment there is no basis for a finding that in making his commercial decision to approve the arrangements Mr Raitzin acted without integrity.

The Second Commission Payment and "framework"

896. The allegation has the following elements:

(1) Before the Second Commission Payment was made, Mr Raitzin became aware of serious concerns that had been raised about the Second FX Transaction by Mr Fellay.

(2) In response to those concerns, Mr Raitzin set Mr Seiler the task of putting in place an "acceptable framework" for Mrs Whitestone and the bank to operate in and asked him to "regularise pending issues", but did not make any further enquiry into the concerns which had been expressed.

(3) Mr Raitzin was aware of the Relevant Risks, that Mr Fellay had raised serious concerns about those risks, and that no proper investigation or enquiry had been undertaken into those risks, yet he recklessly proceeded to confirm his approval of the Second Commission Payment, which was ultimately paid to Mr Merinson on 31 December 2010, before Mr Seiler had taken the actions that Mr Raitzin had tasked him with.

897. Our relevant findings on this allegation are set out at [689] to [714] and can be summarised, as they relate to Mr Raitzin, as follows:

(1) Mr Raitzin attended a meeting on 13 December 2010 with Mr Courrier and Mr Seiler. The meeting dealt primarily with how Mrs Whitestone was to be managed going forward to ensure that further transactions were not executed without prior approval without any focus on the propriety of the commission payment or the terms of the Second FX Transaction.

(2) The proposed framework stated that it "will ensure that Louise operates within a defined and controlled framework" and this is further confirmation that the arrangements to be put in place were primarily for internal management reasons.

(3) On the basis of our finding that no concerns were raised at the meeting on 13 December 2010 regarding the points made by Mr Fellay as to the propriety of the Second FX Transaction or the Second Commission Payment, Mr Raitzin had no information beyond what he knew before that time as to the detail of these transactions which would give rise to concerns as to whether the Second Commission Payment should be made.

(4) Although Mr Raitzin may be criticised for not having probed in more detail as to what Mr Fellay's concerns were, on the basis of what he knew at the time he was not aware of specific concerns that meant that the Second Commission Payment should not be made.

(5) Mr Seiler was not requested to put the framework in place prior to the payment to Mr Merinson.

(6) Mr Raitzin took a commercial decision that the payment could be made without the framework having first been put in place. He explained when asked why he did not object to the payment being made until he was satisfied that the issues had been addressed that he had in mind the USD 400 million of net new money promised and did not wish to irritate the Finder who was responsible for that.

898. Whilst with hindsight, Mr Raitzin can be criticised for having made the commercial decision to authorise the payment without having got to the bottom of what Mr Fellay's concerns were, in our view the evidence is not sufficient to lead to a conclusion that Mr Raitzin acted recklessly in doing so.

899. There are a number of significant factors that demonstrate that in fact Mr Raitzin acted with integrity in taking the steps that he did. In particular:

(1) Mr Raitzin promptly took steps to deal with Mr Fellay's concerns by asking Mr Seiler to resolve the issues and set out a proposed framework. As Mr Jaffey submitted, such action is inconsistent with the notion that he was acting recklessly.

(2) Mr Fellay was content with what had been proposed regarding the framework.

(3) Mr Seiler had reviewed the transaction and was satisfied.

(4) Mr Raitzin only authorised the payment after he had received an email from Mr Courrier on 21 December 2010 informing him that he had asked Mr Seiler to provide an acceptable framework to operate the relationship in the future, following which Mr Raitzin indicated that he had no objection for the payment being made and reiterated the need for the framework to be established.

(5) Accordingly, it is clear that Mr Raitzin had directed that the pending issues be regularised as part of his approval of the Second Commission Payment.

(6) Mr Raitzin then decided to authorise payment because the transaction had already happened, and Julius Baer was legally committed to the payment.

Conclusions on Mr Raitzin's integrity

900. We have considered each of the allegations of recklessness made by the Authority against Mr Raitzin individually and made separate findings in relation to each of them. None of the allegations have in our view been made out.

901. As we have done in relation to the allegations made against Mrs Whitestone and Mr Seiler we have stepped back and looked at the matter in the round and considered the cumulative effect of the various matters which occurred during the Relevant Period and which the Authority says should have raised suspicions with Mr Raitzin.

902. We have done so, but see no reason to change our conclusions.

903. What emerges is that Mr Raitzin did not himself engage with the detail of the proposals that were put to him for approval. He relied entirely on his subordinates to identify and inform him of any serious risks.

904. It is not unreasonable for a busy senior executive to delegate tasks to trusted subordinates and Mr Raitzin cannot be criticised for doing so. However, although he may have criticised Mr Fellay for not bringing his concerns directly to him, Mr Raitzin can be criticised for not himself seeking to establish the detail of those concerns and satisfying himself that they had been fully brought to his attention.

905. Mr Raitzin therefore must, in common with Mr Seiler, bear some responsibility for what has happened, as he candidly admitted in his evidence. With his level of experience, had he done more to establish the facts of what was going on, it is likely that he would have become aware of the Relevant Risks and, had he done so, we have no doubt that he would have taken steps to address them.

906. None of these conclusions satisfy us that at any time during the Relevant Period Mr Raitzin acted recklessly. Accordingly, we can make no finding that Mr Raitzin lacks integrity. That in turn leads to the conclusion that we must allow his reference, with the consequences set out below.

CONCLUSION

907. We have had the benefit of excellent written and oral submissions from four leading counsel, supported by their juniors. The parties have been extremely fortunate in being able to secure representation of the highest quality. The fact that we have not referred to all of the submissions that they have made does not mean that they have not all been carefully considered and appreciated. We are grateful to all counsel, and their legal teams, for their assistance.

908. The references are allowed. Our decision is unanimous.

DIRECTIONS

909. In the light of our decision to allow the references, we must remit the matter to the Authority with a direction to reconsider its decisions to prohibit the Applicants in the light of our findings.

910. The relevant findings that the Authority must consider in this case are our findings of fact and our evaluation of those findings as referred to at [800] to [906] above.

911. On the basis of our findings, it would be irrational of the Authority to make a prohibition order against any of the Applicants on the basis that they acted without integrity.

912. However, the Authority's guidance makes it clear that it will in appropriate cases consider whether either a full or partial prohibition order should be made in circumstances where the individual concerned demonstrates a lack of competence or capability.

913. We do not consider that we should, on the basis of our findings, make a further finding at this stage that the imposition of a prohibition order of some kind would be disproportionate or irrational. As we have found, there are a number of instances in which each of the Applicants in this case have demonstrated varying degrees of a lack of competence and capability.

914. Nevertheless, there are a number of important factors that we consider that the Authority should take into account if it were to consider whether a prohibition order of any kind could be justified on the facts of this case.

915. Most importantly, a prohibition order should not be considered as a proxy for a disciplinary sanction in circumstances where, as in this case, the imposition of a disciplinary sanction against the Applicant concerned cannot be imposed either because he or she was not

an approved person at the relevant time or, where he or she was an approved person, the relevant limitation period has since expired. The imposition of a prohibition order can only be justified where it is necessary to do so in order to protect consumers and the integrity of, or confidence in, the financial system.

