IN THE SUPREME COURT OF GIBRALTAR

Neutral Citation Number 2025/GSC/003

2016/COMP/004
2021/COMP/009

IN THE MATTER OF KIJANI RESOURCES LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF RATIO LIMITED (IN LIQUIDATION)

BETWEEN:

EDGAR CHARLES LAVARELLO and SIMON RICHARD CONWAY
(as joint liquidators of Kijani Resources Limited and Ratio Limited)

Applicants

-and-

(1) RICHARD FAGAN
(2) SIMON HOOPER
~~**(3) LISA BILLINGTON**~~
(4) WILLIAM REDFORD

Respondents

Nicholas Cruz and **Daniel Lewis** assisted by **Kayleigh-Anne Revagliatte (**instructed by **Ellul & Cruz)** for the **Applicants**

The **First Respondent** (being the only respondent due to participate as a party in the hearing) did not appear

Judgment date: 12 February 2025

JUDGMENT

YEATS, J:

1. This judgment concerns claims filed on the 18 June 2021 by the joint liquidators of Kijani Resources Limited ("KRL") and Ratio Limited ("Ratio") against one of the companies' former directors and purported principal, Richard Fagan ("Mr Fagan").

2. KRL and Ratio are companies incorporated in Gibraltar on the 20 September 2010 and the 28 September 2010 respectively. They are currently in liquidation. The joint liquidators of both these companies are Edgar Lavarello and Simon Conway ("the liquidators").

3. There are in effect three claims, all of which are brought pursuant to the provisions of the Insolvency Act 2011 ("the Act"). The first is a claim for compensation arising from the alleged breach of Mr Fagan's duties as a director of KRL and Ratio. This claim is brought pursuant to section 258 of the Act. The second is a claim that Mr Fagan knowingly participated in the fraudulent trading of KRL and Ratio. This claim is brought pursuant to section 259 of the Act. The third is a claim that KRL and Ratio traded whilst insolvent. This claim is brought pursuant to section 260 of the Act. I shall adopt the nomenclature used by the liquidators' counsel and shall refer to these as the Misfeasance Claim, the Fraudulent Trading Claim, and the Insolvent Trading Claim respectively. The liquidators say that the net losses suffered by the companies are £56,201,905.10 in the case of KRL and £5,785,368.32 in the case of Ratio.

4. A separate application was filed as against each of the two companies. However, by Order dated the 16 July 2021, the applications were consolidated into one. As can be seen from the title to the action, the claims were originally brought against four respondents. Judgment in default was entered against the second respondent Simon Hooper on the 30 April 2024 after he failed to comply with an 'Unless Order'. (Incidentally, Mr Hooper has recently been convicted in the United Kingdom of three counts of fraud in an unrelated case. He was sentenced on the 4 October 2024 to six years' imprisonment.) The liquidators discontinued the claims against the third

respondent, Lisa Billington. She was called by the liquidators to give evidence at the hearing. As for William Redford the fourth respondent, judgment in default was entered against him on the 8 November 2022. He has not engaged with these applications. (On the 30 November 2018, Mr Redford was found by Butler J to be in contempt of court for breaching the terms of a freezing injunction obtained by the liquidators relating to Ratio's assets and was sentenced to 16 months' imprisonment. He has not surrendered to serve that sentence.)

Background

5. The Four Elements PCC ("the Four Elements") was a collective investment scheme and protected cell company incorporated in Mauritius on the 16 May 2008. It was regulated by the Mauritius Financial Services Commission ('MFSC'). Included within the Four Elements were four cells: the Kijani Commodity Fund (USD); the Kijani Commodity Fund (GBP); the Kijani Commodity Fund (EUR); and the Kijani Commodity Fund (CHF). (I shall refer to these cells together as "the Kijani Funds"). Belvedere Management Ltd ("Belvedere"), a Mauritius company, was the administrator of the Kijani Funds.