916. In that regard, we direct that the Authority must take into account the following matters in reconsidering its decisions:

(1) Neither Mr Seiler nor Mr Raitzin considered any of the transactions in question in the performance of any controlled function, or any function for which he required approval.

(2) There was no allegation of wrongdoing undertaken in the UK on the part of Mr Seiler or Mr Raitzin.

(3) The primary regulator with jurisdiction over Mr Raitzin and Mr Seiler was the Swiss regulator, FINMA, who reviewed the matter and decided to take no action.

(4) Neither Mr Seiler nor Mr Raitzin had responsibility for day-to-day supervision of Mrs Whitestone.

(5) The Authority has taken no action against any individual in the UK responsible for the systems and controls at JBI which it found to be severely deficient.

(6) There have been serious delays in bringing the proceedings against the Applicants and these proceedings have become unduly prolonged. The events in question happened many years ago.

(7) All three Applicants have expressed regret for what had happened and have admitted to a number of failings. Mrs Whitestone, in particular, was very candid about her lack of competence and capability at the time.

(8) The evidence shows that Mrs Whitestone, although expressing no interest in returning to the financial services industry, has sought to learn from her experiences and, with the effluxion of time, it is clear that any process of rehabilitation will have started some time ago.

917. We remit the references to the Authority with a direction that effect be given to our determinations.

POSTSCRIPT: s 133A (5) FSMA

918. At the end of his closing submissions, Mr Jaffey asked the Tribunal to consider making recommendations pursuant to s 133A (5) FSMA in relation to a number of matters. That provision empowers the Tribunal on determining a reference to make recommendations as to the Authority's "regulating provisions or its procedures".

919. The matters in respect of which suggestions were made were:

(1) delay;

(2) disclosure;

(3) failure to call key witnesses, in particular Mr Campeanu; and

(4) failure to take regulatory action against Mr Campeanu.

920. As regards the Authority's disclosure failings in this case, it is of considerable concern that it is a recurring theme in Tribunal decisions that the Authority is castigated for failings

in its disclosure obligations: see *Hussein v FCA* [2018] UKUT 186 (TCC) *Alistair Burns v FCA* [2019] UKUT 0019 and *Forsyth v FCA* [2021] UKUT 162. In relation to *Forsyth*, recommendations were made regarding disclosure procedures, including a recommendation that the Authority should consider whether its staff are properly trained.

921. It is therefore exasperating that basic errors still seem to occur, as detailed at [120] to [137] above. There are only so many times that the Authority can apologise for its failings, insist that lessons have been learned and then expect that those affected should simply move on.

922. On the basis of the findings that we have made regarding the disclosure failings in this case, there clearly seems to be a continuing problem with the competence of those to whom the Authority delegates the disclosure process and therefore the adequacy of their supervision. This is therefore a matter that the Authority should review in the light of the failings identified in this decision, particularly the unacceptable late disclosure which occurred after the conclusion of the hearing of these references, as referred to at [127] to [137] above.

923. In relation to the other matters raised by Mr Jaffey and other matters on which we have made observations, we do not consider it necessary to make any formal recommendations, but we encourage the Authority to take heed of the following matters referred to in this decision.

924. First, our observations set out at [93] to [114] above as to the failure of the Authority to call key witnesses, notwithstanding the Tribunal's exhortation in previous cases to assist the Tribunal with full and accurate explanations of all the facts which are relevant to the issues which the Tribunal must decide. It should not be the case that as a tactical decision the Authority declines to call a witness who can assist the Tribunal with relevant information so as to benefit its own theory of the case.

925. Second, our observation at [119] above that it is for the Authority to give serious consideration as to whether it is appropriate to continue with an investigation which it does not have the resources to complete within a reasonable period of time and where it has decided that its priorities for its limited resource lie elsewhere.

926. Third, the Authority should consider the appropriateness of conducting contested proceedings against individuals on the basis of its acceptance of a version of events put forward by the employer of those individuals who is keen to settle the separate proceedings taken against that firm without the Authority conducting its own rigorous investigation into the individuals concerned. Many of the difficulties in this case have arisen as a result of the Authority taking that course of action and relying primarily on the internal investigations commissioned by JBI into the events which are relevant to these references.

927. Fourth, our observation at [134] to [138] regarding Mr Campeanu.

928. The Authority swallowed hook, line and sinker what Mr Campeanu said in his email of 30 November 2012 and based its own theory in its proceedings against the Applicants on it. It continued to do so notwithstanding its later doubts about Mr Campeanu's veracity, his dubious status as a whistleblower, and the subsequent disclosures that were made.

929. It does not appear that at any point the Authority stepped back and considered whether it was more likely that the Applicants, with nothing in their background and life experiences to suggest that they would act without integrity over a prolonged period of time, were aware of the risk of fraud and did nothing about it, as opposed to it being more likely that, against a background of defective systems and controls, the Applicants in a number of respects

failed to demonstrate the level of competence expected when faced with two individuals who were able to exploit the weaknesses concerned.

930. It appears that the Authority became anchored in its initial impressions of what happened, informed by Mr Campeanu's email, so that the subsequent disclosures late in the process simply gave rise to a mindset of confirmation bias.

931. The Authority will now have to consider how it deals with the JBI Final Notice in the light of our findings. It would clearly be unfair to the Applicants if that notice continues to be published in full on the Authority's website. We recognise that the outcome as far as the position between JBI and the Authority is concerned cannot be changed, but consideration should be given as to whether a summary of the outcome, which does not refer to the findings against the Applicants which have now been demonstrated not to be justified can replace the Final Notice on the Authority's website.

APPENDIX

The Tribunal's jurisdiction regarding the Third FX Transaction

932. Both Mr Seiler and Mrs Whitestone contend that the Tribunal has no jurisdiction to consider the Third FX Transaction and the Third Commission Payment.

933. Mr Strong helpfully set out the background to this issue in his opening submissions which we gratefully adopt at [934] to [952] below.

934. The Third FX Transaction is defined in the Authority's Statement of Case relating to Mr Seiler as, "the FX transaction converting EUR 7,000,000 into USD conducted by Julius Baer for Fair Oaks pursuant to an order placed on 15 August 2011". This is entirely different to what was defined as the Third FX Transaction in Mr Seiler's Warning Notice. That transaction was said to be "collectively the series of FX transactions conducted by Julius Baer for Yukos Hydrocarbons Ltd on 18 August, 8 September and 10 November 2011". To avoid confusion, the Third FX Transaction defined in the Statement of Case is referred to here as the "New Third FX Transaction".

935. The reason behind this change in the Authority's case is simply that it did not properly investigate the transactions which occurred in 2011 prior to the issue of Mr Seiler's Warning Notice. Mr Seiler's Written Representations to the RDC pointed out that there was no proper evidence of the three parts of what was then alleged to be the Third FX Transaction, or any evidence at all as to how much Mr Merinson had received in respect of it. Unknown to Mr Seiler's legal team at the time, Mrs Whitestone's solicitors had already asked the Authority for disclosure of the relevant documents. Subsequently, the Authority obtained from JBI a set of documents which were listed in a document sent to the Authority five years earlier, on 2 July 2015. These documents showed that the original case against Mr Seiler in relation to the Third FX Transaction, as set out in his Warning Notice, was wholly unsustainable, even though JBI had already admitted it.