6. The Kijani Commodity Fund (USD) was in effect the principal fund. The offering document for that fund was contained in a Cell Appendix dated 14 September 2009 and amended on 16 September 2013 ("the Cell Appendix"). This set a target return for investments of 20% per annum. The investment strategy was to trade through an automated commodity futures trading system, both in hard and soft commodities. The offering documents for the other Kijani Funds described their investment strategy as being to "*invest substantially all its assets into the Kijani Commodity Fund (USD)…, and hedge the currency exposure back to*" pounds, euros and Swiss francs.

7. According to the liquidators, approximately $123 million was invested into the Kijani Funds by globally recognised pension funds and private investors.

8. On the 4 December 2011, the Kijani Funds entered into a loan agreement with KRL ("the Loan Agreement"). Pursuant to the Loan Agreement, the sum of $85,883,401.68 of the investors' funds was advanced in tranches by the Kijani Funds to KRL. Some of those funds were in turn advanced by KRL to Ratio. The purpose of the loan, as set out in paragraph 3.1 of the Loan Agreement, was to:

> "*use all money borrowed under this Agreement in accordance with the Investment Strategy and Policy and the Investment Restrictions sections of the Cell Appendix of Kijani Commodity Fund, as may be amended from time to time.*"

9. On the 5 February 2015, the Four Elements assigned the Loan Agreement to Brighton SPC ("Brighton"), a segregated portfolio company incorporated and regulated in the Cayman Islands. On the 30 April 2015, the Cayman Islands Monetary Authority ("CIMA"), having been alerted to an article in *OffShoreAlert* alleging that Belvedere was a criminal enterprise operating a Ponzi scheme using Brighton, appointed Simon Conway and David Walker of PwC in Cayman to examine the affairs and business of Brighton. They were subsequently appointed joint controllers of Brighton on the 1 June 2015.

10. On the 19 June 2015, Brighton (as sole shareholder of KRL) resolved to put KRL into member's voluntary liquidation and Edgar Lavarello and Mr Conway were appointed as the joint liquidators.

11. On the 27 April 2016, this Court (on the application of KRL) appointed Mr Lavarello and Mr Conway as joint liquidators of Ratio.

12. The case for the liquidators is that the funds advanced to KRL pursuant to the Loan Agreement were fraudulently dissipated by Mr Fagan and others. In opening the liquidators' case, Mr Cruz described three methods by which the funds were dissipated. The first, that they just took the money. They used labels like "*commissions*" or "*payments*" to do this. The second, that they did a little business and then took the money. An example of this is the acquisition of an olive oil refinery in Spain which was later mortgaged and

the funds raised removed. The third, that they took the money, made purported investments and then artificially inflated the value of those investments. This enabled them to perpetuate the fraud.

13. Realisations made by the liquidators to date in respect of both companies are in the region of £2 million.

Mr Fagan's non-attendance at the hearing

14. Mr Fagan did not attend the final hearing and I refused his last minute request by email for the hearing to be adjourned. I indicated that I would give my reasons for refusing the adjournment when delivering this judgment.

15. At 0957 hours on the first day of the hearing on Monday 18 November 2024, in other words three minutes before it was due to begin, Mr Fagan sent an email to the Registry's Listing Officer attaching a letter in which he said that he was unable to attend due to a medical condition and asked that the case be adjourned. In the letter, he explained that he is living in Dubai and has been "*dealing with significant health challenges which have manifested in the last 10 days*." He said that he has hypertension and has had "*episodes of dizziness and short blackouts*". He attended his doctor on Wednesday 13 November 2024 and was advised not to travel because he was at risk of "*significant and permanent cognitive damage*". As he nevertheless wanted to travel to Gibraltar for the trial, he sought a second opinion from a different practitioner on Saturday 16 November but at the time of writing was awaiting the test results. He further explained that he had been advised that it would be "*several weeks"* before he was able to travel.