936. In respect of the New Third FX Transaction referred to by the Authority, the allegations of recklessness against Mr Seiler as set out in the Authority's Statement of Case are:

> (1) that the alleged concerns of Mr Campeanu set out in an email of 18 July 2011 regarding the ethics of the relationship with Yukos were expressly drawn to Mr Seiler's attention and he failed to prevent the New Third FX Transaction or the Third Commission Payment; and
>
> (2) that, in August 2011, Mr Seiler was aware of (or a reasonable person in Mr Seiler's position would have been aware of) the Relevant Risks and "the obvious likelihood that the Third FX Transaction would be carried out in the same manner as the First and Second FX Transactions" but failed to take any steps to prevent the Third Commission Payment.

937. The first time that this allegation was formulated by the Authority was in Mr Seiler's Decision Notice, but there was no reference to Mr Seiler having been aware of an "obvious likelihood that the Third FX Transaction would be carried out in the same manner as the First and Second FX Transactions". It is not alleged that Mr Seiler knew of the New Third FX Transaction in advance, or even that he should have suspected it was going to take place. Enforcement accepted before the RDC that "there is no evidence that Mr Seiler was specifically made aware of the [New] Third FX Transaction".

938. The allegations now made were not made at any stage before the issue of the Decision Notice. Enforcement's Response to Mr Seiler's Written Representations to the RDC stated:

> "In setting up the "framework", which he was personally charged with implementing, on a basis under which further approvals, or even reporting, were not required, such that Mr Seiler would not even be made aware of the quantum and methodology for any proposed future retrocessions, Mr Seiler intended to minimise the compromising information which might be brought to his attention. Mr Seiler's failure to take any steps to monitor Ms Whitestone, or to require formal approvals or even reporting, was a clear example of deliberately turning a blind eye to what Ms Whitestone was, or might be, doing.
>
> In the circumstances, Enforcement accepts that WN 5.4(13) should be deleted and replaced with the following:
>
> > "Despite having line management responsibility for Ms Whitestone, and having set up the "framework" for the relationship with Mr Merinson and Mr Feldman, and being aware of the concerns raised by the JBI Line Manager on 18 July 2011, Mr Seiler permitted Ms Whitestone to operate without oversight, with the result that the Third FX Transaction took place without Ms Whitestone requiring approval from senior management or anyone else. In failing to monitor Ms Whitestone's activities with regard to Yukos, Mr Seiler recklessly turned a blind eye to the further one-off retrocessions that she might (and in the event did) arrange."
>
> In addition, it would be appropriate to add the following wording at the end of WN 5.4(11):
>
> > "That risk crystallised: in August 2011, the Third FX Transaction took place, in respect of which Mr Merinson was paid a further retrocession."

939. Enforcement thus alleged that Mr Seiler deliberately permitted Mrs Whitestone to operate without oversight, and did not monitor her, with the object of avoiding compromising information coming to his attention. That allegation was not accepted by the RDC and has not been resuscitated in the Authority's Statement of Case.

940. Yet another version of the Authority's case appeared in a revised JBI Warning Notice sent to Mr Seiler's solicitors on 19 November 2020 (i.e. after the RDC oral representations meeting in Mr Seiler's case but before his Decision Notice), which was said to be treated as though it had been issued on 22 April 2020. Mr Seiler's solicitors addressed the multiple issues to which this course of action gave rise in a letter dated 24 November 2020. Mr Seiler has thus been asked to address a moving target.

941. More importantly, Mr Strong submits that the Authority simply has no power to make a prohibition order on the basis of the allegations pleaded in respect of the New Third FX Transaction. Section 57 FSMA 2000 requires that, if the FCA proposes to make a prohibition order, it "must" provide a warning notice which sets out the terms of the prohibition. Section 387 FSMA 2000 provides that a warning notice "must […] give reasons for the proposed action". As already noted, however, the pleaded allegations of recklessness do not feature as any part of the reasons given for the action proposed in Mr Seiler's Warning Notice.

942. Mr Seiler pointed out that it would have been necessary for the Authority to issue a new Warning Notice, but it did not to do so. Instead, the Authority went ahead and issued a Decision Notice giving new reasons in respect of the New Third FX Transaction. In the circumstances, Mr Strong submits that there is no power under FSMA for the Authority to make a prohibition order against Mr Seiler on the basis of the matters now alleged in respect of the New Third FX Transaction.

943. Mrs Whitestone has raised the same point. The Warning Notice allegation was that USD 7 million was converted into Euros on 17 August and 8 September 2011. Then, on 10

November 2011 the same Euros were then converted back into USD crystallising a significant loss on the transactions as well as commission fees of which 70% was paid to Mr Merinson and that there was no commercial rationale for this transaction. The Authority contended, among other things, that Mrs Whitestone recklessly ignored the clear risk that it was undertaken in breach of Mr Merinson's and Mr Feldman's duty to the relevant Yukos companies.

944. The finding in Mrs Whitestone's Decision Notice was that in August 2011, EUR 7 million was converted into USD for Fair Oaks at a high rate of commission which funded a retrocession paid to Mr Merinson on 1 February 2012. The Authority said that the transaction used the same trading approach as for the First and Second FX Transactions and that there was no commercial rationale for the commission payable to Mr Merinson. The Authority contended that Mrs Whitestone failed to have regard to the obvious risk, of which she must have been aware, that this transaction was undertaken in breach of Mr Merinson's and Mr Feldman's duties to the relevant Yukos Group Companies.

945. That finding is in material terms repeated as an allegation against Mrs Whitestone in the Authority's Statement of Case.

946. Mrs Whitestone says that even now, important aspects of the factual matrix are not at all clear (for example how Mr Merinson's commission payment was calculated). There are also no records of this transaction or the rate at which it was booked. The Authority's evidence regarding these transactions is lacking in material respects and it appears that no effort has been made to obtain or disclose contemporaneous documents surrounding this trade that must surely exist. In the absence of these, Mrs Whitestone is prejudiced in not having the opportunity to refresh her memory using contemporaneous documents such as contact reports, meeting notes and emails that would assist her in recalling the circumstances of the Third FX Transaction and the commercial rationale for it.

947. The Authority rejects Mrs Whitestone's and Mr Seiler's contention that the Tribunal does not have jurisdiction to hear its allegations in respect of the Third FX Transaction and Third Commission Payment. Mr George submits that it is not correct that the Tribunal does not have power to make a prohibition order on the basis of those matters.

948. The Authority accepts that there have been some changes to the details of its case on the Third FX Transaction (where the wrong transaction was initially identified in the Warning Notice). But the Tribunal's jurisdiction is defined by reference to the relevant Decision Notice and the Tribunal may consider any evidence relating to the subject-matter of a decision so referred, whether or not it was available to the original decision maker at the material time.

949. In this case, the subject matter of the reference in relation to each Applicant was the decision of the Authority to make a prohibition order against the Applicant on the grounds that the applicant was not a fit and proper person. In that regard, the conduct of Mr Seiler and Mrs Whitestone in relation to the New Third FX Transaction did form part of the reasons in the Decision Notice for the decision to impose a prohibition order and accordingly the Tribunal had the jurisdiction to consider that transaction on the basis of what was pleaded in the Authority's Statement of Case.

950. The Authority therefore does not accept the submission of Mr Strong that it has no power to make a prohibition order on the basis of allegations that differ from those set out in the Warning Notice, even where the allegations were set out in the Decision Notice.

951. Mr George submits that the procedural steps that were followed before the issue of the Decision Notice, and in particular the fact that Mr Seiler and Mrs Whitestone were able to make representations in relation to the New Third FX Transaction and the rule that the Upper Tribunal cannot consider matters which are wholly unconnected with the allegations in the

Decision Notice, do operate to safeguard their interests. The FSMA framework is designed to protect the public interest by preventing those who are not fit and proper from performing regulatory functions. An undue narrowing of the Tribunal's inquiry would imperil that public interest.

952. Further and in any event, even if the Upper Tribunal concludes that allegations must be raised in a Warning Notice to fall within the Tribunal's jurisdiction:

(1) The Tribunal's interpretation of "the matter" for determination should remain undisturbed. As the case law makes clear, where the allegation is that the person was not fit and proper to perform any function in relation to regulated activities because he or she lacked integrity, the Authority may rely on fresh evidence of a lack of integrity as long as it does not raise another unconnected matter. Broad allegations of that kind have always been made in respect of each of the Applicants, including as a result of their continued use of FX transactions to generate inflated commissions for Mr Merinson/Mr Feldman's benefit, at the relevant time of the Third FX Transaction. The broad thrust of the allegations now pursued therefore remain unchanged from the Warning Notice.

(2) While the Authority does not pursue any allegation that Mr Seiler expressly approved the Third Commission Payment, the allegation that he failed to object to it (having been informed of the proposed payment) is really a reduced form of the original pleaded allegation and was clearly encompassed within it. The fact that the payment was in relation to a different FX transaction, which took place around the same time, is a change in detail; but does not alter the substance of the allegation. On the facts, therefore, this is not a new allegation.

(3) It is plainly the case that Mr Seiler and Mrs Whitestone have in no way been prejudiced or disadvantaged because (i) the underlying nature of the transaction and allegation did not change between the warning and decision notice in any material way, (ii) Mr Seiler's evidence is that he had no idea what was happening with the Third FX Transaction; and Mrs Whitestone, even with identification of the correct transaction, is clear that she cannot be sure what occurred and cannot comment further, and (iii) the Applicants have, in any event, had the Authority's case for a considerable time and have been able to make full submissions on it.

(4) Alternatively, insofar as the Tribunal concludes that the Authority is seeking to advance a case in respect of an allegation that did not appear in the Warning Notice, the Tribunal is nonetheless invited to exercise its discretion to permit the Authority to do so for the reasons identified above, and recognising the important public policy considerations that arise from the making of a prohibition order and the difficulties that inevitably arise for public decision makers in a context where conduct is deliberately concealed through the use of complex financial trading.

953. Section 57 (5) FSMA states that a person against whom a decision to make a prohibition order is made "may refer the matter" to the Tribunal.

954. The Tribunal's jurisdiction in relation to a reference is prescribed by s 133(4) FSMA which states:

> "The Tribunal may consider any evidence relating to the subject-matter of the reference… whether or not it was available to the decision maker at the material time"

955. Thus, reading s 57(5) and s 133 (4) together, the subject matter of the references in this case is the decision of the Authority to impose a prohibition order.

956. The question of what is within the subject matter of a reference to the Tribunal has been considered in a number of authorities. The starting point is the decision of this Tribunal's predecessor, the Financial Services and Market Tribunal, in *Jabre (Decision on Jurisdiction) v Financial Services Authority* [2002] UKFSM FSM035 (10 July 2006) .

957. In that particular case the Warning Notice issued to Mr Jabre proposed to impose a penalty on him for market abuse and also to withdraw the approval given to him by the Authority under s 59 of FSMA that allowed him to perform certain functions for his employer, a firm regulated by the Authority, on the basis that his actions meant that he was not fit and proper to perform those functions.

958. Having considered Mr Jabre's representations the RDC decided to maintain the financial penalty but declined to withdraw Mr Jabre's approval and issued a Decision Notice accordingly.

959. When Mr Jabre referred the decision to impose the financial penalty to the Tribunal, the Authority in its statement of case argued for Mr Jabre's approval to be withdrawn in addition to the imposition of the financial penalty. Mr Jabre argued that it was not open to the Tribunal to take that course because it did not form part of the "matter" referred to the Tribunal as it was not provided for in the RDC's decision notice. The Tribunal decided that the "matter" referred was not the decision as expressed in the decision notice, but it was the circumstances on which the decision is based that fall to be considered and evaluated; it was for the Tribunal to decide what was the appropriate action to take in the light of those matters and any further relevant evidence presented to it.

960. The Tribunal stated at [28]-[29]:

> "28. The meaning of the expressions "the matter referred", or "the subject-matter of the reference" in section 133 has to be derived from their context. The first point relevant to this is the Tribunal's function. It provides a stage in the regulatory process to "determine" what is the appropriate action for the Authority to take having considered any evidence relating to the subject-matter of the reference. As the Tribunal's role is not to adjudicate on the rightness or otherwise of the decision as expressed in the decision notice, the decision itself is not strictly a relevant consideration for the Tribunal to take into account. Instead it is the allegations made in the decision notice and the circumstances on which these are based that fall to be considered and evaluated. They comprise the matter referred. It is in relation to those circumstances and any further relevant evidence that was not available to the Regulatory Decisions Committee that the Tribunal's function is to determine the appropriate action for the Authority to take. The indications, so far, are that the circumstances, the evidence and the allegations before the Regulatory Decisions Committee, and not the decision, are "the subject-matter of the reference".
>
> 29. The second point is that in the present case the facts and circumstances on which the Authority relies in its statement of case were before the Regulatory Decisions Committee. They are either set out within the decision notice or are recorded in the decision notice as matters on which the Regulatory Decisions Committee did not reach a concluded factual finding. In this respect it can be said that the facts and matters before the Regulatory Decisions Committee are the facts and matters relied upon by the Authority for the purposes of the present reference. This is not a case such as that considered in *Parker v FSA* (an unreported decision on a preliminary issue) where a new allegation unconnected with the factual context that gave rise to the original decision was sought to be raised. Nor is the present situation comparable to that found in *Ryder (No.2)* (2006), a Pensions Regulator Tribunal reference. There the matter that Mr Ryder had sought to raise related to factual issues that had not been in front of the

> Determinations Panel of the Pensions Regulator and therefore formed no part of the body of facts to which the determination notice related."

961. It is clear from these passages that the Tribunal placed some emphasis on the fact that the matters on which the Authority relied in its Statement of Case before the Tribunal were "the facts and matters" before the RDC and therefore those facts and matters were capable of being pleaded before the Tribunal in the Authority's Statement of Case. That is so even if findings on those facts and matters are not made in the Decision Notice. Consequently, allegations which were in the statutory notices and made to the RDC may be pursued before the Tribunal even if the RDC rejected them.