16. The liquidators objected to the Court adjourning the hearing. Mr Cruz submitted that this was simply a blatant attempt by Mr Fagan to derail it. The request had come at the eleventh hour and no medical evidence had been produced. Mr Cruz outlined how in the liquidators' view, Mr Fagan had previously conducted himself in a manner which was solely aimed at delaying the hearing of the applications and avoiding the claims.

17. In *Levy v Ellis-Carr* [2012] EWHC 63 (Ch), Norris J dealt with the question of what medical evidence was required when a party was requesting an adjournment of a hearing for reasons of ill health. (This guidance was approved by the English Court of Appeal in *Forrester Ketley v Brent* [2012] EWCA Civ 324.) At paragraph 36 of his judgment, Norris J said the following:

> "…*Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."*

18. Mr Fagan has presented no medical evidence. However, in 2016, in applying to adjourn another hearing, Mr Fagan produced a medical note from the Quore Clinic in Sotogrande, Spain with two entries dated 21 March 2016 and 28 March 2016. The first entry was by a GP who stated that Mr Fagan was hit by a ball when playing polo and had lost consciousness for 10 to 15 seconds. The second was by a consultant neurosurgeon who said that Mr Fagan had suffered a right occipital contusion with no fracture. He was advised to rest for a six-week period. In his witness statement dated 26 April 2024 prepared for this hearing, Mr Fagan explains that he still suffers from memory loss as a result of the injury sustained in 2016. However, no medical evidence for this has been presented beyond the Quore Clinic report that I have already referred to.

19. Although in the course of the last two years Mr Fagan has had three different Gibraltar law firms acting for him, and has instructed London counsel to appear at a number of applications, he is now a litigant in person. His last

solicitors, Messrs Charles Gomez & Co, filed a Notice of change of solicitors on the 11 November 2024. How then was Mr Fagan to know that he had to follow a particular process and provide comprehensive medical evidence? The answer in my judgment is simple. If Mr Fagan was genuinely interested in attending the hearing he would have engaged with the Court and/or the liquidators' solicitors as soon as it became obvious that he was facing difficulties in travelling to Gibraltar. His letter said that he had been suffering his symptoms for the last 10 days. He also said that he attended his GP on the 13 November when he was told that he could not travel. Had he made contact then, he could have been advised of the requirements. Sending an email three minutes before the case was due to start was totally inappropriate in the circumstances and lends support for the conclusion that all that Mr Fagan was trying to do was force the Court into adjourning the hearing.

20. The liquidators' submission that Mr Fagan has previously done all he could to delay this claim coming to trial has some merit. After service of the applications was effected on him and on the second and fourth respondents, the liquidators made an application for judgment in default to be entered against them. This came for hearing on the 21 July 2022. A solicitor, Mr Stephen ffrench-Davis of Governor's Street Chambers, was present in Court on a watching brief on Mr Fagan's behalf. The hearing was adjourned to allow counsel for the liquidators to make submissions on the applicability of CPR 12.3 to applications under the Act. The matter was re-listed to the 27 September 2022. Some days before that hearing, Mr Fagan filed an application contesting service. His application was then set down for the same date. However, on the day that both applications were due to be heard, Mr Fagan simply filed his Defence. Pursuant to an Order of the 16 July 2021, Mr Fagan was served by email on the 23 July 2021. He was also served at an address in Sotogrande, Spain on the 3 September 2021. By an Order dated the 16 November 2021, Mr Fagan was to file his Defence by the 28 February 2022. He did so seven months late on the day that the Court was going to consider entering judgment against him.

21. On the 14 June 2024, Mr Fagan filed an application for an order for disclosure against the liquidators. At a hearing on the 1 August 2024, the submission was made that the lack of disclosure meant that his expert's accounting report would not be ready until the end of October 2024. This would have given very little time for the experts to discuss their reports and prepare a joint statement in time for the 18 November 2024 trial. In the event, on the question of disclosure, I found in the liquidators' favour and ordered Mr Fagan to pay the sum of £18,000 on account of the liquidators' costs by the 4 October 2024. This has not been paid despite Mr Fagan's then counsel saying at the pre-trial review of the 22 October 2024 and at a hearing of the 6 November 2024 (on an application for defence witnesses to give evidence remotely) that he had been instructed to confirm that the costs would be paid imminently.

22. The directions for trial required each side to exchange and file their written submissions for the hearing by the 11 November 2024. Counsel for the liquidators did so. Mr Fagan did not.

23. In my judgment, the request/application for an adjournment had to be refused. Mr Fagan had ample opportunity to provide medical evidence in support of his application. He did not do so. He did not engage with the Court on this nor did he engage with the liquidators' solicitors as to the final preparations for the trial. Although this is a large claim which will have a significant impact on Mr Fagan if the Court finds against him, I have to balance this as against the interests of the creditors of the companies. The matter has been listed for hearing since December 2023. The events which have led to the claim are some 10 years' old. They have to be determined.

24. In any event, I am not satisfied that if the matter had been adjourned, Mr Fagan would have engaged at any later hearing.

The Court's approach

25. After I determined that the trial would proceed in Mr Fagan's absence, Mr Lewis addressed me as to the approach that the liquidators were entreating

the Court to follow. Rather than enter judgment in default in accordance with CPR 39.3, the liquidators asked that the Court determine the applications on the merits. This was because in the event that they were successful, enforcement proceedings would be taken against Mr Fagan in other jurisdictions. To do this, a merit based judgment would be preferable. In order to assess the merits of the liquidators' applications, the Court has to have regard to the pleaded defence. As to the evidence, the starting point under CPR 32.2 and 32.5 is that oral evidence has to be called unless it is agreed. The liquidators however asked the Court to have regard to the defence witness statements, albeit that the assessment of the evidence has to take account of the fact that it will not have been tested in cross-examination. It seemed to me that this was a sensible course to take in this case.

26. Mr Lewis referred to *CMOC Sales & Marketing Ltd v Persons unknown & ors* [2018] EWHC 2230 (Comm) a case before HHJ Waksman QC, sitting as a judge of the High Court. There the claimant had been defrauded by unidentified persons and made a number of claims including proprietary claims and claims for compensation for dishonest assistance. The learned judge made a number of what he referred to as "*preliminary observations*" which are relevant to our case and which I will have regard to. These were the following: Even where a defendant does not engage in the proceedings, the Court still needs to be satisfied on a balance of probabilities. Where the underlying allegation is one of fraud, cogent evidence is required to satisfy the burden of proof. Where a case depends upon the drawing of inferences, an inference of fraud or dishonesty should only be drawn where it is the only reasonable inference to be drawn. Where the defendant does not attend the hearing, there is an obligation on the claimant to present the case fairly and to bring to the court's attention points which might be to the benefit of the defendant.

Mr Fagan's response to the claims

27. Mr Fagan filed an 'Amended Points of Defence' on the 8 November 2022. (I shall refer to this as the "Defence" throughout this judgment.) The

Defence was settled by David Scorey KC and Stephen Ferguson. The parties then agreed a 'Case Summary' and a 'List of Issues'. Mr Scorey approved both of these on behalf of Mr Fagan. When they were prepared, judgment had not yet been entered against Mr Hooper and some of the points made in these documents relate to him alone. Insofar as Mr Fagan is concerned, the following is an outline of the Defence as set out in the Case Summary:

i. Mr Fagan offers to provide an account of all sums received by him from KRL and Ratio but says that he does not hold all the documents necessary to do so and requires disclosure before such an account can be provided.

ii. He denies that the Loan Agreement was contrary to the Kijani Funds' offering documents, and contends that they were not relevant to KRL's obligations under the Loan Agreement, to his obligations as a director, or to the allegations being made against him.

iii. The Loan Agreement was a non-recourse agreement.

iv. The Kijani Funds' rights against KRL were limited to the assets pledged under the Loan Agreement.

v. The shares in KRL were transferred to Brighton in satisfaction of any debt due to Brighton pursuant to the Loan Agreement.

vi. Mr Fagan denies that he knew or ought to have known that KRL or Ratio were insolvent.

vii. He denies that the business of KRL and Ratio was carried out with intent to defraud creditors or for a fraudulent purpose.

viii. He denies that he knew or ought to have known that there was no reasonable prospect of KRL and Ratio avoiding insolvent liquidation from December 2011.

ix. The claims are limitation-barred.

x. Mr Fagan claims relief from liability as having acted honestly and reasonably.