962. The reference to the "statutory notices" is important. The Authority's decision-making procedure which must be followed before it can decide to make a prohibition order requires regulatory proceedings to be commenced by the issue of a Warning Notice. Section 387 FSMA states that a warning notice "must" state, among other things "the action which the [Authority] proposes to take" and "give reasons for the proposed action." In this case, therefore it was incumbent on the Authority to issue a Warning Notice to the Applicants stating that the Authority was proposing to impose a prohibition order. It must then set out the reasons why the Authority is seeking to take that action. We consider later what is meant by the "reasons" in this context.

963. The purpose of the Warning Notice is clear. It enables the subject of it to make effective representations to the RDC as to why the Authority should not proceed with the proposed action. It is therefore important that the subject of the notice knows the reasons for the proposed actions and so they can be addressed in his or her representations. It is then the duty of the Authority to engage with those representations and explain in the Decision Notice how it has dealt with them.

964. The question arises as to whether the Warning Notice has a role in delineating the "subject matter of the reference" as well as the Decision Notice. Mr Strong's primary submission is that it does in that compliance with the terms of s 387 is mandatory and the Authority has no power to issue a prohibition order unless a Warning Notice setting out all the matters on which the Authority seeks to rely has been given to the subject of the proposed regulatory action.

965. In *Jabre* the Warning Notice did make the allegations regarding fitness and properness that the Authority sought to revive in the Tribunal. At [36] of *Jabre* the Tribunal said:

> "Once the formal process governing the making of decisions as released in the warning and decision notices has been completed and the relevant matter has been referred, that formal process gives way to the Tribunal's statutory "determination" function and the Tribunal's rules of engagement take over."

966. It is clear therefore that the Tribunal had it in mind that the legislation envisaged that it was necessary for the statutory notice procedure to be completed, including the issue of both a Warning Notice and a Decision Notice, which it must be taken as read needs to comply with the statutory requirements as to form and content, before the matter reached the Tribunal.

967. Therefore, although the Tribunal's reasoning was based on the "facts and matters" on which the Authority sought to rely in the Tribunal having been before the RDC, it did not distinguish between situations where the facts and matters concerned had not been referred to in the Warning Notice but were subsequently raised during the course of the representations phase before the RDC and subsequently dealt with in the Decision Notice. That is the situation with which we are concerned in this case and Mr George's position on that point is that the Tribunal's jurisdiction is not affected by the fact that the matter concerned was not referred to in the Warning Notice as one of the reasons for the making of the prohibition order because the matter was ventilated before the RDC.

968. There are examples of cases where it has been held that the Tribunal has jurisdiction to consider an allegation that was not made in the relevant Warning Notice.

969. The decision of the Tribunal in *Allen v Financial Services Authority* (2012) FS/2012/0019 shows that the Tribunal may, exercising its case management powers, permit the respondent in a financial services case to amend its statement of case to enable account to be taken of facts and matters not relied on in the Warning Notice.

970. The Authority was seeking a prohibition order against Mr Allen. In its Decision Notice, the RDC had based its decision on Mr Allen's conduct during a period when he worked on a consultancy basis for an insurance broker and where it is alleged that he had, *inter alia*, overcharged a client and misappropriated money belonging to his employer and the client. The Authority had based its conclusions on the evidence of a witness who worked for the client in question, but the Authority had now come to the conclusion that it could not rely on that witness as a witness of truth after a judge in litigation brought in the High Court by Mr Allen found that the witness had made untrue statements in his evidence as a consequence of which the judge found that the witness's evidence was unreliable. Mr Allen relied on the judge's findings in relation to this witness to undermine the Authority's case on his reference to the Tribunal and provided the Authority with a redacted excerpt from the transcript of the judge's comments.

971. In the same proceedings, the judge found that Mr Allen was guilty of serious misconduct in his conduct of the proceedings in that, *inter alia*, he had forged a signature on a document, produced false evidence to bolster his case and repeatedly lied to the Court. These matters had been redacted from the transcript Mr Allen provided to the Authority.

972. In the light of this, the Authority applied for permission to amend its Statement of Case to remove the reference to the evidence of the witness on which it previously relied and to rely on other evidence to prove that Mr Allen was not fit and proper and should be prohibited. In particular, the Authority now sought to rely on Mr Allen's conduct in the court proceedings and his attempts to hide the full details from the Authority. Mr Allen objected to the Authority's application on the grounds that it introduced separate and distinct allegations from the allegations that were made in the Decision Notice and pointed out that the matters had never been investigated.

973. Judge Sinfield in his decision on the application referred to *Jabre*, and in addition to the earlier decision in *Legal & General Assurance Society Limited v The Financial Services Authority* (2005) where the Tribunal stated at [15]:

> "The parties are permitted to raise matters not directly brought before the RDC. … As a matter of common sense and fairness we would generally expect FSA with the wide powers open to it, having taken time to evaluate matters, and having carefully reviewed and carried forward charges to the RDC, to bring much the same case when taken to this Tribunal. Of course important new evidence may unexpectedly come to light or there may be in other cases special circumstances which change that general expectation. Similarly

> it seems to us that FSA, having set out its position in the Statement of Case, should usually be confined to the charges contained in it, perhaps refined as the case moves forward."

974. Judge Sinfield adopted a very wide definition of the scope of "the matter referred". At [19] he stated:

> "As the Tribunal in *Legal & General Assurance Society* observed, the FSA should usually be confined to the charges set out in the Statement of Case but that may not always be the case where important new evidence unexpectedly comes to light or there are other special circumstances. In this case, I do not consider that the charge made against Mr Allen has changed. My view is that, as recognised by the Tribunal in *Parker*, there is a distinction between an allegation or charge and the evidence relating to it. I consider that the allegation in this case is that Mr Allen is not fit and proper to perform any function in relation to regulated activities because he lacks honesty and integrity. It follows that the "matter referred" or 'subject-matter of the reference' in this case is whether Mr Allen is a fit and proper person. I regard the circumstances pleaded in the original and amended Statement of Case as evidence that relates to that allegation. The Authority no longer relies on the evidence contained in the original Statement of Case for the reasons set out above. The Authority has not, however, withdrawn its allegation that Mr Allen is not a fit and proper person. The Authority now relies on other evidence which, it says, shows that Mr Allen is not a fit and proper person but the allegation is the same. The factual situation in *Parker* was, in my view, different. In that case, the allegation was of market abuse relating to specific dealings in shares. Market abuse in relation to other share transactions would be a new allegation involving separate misconduct, albeit of the same type. In the case of Mr Allen, the allegation is general rather than specific. The allegation is not that Mr Allen was not fit and proper in relation to a specific transaction or transactions. As the Tribunal held in *Jabre*, it is the allegation made in the Decision Notice and the circumstances on which these are based that comprise the matter referred. The allegation in the Decision Notice was that Mr Allen is not a fit and proper person to perform any function in relation to regulated activities generally because he lacks honesty and integrity. Any evidence that relates to Mr Allen's honesty and integrity, whether or not it was available to the Authority at the time of the Decision Notice, may be considered by the Upper Tribunal."

975. Having therefore found that the Tribunal had jurisdiction to consider the new evidence Judge Sinfield then considered whether it was consistent with the overriding objective of the Rules to enable the Upper Tribunal to deal with cases fairly and justly, to exercise its discretion in favour of amending the Statement of Case. Judge Sinfield identified that the key consideration was whether in the absence of a new process of investigation, Warning and Decision Notices, Mr Allen would know the charges he had to face and would not be unfairly taken by surprise. He concluded at [23] that this would be the case because of the length of time that had elapsed before the reference could be heard so that Mr Allen would have plenty of time to make representations and provide any further evidence in response to the new evidence.