28. Insofar as Mr Fagan alone is concerned, the List of Issues sets out 26 points for the Court to determine (some with a number of sub-issues). I shall be identifying and determining all of these issues in the course of this judgment.

29. Mr Fagan filed a 74-page witness statement dated the 26 April 2024. In addition, he filed witness statements (all also dated the 26 April 2024) by the following persons: David Cosgrove, Ian Hamilton, Michael Fortun, Nick Michaels, and Paul Rodger.

30. Mr Fagan instructed Michael Fanshawe to prepare an expert Accountancy Report. Mr Fanshawe is a Fellow of the Association of Chartered Certified Accountants and a Director in the Disputes, Investigations and Valuations team at Quantuma Advisory Limited. He prepared a report dated the 11 October 2024.

31. In their written submissions, counsel for the liquidators suggest that Mr Fagan's tendency in his witness statement is to blame others, including the liquidators, for the lack of realisable assets. It was submitted that this misunderstands the non-delegable fiduciary duties that attached to Mr Fagan as a director of both KRL and Ratio.

32. I have touched upon Mr Fagan's health issues and the polo accident that he suffered in 2016. In his witness statement at paragraph 4 he says:

> *"It is important that I set out from the start that I was involved in a polo accident on 20th March 2016 when I was hit on the back of the head and suffered an intracranial haemorrhage/stroke (a bleed on my brain). I was initially advised to enter an induced coma but having refused consent, I was assigned to three months' total bedrest. I was not allowed to do any work, take any phone calls or do anything that might raise my blood pressure as this would exacerbate the bleed and lead to permanent brain damage. I suffered difficulty speaking, confusion, memory loss and vertigo. These symptoms persist to date and have caused me significant difficulties in producing this witness statement. I have endeavoured to provide*

> *my recollection as best I am able, and in places there are gaps in that recollection."*

33. The point was made on behalf of the liquidators that there is a lack of medical evidence to support these claims. It was suggested that this difficulty was not genuine.

34. It seems to me that Mr Fagan's witness statement does go into a high level of detail on many things. If we add that to the fact that there is no medical evidence to substantiate him having any on-going difficulties resulting from his accident 8 or 9 years ago, it is difficult to accept that the lack of information on investments and assets is down to memory issues. I agree with the liquidators that this is not credible.

Mr Lavarello's witness statement of the 17 October 2024

35. At the pre-trial review of the 22 October 2024, the liquidators sought permission to rely on a witness statement by Mr Lavarello dated the 17 October 2024. As Mr Fagan's then counsel did not have instructions on the matter, I indicated that the liquidators should file an application and that this would then be determined. The application was filed and was listed for the first day of the hearing.

36. In the event, I granted the liquidators permission to rely on the statement. The statement dealt with three different issues. The first, open source information and documents relating to some of Mr Fagan's witnesses. As Mr Cruz said, these did not have to be disclosed and could have been put to the witnesses in evidence, but the liquidators thought it fair to present the documents at an early stage in the interests of transparency. The second was the exhibiting of a transcript of a telephone conversation between Mr Fagan, Mr Hooper and Mr Conway said to have taken place on the 10 June 2015 (Mr Fagan records it as having taken place on the 11 June 2015). Mr Fagan had referred to this conversation in his own witness statement and had complained that the transcript had not been produced. Mr Lavarello explains in his statement that it had not been disclosed in error and he was now exhibiting it to his statement. The third matter was the exhibiting of

correspondence in 2015 between Mr Conway and Balrath Capital Limited ("Balrath") where Mr Conway had sought the return of what he considered to be a prepayment by KRL to Balrath of $868,569.88. Again, this had not been disclosed due to inadvertence. The liquidators had noticed the gap in their disclosure when Mr Fanshawe had made a reference to the amounts paid to Balrath in his updated report of the 11 October 2024.

37. It seemed to me that there was no prejudice being caused to Mr Fagan in admitting this statement even though it had been prepared quite late in the day. I considered that it was in the interests of justice that the transcript of the conversation that Mr Fagan was himself referring to should be in evidence. It was also in the interests of justice that the full picture regarding the payments to Balrath be before the court.

THE EVIDENCE

38. I heard the live evidence of three witnesses at the hearing. Mr Lavarello, Lisa Billington, and Yannick Fok, the liquidators' expert on Mauritian law.

Edgar Lavarello

39. Edgar Lavarello is a Fellow of the Institute of Chartered Accountants. He is licensed by the Gibraltar Financial Services Commission ("GFSC") as a Registered Auditor and as an Insolvency Practitioner. He has over 38 years of experience in auditing, forensic accounting, group restructuring, reorganisations, investigations and insolvency work. He has been a Partner of PwC Gibraltar since 2001 and the advisory lead of PwC Gibraltar since 2005.

40. Mr Lavarello prepared a number of witness statements in the course of the proceedings. Of particular note is a statement dated the 26 April 2024 which he prepared as an expert in forensic accounting. It is a comprehensive statement which runs to 195 pages and to which he exhibits over 5,000 pages of documents. (Unless otherwise stated, a reference in this judgment to Mr Lavarello's statement is a reference to this statement of the 26 April 2024.)

At the hearing, he went through the contents of his statement and also answered questions put to him by Mr Cruz which were based on assertions made by Mr Fagan in his Defence.

41. Mr Lavarello has appeared regularly in the Supreme Court and has acted as a Court appointed liquidator and administrator in a number of high-profile cases. He is undoubtedly highly qualified and experienced and is able to provide a forensic accounting opinion as an expert in this case.

42. As a liquidator, Mr Lavarello is an officer of this Court. Although he was not challenged in cross-examination, I have no hesitation in finding that he gave honest and truthful evidence.

Lisa Billington

43. Lisa Billington was the purported financial controller of KRL from 2013 and a director of Ratio from the 17 February 2014. Ms Billington was the third respondent in this action until the claims against her were stayed on the 16 June 2022 and then discontinued on the 6 November 2023. This followed a settlement agreement she made with the liquidators. In return for the liquidators agreeing to stay and then discontinue the proceedings against her, Ms Billington agreed to cooperate with them by providing information on the relevant companies, assisting with the identification of assets and giving evidence against the remaining respondents.

44. Ms Billington filed a witness statement dated the 24 April 2024 and gave evidence at the hearing. Although she was asked some questions by counsel for the liquidators, she was not subjected to any searching cross-examination. Her evidence has to be considered with some care given the circumstances in which she appeared as a witness. Unsurprisingly, it was put to her by Mr Cruz that an observer may think she was only assisting the liquidators because of the agreement she struck. In response, Ms Billington pointed out that what she was saying now closely mirrored what she had said in 2018 when she was interviewed by the liquidators in a private examination.

45. I should pause to also refer to the following. On the 27 April 2016, Ms Billington gave evidence at a hearing relating to the liquidation of Ratio. She did so on behalf of Ratio in an attempt to contest the validity of the service of a statutory demand by the liquidators (then acting in their capacity as liquidators of KRL). Jack J was not impressed with her evidence and in his ex tempore judgment said the following (at pages 73 and 74 of the transcript of the hearing):

> "*I have to say at once that I didn't find Miss Billington a satisfactory witness….Thus I don't accept her evidence that it was never received there. She was attacked extensively as to credibility and there are certainly aspects of her documentation and record keeping which raised questions as to her credibility, however I don't need to say that she was definitely telling untruths, I simply don't accept that the document wouldn't have come to her notice had she been paying proper attention to it*"

46. With all the above in mind, I shall refer to the important aspects of Ms Billington's evidence later on in this judgment. At this stage, I will record the following. Ms Billington's evidence was that Mr Redford introduced her to Mr Fagan and Mr Hooper. She had experience in administrative tasks and bookkeeping. Initially, she was engaged by Mr Fagan as a self-employed bookkeeper for Ratio through a BVI company (Infinity Consulting Services Ltd). She was then asked to provide similar support to KRL.