976. The key point to take from *Allen* is that the allegation of not being fit and proper did not change but other evidence in support of it was introduced on the Reference. Consequently, the allegation did not fall outside the subject matter of the Reference and the Tribunal had jurisdiction to consider it. The position that the Tribunal may consider any "evidence" relating to the subject matter of the reference, whether available to the Authority at the RDC stage or not is expressly provided for in s 133(4) FSMA.

977. The Court of Appeal also considered the issue in *Financial Conduct Authority v Hobbs* [2013] EWCA Civ 918. In this case the Authority proposed to make a prohibition order on Mr

Hobbs on the basis that he had engaged in market abuse. The Authority had also contended, in the Warning Notice issued to Mr Hobbs, that he had lied to his employer and the Authority during the course of the investigation into his conduct and these allegations also formed part of the basis of the RDC's decision to prohibit Mr Hobbs. Mr Hobbs referred the matter to the Tribunal which allowed his reference as it decided that Mr Hobbs' trading did not amount to market abuse. The Tribunal found that Mr Hobbs had lied to the Tribunal about why he had undertaken the trades in question but decided that since the Authority's case had rested on a consideration of Mr Hobbs' alleged conduct in committing market abuse and then lying about it, it was not satisfied that the Authority had made its case that Mr Hobbs was not a fit and proper person.

978. The Court of Appeal gave two reasons why it was incumbent upon the Tribunal to have considered the issue of Mr Hobbs' lies and whether that justified a prohibition order. The first reason centred on a question of statutory construction. In paragraph 32 of his judgment Sir Stanley Burnton stated:

> "The issue of statutory construction concerns the meaning of "the matter" which a person subject to a decision notice is entitled to refer to the Tribunal under section 57. Happily, Mr Jaffey and Mr Hunter were agreed that that expression should be given a wide meaning. "The matter" includes the facts and evidence referred to in the decision notice on the basis of which the Authority concluded that the person in question was not a fit and proper person and that a prohibition order was appropriate."

979. Consequently, in the Court of Appeal's view as Mr Hobbs' lying was part of the case before the RDC and Mr Hobbs' lying was one of the bases for the Authority's conclusion that Mr Hobbs was not fit and proper, it was incumbent on the Upper Tribunal to address the issue.

980. The second reason was more of a point of principle as to the nature of the proceedings before the Tribunal. This was expressed in paragraph 38 of Sir Stanley Burnton's judgment as follows:

> "Furthermore, in my judgment it is important for the Tribunal to consider all the facts and evidence put before it on a reference under section 57. There are two reasons for this. The first is that its consideration of a reference is not ordinary civil litigation. There is a public interest in ensuring, so far as possible, that persons who are not fit and proper persons to perform functions in relation to a regulated activity are precluded from doing so. A narrowing of the inquiry by the Tribunal that excludes relevant material from its assessment of an application is to be avoided, provided, of course, that the applicant is given a fair opportunity to address the Authority's case. In Mr Hobbs' case, it could not be suggested, and was not suggested, that he did not have a fair opportunity to address the allegations that he had been guilty of repeated and persistent lying. The second reason is that if the Tribunal incorrectly restricts its determination, it may be difficult for the Authority to rely on the excluded facts in future in assessing, for example, whether the Applicant is a fit and proper person, or should be granted an authorisation he seeks to engage in a regulated activity. To take the present case as an example I can see that it might be arguable that on *Henderson v Henderson* grounds the Authority should not be permitted to rely on allegations that it put before the Tribunal but which the Tribunal did not accept demonstrated that Mr Hobbs was not a fit and proper person. Such a situation should be avoided."

981. We observe that the Court of Appeal, recognising that there is a wider public interest in regulatory proceedings than is the case with ordinary civil litigation, was of the view that the Tribunal should avoid any narrowing of the inquiry and any potential prejudice to the applicant could be addressed by giving him a fair opportunity to address the case.

982. It is important to note that in both *Allen* and *Hobbs*, the Authority sought to rely on facts and circumstances which arose after the regulatory process had been completed and therefore were not capable of being included in the original Warning Notice.

983. The position where the Authority sought to rely in its Statement of Case on facts and matters which were not contained in the original Warning Notice was addressed in *Khan v Financial Conduct Authority* ([2014] UKUT 186 (TCC)). That case demonstrates that where the Authority seeks to make an allegation in its Statement of Case before the Tribunal which was not pursued before the RDC (but could have been) it is necessary that the allegation has been raised during the RDC process. The Authority's Statement of Case alleged that the applicant had acted dishonestly in relation to the certification of mortgage applications. The applicant made an application challenging the inclusion of that allegation in the statement of case, on the basis that it was contrary to the findings of the RDC which, he said, only found that he had failed to act with due skill, care and diligence in making the certifications: [77] to [79]. Judge Herrington refused the application but did so on what transpired to be the "mistaken assumption" (see [79] and [80]) that the Warning Notice issued to the applicant had contained the dishonesty allegation (which the RDC had then simply downgraded to a finding of negligence). In fact, at the full hearing of the reference, it emerged that the dishonesty allegation had not been included in the warning notice, or preliminary investigation report: see [81].

984. The Authority sought to retain the allegation of dishonesty on a different basis. It submitted that the RDC had in fact raised the issue of dishonesty of its own initiative, including an implicit finding to that effect in one line of the Decision Notice: [84] and [85]. The Tribunal found as follows:

> "87. As we indicated above this position is not satisfactory. It is to be expected that in normal circumstances the Authority should maintain the same case as it set out in its Warning Notice and on which the subject would have framed his representations before the RDC. As the case of *Allen v FCA* (FS/2012/0019) indicates, there can be a departure from this position where new circumstances come to light after a Warning Notice has been issued but we are not convinced that the subject matter of the reference embraces matters that were raised by the RDC on its own initiative but which do not relate to a change in circumstances without those circumstances having been the subject of a full investigation and the Warning Notice procedure."

985. In our view, the authorities demonstrate, in relation to references concerning prohibition orders, that the Tribunal has jurisdiction to consider allegations based on facts and matters which were considered before the RDC whether or not those facts and matters were relied on in the relevant Warning Notice.

986. However, whether or not the Authority should be permitted to rely on matters which were not relied on in the Warning Notice is a different matter. As was indicated in *Khan*, the position may well be different where the facts and matters concerned could have been contained in the Warning Notice but were not. In those circumstances, in our view the Tribunal should have regard to the overall purpose of the statutory scheme and the place of the Tribunal in the regulatory process and consider whether it should exercise its case management powers to prevent the Authority relying on a matter which was not relied on in the Warning Notice.

987. That position was not considered directly either in *Allen* or *Hobbs*, but it appears to us to be clear that in *Allen* the Tribunal, and effectively in *Hobbs* the Court of Appeal, exercised its discretion to allow the Authority in effect to amend its pleaded case to include reliance on facts and matters which post-dated the Warning Notice.