The Kijani Funds

47. As has been explained in the introduction to the claims, the Four Elements investment scheme included the four Kijani Funds. The principal fund was the Kijani Commodity Fund (USD). This fund had an offering document which was contained in the Cell Appendix. The "*Investment Objective*" was described in the Cell Appendix as follows:

> "*To generate uncapped absolute returns with low volatility and minimal correlation to traditional investment markets. The Cell's target return is 20% per annum. The Manager will not pay any performance fees until the benchmark of 8% per annum is achieved*."

48. Importantly, the "*Investment Strategy*" was the following:

> *"The Cell's strategy to seek out and benefit from arbitrage opportunities, combining physical commodity trading, both hard and soft commodities. Exchange traded commodity futures are also traded through an automated commodity futures trading system. These investments may be acquired directly, via special purpose vehicles, investment companies, and other mutual funds. This system enhances diversification and gives greater liquidity in certain market conditions. Physical Commodities trading is the primary focus within the overall strategy. Utilising years of experience and excellent local and government level connections coupled with a stringent risk management methodology to control specific risk, the Kijani model is uniquely positioned to exploit the highly profitable arbitrage opportunities that exist in this specialised field. The automated system takes daily trading positions in a basket of commodities in the managed futures markets. Rigorous controls and stop loss limits manage investment risk. The combined strategy trading both physical and exchanged traded futures enables the cell to make gains in rising and falling markets and remain fundamentally liquid at all times. Whilst there are no explicit capital guarantees, there are high levels of capital protection as a result of strict trading criteria and Lloyds of London insurance on physical commodities."*

49. Mr Cruz highlighted how the investment strategy was that the cells would remain "*fundamentally liquid at all times*".

50. In his Defence, Mr Fagan neither admits nor denies the contents of the Cell Appendix. He asserts that these are outside of his knowledge. Consequently, *Issue 6* in the List of Issues is the following: Was the loan to KRL under the Loan Agreement contrary to the Cell Appendices (for all four funds) and, if so, what is the relevance of this to the obligations of Mr Fagan as director?

51. In Mr Fagan's witness statement at paragraph 32, he says:

> *"We were advised that a special purpose vehicle ('SPV') would be required below KCF. KCF would then send investment funds to that SPV and the commodity trading would take place in the name of that SPV. We in turn advised that KRL was a Gibraltar company with bank accounts and insurance in place for commodity trading."*

Mr Cruz submitted that this evidences that Mr Fagan knew what he had to do with the monies advanced. KRL had to trade in hard and soft commodities.

52. Indeed, later on in his witness statement, Mr Fagan clearly refers to his understanding of what the Investment Strategy was and asserts that investments were made in compliance with the Cell Appendices. For example, at paragraph 138, Mr Fagan says the following in relation to KTR Ltd, a company through which Mr Fagan says he provided day-to-day management and investment advice to KRL:

> *"KTR complied with the cell appendix by ensuring investments were always related to physical commodities, whether that was direct trading of physical commodities, providing commodity finance through SPVs or investing in public companies whose business was physical commodity trading…"*

I therefore fail to understand why Mr Fagan pleads that the contents of the Cell Appendices were outside of his knowledge.