988. There is clear support for the proposition that the Tribunal has a discretion in relation to matters which did not post-date the Warning Notice from the case of *ITV plc v Pensions Regulator* [2015] 4 All ER 919 ("*ITV").*

989. Where under The Pensions Act 2004 ("PA 2004") the Pensions Regulator seeks to impose, among other things, a financial support direction ("FSD") there is a similar administrative decision-making procedure to that which applies in relation to decisions made by the Authority under FSMA. As Mr George recognised, there are points in *ITV* which are relevant to the financial services context. For example, the Authority—like the Pensions Regulator—is a public authority and therefore owes a duty to act fairly.

990. There are also clear similarities between the prohibition order regime under FSMA and the FSD regime under the PA 2004: both regimes provide for a Warning Notice, for the subject to have a right to make representations on the Warning Notice to a decision-maker separate to those responsible for investigating the facts and matters on which the Warning Notices is based, that is a Determinations Panel in the case of matters brought under PA 2004 and the RDC in relation to matters brought under FSMA . What then follows is a Decision Notice or, in the case of action under the PA 2004, a Determination Notice and a right to refer the matter to the Tribunal (FSMA s.57; PA 2004 s.96). In both cases, the Upper Tribunal reference results in a de novo hearing.

991. It should be noted that unlike s 387 FSMA, the PA 2004 does not prescribe the contents of a Warning Notice, although the Pensions Regulator has issued guidance as to what would be contained in a Warning Notice.

992. Nevertheless, in *ITV the* Court of Appeal recognised the importance that a Warning Notice plays in the regulatory and judicial processes which are relevant to the making of a decision to impose an FSD.

993. As Arden LJ (as she then was) mentioned at [1] of her judgment, the issue was the extent to which, following a Warning Notice, the Pensions Regulator can rely on grounds that it did not mention in the Warning Notice if its action is challenged.

994. At [57] and [58] she said:

> "57. In my judgment, the very requirement that a WN must be given shows that Parliament considered the service of a proper WN was an important protection for targets. The impact of the WN is obvious. From that time on, the targets know the case that they have to meet and, where the WN warns the target that TPR is considering the issue of an FSD, they are formally on notice of their vulnerability to an FSD.
>
> 58.I would accept Lord Pannick's submission that the WN must tell the target the case against it. While there is no statutory requirement as to what the WN has to contain, it is clear that, to fulfil any sensible purpose, it must effectively describe the bases on which TPR thought that specified regulatory action lay. Public authorities owe a duty to act fairly. It follows that TPR would have to be frank and transparent in this WN. It could not hold anything back."

995. The clear implication from this passage is that the Regulator should put its cards on the table at the Warning Notice stage rather than seek to introduce further allegations as the proceedings developed.

996. Having considered the Pensions Regulator's guidance regarding the content of warning notices, Arden LJ went on to say at [60]:

> "But it is significant that PA04 does not go on to say that either the Determinations Panel or the Upper Tribunal are constrained in the conclusions they can reach by the absence of a relevant ground in the WN. In my judgment, the absence of a provision to that effect firmly

indicates that Parliament left the question whether the Determinations Panel or the Upper Tribunal could do so to their discretion."

997. At [67] to [69] Arden LJ set out the basis on which the Tribunal should approach the introduction of allegations which go outside the Warning Notice as follows:

> " 67. In my judgment, the exercise of the Upper Tribunal's discretion to allow TPR to raise a new case not contained in the WN should depend on a consideration of all the relevant factors in the case, and not just the narrow question whether TPR had good reason for seeking to enlarge its case. The Upper Tribunal has to weigh up all the facts and circumstances in deciding whether to permit TPR to adopt a new case. It would be impossible to provide a comprehensive list of those facts and circumstances, though I can give a few examples.
>
> 68.The Upper Tribunal has to consider the nature of the new allegations, and their impact on the case. If the new case involves fraud or bad faith, it may be less willing for a new case to be brought forward unless the case is clearly pleaded and appropriate detail given. It has to consider the reasons why the case was not previously put forward.
>
> 69.The Upper Tribunal has to consider whether the targets will be able to deal with the new allegations or are prejudiced in some other way. It may be that some new evidence has been found which the targets could not have anticipated (for example, dishonesty on the part of an employee who escaped all proper internal controls), or that some important evidence has been lost through no fault of the targets, or that the targets have taken some action which they would not have undertaken if they had known that TPR would raise these allegations. On the other hand, the new case may flow from information which the targets failed to disclose to TPR at an earlier stage. The conduct of TPR would also be relevant, including any delay on its part, as well as any delay that would result from the new case going forward."

998. In our view, bearing in mind the similarities between the two regimes, we conclude that the starting position is, consistent with the intention of Parliament, that the Tribunal should not in relation to proceedings concerning the imposition of prohibition orders consider facts and circumstances not relied on by the Authority in its Warning Notice unless, in its discretion, it decides that it would be appropriate to do so. In that context, we consider that the term "reasons" as used in s 387 FSMA means, in relation to proceedings seeking the imposition of a prohibition order, the facts and matters on which the Authority relies in coming to its conclusion that the subject of the proceedings is not a fit and proper person and accordingly should be made the subject of a prohibition order. It is clear in this case that the Third FX Transaction is such a matter and in order to be relied on by the Authority the relevant facts relating to that should be accurately formulated and clearly stated in the Warning Notice.

999. It follows that there would need to be an application from the Authority to rely on the facts and matters concerned even if those facts and matters were referred to in the Decision Notice. In determining that application the Tribunal will take into account all the relevant factors in the case and apply the overriding objective in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with the matter fairly and justly.

1000. As far as the intention of Parliament is concerned, the position as regards the importance of the Warning Notice is stronger in the case of FSMA than it is in relation to PA 2004. As we have observed, the requirements of s 387 to contain reasons for the proposed action is mandatory. We therefore consider that there will be a considerable burden on the Authority to satisfy the Tribunal that in all the circumstances it is appropriate for the Authority to be able to rely on the matter concerned where it has not been properly formulated and clearly stated in the Warning Notice.

1001. We also bear in mind the importance that both Parliament has indicated in FSMA and the Authority has provided for in its administrative decision-making procedure for disputes between a subject of enforcement action and the Authority to be determined, where possible, through fair and effective administrative decision-making procedures. In that regard, the Warning Notice and Decision Notice procedure goes beyond what might be the minimum under general administrative law principles, providing as it does for a decision-maker separate from those responsible for conducting the relevant investigation.

1002. In deciding the constitution of the decision-maker, the Authority has decided that the RDC should be chaired by an employee separate from the Authority's Executive, the RDC being a committee of the Board of the Authority which does not report to the Authority's Executive and, aside from the Chairman, its members are entirely independent of the Authority, containing a mixture of financial services practitioners and other lay members. All that is clearly designed to ensure that those who are regulated by the Authority or otherwise might be subject to its enforcement procedures have confidence in the fairness and effectiveness of the Authority's procedures, bearing in mind the important role of the financial services industry in the country's economy.

1003. Furthermore, it is well known that judicial proceedings are expensive. It is clear from what we have said above that the intention of Parliament was that in so far as is possible, Tribunal proceedings should be the last resort and if the Authority's administrative proceedings are fair and robust then most subjects will be satisfied that the matters are been fairly dealt with through a process that is designed to be less formal, less expensive and swifter in their resolution.

1004. Those objectives will be compromised if the Authority does not use its best endeavours to ensure that all relevant matters are placed on the table at the Warning Notice stage.

1005. At each stage of the regulatory process, the subject of the action needs to have all relevant material pursuant to which they can make an informed decision whether to contest the matter contained in the Warning Notice before the RDC or to contest the matter contained in the Decision Notice in a reference to the Tribunal knowing clearly what the allegations are that they are going to be faced with.

1006. It is also the case that a draft Warning Notice is a key document presented to the subject of enforcement proceedings setting out the Authority's preliminary findings following the completion of its investigation and at that point the subject can decide whether to contest the proceedings or endeavour to reach a settlement. Again, reaching a settlement rather than contesting the proceedings is to be encouraged where possible to avoid the length, delay and expense of both regulatory and possible judicial proceedings.

1007. For all these reasons the integrity of the Warning Notice is important. The Authority should not be tempted into thinking that if there are deficiencies in its case at the Warning Notice stage then these can be remedied later in the proceedings, either by raising new issues during the representations phase before the RDC, as happened in this case, or later in the Tribunal.

1008. The fact that the proceedings before the Tribunal start afresh and the Authority has to prove its case on the basis of the allegations set out in the Statement of Case do not mean that the Authority should not in principle be constrained by what was said in the Warning Notice.

1009. While it was made clear in *Hobbs* that it is in the public interest for the Tribunal to make relevant findings on all matters under consideration, this should not detract from the Authority's duty to articulate clearly and with certainty, the regulatory case that it wishes to pursue.

1010. As was made clear many years ago in the extract from the *Legal and General* case set out at [973] above, it is generally to be expected that the Authority will have completed its investigation before the commencement of the regulatory proceedings and carry forward the same case both through the regulatory proceedings and in the Tribunal. The judicial proceedings in the Tribunal, whilst of a different character, are, as was made clear in *Jabre*, part of the regulatory process and part of the same continuum that commences with the Warning Notice.

1011. Consequently, pleadings on a reference to the Tribunal are in no way akin to particulars of claim in civil proceedings. The Court of Appeal in *Hobbs* also made reference to the difference between regulatory proceedings and civil proceedings. In those proceedings the Applicant is entitled to know the full nature of the allegations, findings and decisions made against him by the Authority in order to consider whether to contest the regulatory action proposed or whether to make a reference to the Tribunal.

1012. An application by the Authority to amend a Statement of Case on a reference, or even to introduce fresh factual or legal allegations without such an amendment, is therefore not akin to amending pleadings in disciplinary or civil proceedings. In those proceedings allegations are free-standing and the court may exercise its discretion to permit amendments subject to the standard principles of procedural fairness. However, in relation to prohibition proceedings if the Authority seeks to bring in fresh allegations the first question will always be whether they formed part of the reasons in the Warning Notice. If they did not, the Authority will need to make an application to the Tribunal for permission to rely on the allegations concerned.

1013. Against that background, we turn now to the question as to whether we should exercise our discretion to permit the New FX Transaction to be pleaded.

1014. The factors in favour of granting permission appear to us to be as follows:

(1) As Mr George observed, the conduct of Mr Seiler and Mrs Whitestone in relation to the New Third FX Transaction did form part of the reasons in the Decision Notice for the imposition of a prohibition order rather than being raised in the Tribunal for the first time.

(2) Mr Seiler and Mrs Whitestone were able to make representations in relation to the New Third FX Transaction before the RDC.

(3) Excluding the New Third FX Transaction would narrow the enquiry of the Tribunal into matters relating to Mr Seiler's and Mrs Whitestone's fitness and properness, arguably against the public interest.

(4) The New Third FX Transaction is an example which is similar to the other FX Transactions relied on by the Authority in that the Authority relies generally on allegations that there was a continued use of FX Transactions to generate inflated commissions for Mr Merinson so that the substitution of the New Third FX Transaction is a point of detail and does not alter the substance of the allegation.

(5) There is no prejudice to Mr Seiler or Mrs Whitestone if the matter is considered because they have both had the Authority's case for a considerable time and have been able to make full submissions on it.

1015. In our view, these factors are clearly outweighed in this case by the following matters.

1016. First, the situation has arisen as a result of the conduct of the Authority. As we have observed, there have been serious failings in the way that the Authority has conducted its

investigation. There is no good reason why the correct facts and matters regarding the New Third FX Transaction could not have been contained in the Warning Notice had the Authority conducted its investigation with due skill, care and diligence.

1017. Second, the Authority had the opportunity to correct its earlier mistake by asking the RDC to issue a revised Warning Notice, thus permitting the RDC to test the allegations pursuant to the usual ex parte process that is followed before the issue of a Warning Notice.

1018. As described at [924] above, it was Enforcement that proposed that the Warning Notice be amended but that was not followed through. In effect, what happened at the representations phase was that matters proceeded as if that amendment had been made, but the RDC never carried it through. It was therefore procedurally irregular for the RDC to have made the findings it did without the Warning Notice having been amended.

1019. Third, in relation to Mr Seiler, what finally emerged in his Decision Notice was a finding that was completely different to that which was set out in the proposed amendment and, as Mr Strong observed, as described at [923] above, there was no reference in the Decision Notice to one allegation which subsequently was made in the Statement of Case. Mr Strong is therefore right to characterise what happened as Mr Seiler having to deal with a moving target which was yet another sign of the matter not being properly bottomed out by the Authority.

1020. We therefore do not accept that Mr Seiler and Mrs Whitestone have not been prejudiced by what has happened. They did not have the protection of the matter having properly gone through the Warning Notice procedure when that was clearly an option open to the Authority at the time. It is clearly not appropriate for new allegations to be introduced during the course of the representations phase after the investigation should have been and could have completed. The fact that they have had the opportunity of making submissions in the Tribunal's proceedings does not alter that position.

1021. Fourth, we do not, contrary to Mr George's submission, regard the changes as being a matter of detail. This is a serious case where cogent and compelling evidence is required to justify the making of a prohibition order. The precise terms of the transaction which is alleged to evidence a lack of integrity should be properly formulated. As is now submitted on behalf of Mrs Whitestone, as set out at [1006] above, important aspects of the factual matrix are not at all clear from the documents that are in evidence before us. We are therefore not satisfied regardless of the pleading point, that there is a satisfactory evidential basis for the allegations in relation to this transaction.

1022. Finally, and to meet the point that the Tribunal would be narrowing the enquiry if it did not permit the transaction to be pleaded, we do not consider, bearing in mind our conclusions in relation to the First FX Transaction and the Second FX Transaction, that it would make any material difference to the outcome of this case were we to allow the matter to be pleaded. This is only one of many allegations that the Authority has made and it is not central to its case. It will not stand or fall on the basis of any findings that are made in relation to this transaction.

1023. Consequently, bearing in mind our finding that there is a heavy burden on the Authority to satisfy us that the matter should be pleaded in circumstances where due to their own shortcomings the provisions of s 387 FSMA have not been complied with, we decline to exercise our discretion to permit the matter to be pleaded.

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 13 June 2023

ANNEX: THE YUKOS GROUP STRUCTURE