53. At paragraph 136 of his witness statement, Mr Fagan says:

> "*Further, the cell appendix did not have a section entitled 'Investment Restrictions'. Therefore, whilst there was a strategy highlighting certain trades, the cell appendix did not prohibit any particular transactions and allowed for up to 100% exposure in either 'global commodities' or 'derivatives'."*

54. I agree with counsel for the liquidators. The fact that transactions are not expressly prohibited cannot mean that they are therefore permissible. Investments had to come within the type of investments contemplated in the offering documents. Otherwise, investors were being misled. As will be seen, the investments, or purported investments, made by KRL cannot be said to fall within the Kijani Funds' investment strategy.

The Loan Agreement

55. The Loan Agreement was made on the 4 December 2011 between the "*Kijani Commodity Fund being a segregated cell of the Four Elements*

PCC" (which is described as the "*Lender*") on the one part and KRL (described as the "*Borrower*") on the other. It was signed by Mr Fagan on behalf of KRL (he actually signs every page of the document). It recites that the Kijani Funds has agreed to provide KRL with "*an unsecured loan facility*".

56. A number of its terms are particularly relevant to the claims. The first is clause 2. This provides that the Kijani Funds shall lend to KRL such amounts as may be requested by KRL from time to time. There is no apparent limitation to the amounts that can be lent/borrowed.

57. The purpose of the loan is set out at paragraphs 3.1 and 3.2. These say as follows:

> "*3.1 The Borrower shall use all money borrowed under this Agreement in accordance with the Investment Strategy and Policy and the Investment Restrictions sections of the Cell Appendix of Kijani Commodity Fund, as may be amended from time to time.*
>
> *3.2 The Lender is not obliged to monitor or verify how the Loan Amount advanced under this agreement is used*."

58. Returning to *Issue 6* which has been discussed in the previous section, paragraph 3.1 of the Loan Agreement makes the position absolutely clear. KRL was to use the monies loaned by the Kijani Funds in accordance with the investment strategy of the Cell Appendix. Mr Fagan executed the Loan Agreement on behalf of KRL. It is therefore not credible for Mr Fagan to plead in his Defence that the investment strategy was outside of his knowledge.

59. Clause 6 of the Loan Agreement deals with the interest payable by KRL. Interest is to be calculated in accordance with the provisions of one of the Schedules to the Loan Agreement and is said to accrue daily. Then at paragraph 6.3 the following is provided:

> *"6.3 In the event that the Borrower suffers an overall loss at any time in relation to its investments the Loan Amount repayable to the Lender at that time shall be reduced to the value of such investments and no interest on such amounts shall be payable."*

60. Repayment of the monies is dealt with in clause 8. This says that the loan amount and any interest shall be paid on five days' notice being given. In the case of an event of default, the Kijani Funds were entitled to give notice of the default and the loan and accrued interest were to be repaid within three days (clause 10). In his opening, Mr Cruz suggested that the short five-day period for repayment supports the proposition that the investments were to be fundamentally liquid. It is a sensible suggestion.

61. In terms of applicable law and jurisdiction, this is the law and courts of Mauritius, as provided for in clause 17:

> "*17 .1 This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by, and construed in accordance with the law of Mauritius.*
>
> *17.2 The parties to this agreement irrevocably agree that the courts of Mauritius shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).*"

62. Clause 18 provides that the Loan Agreement and any drawdown of funds is subject to KRL providing the following within 30 days of drawdown:

> "*A Pledge of the investments undertaken by the Borrower in favour of the Lender equal to the Loan Amount (subject to clause 6.3 of this Agreement) reduced to writing in the form of a Pledge Agreement and executed by the Parties*."

63. Mr Fagan and Mr Charles Langton (a former director of KRL) signed a Pledge dated 5 December 2011. The operative part of it reads as follows:

> "*We being the Directors of the Company hereby acknowledge that pursuant to Clause 18 of the Loan Agreement all the investments held by the Company have been pledged to and held as if registered in the name of the Lender*."

64. At paragraph 34C of his Defence Mr Fagan says that:

> *"this meant that the Kijani Fund's rights against KRL (if any) for any losses and/or for recoupment of monies advanced pursuant to the KRL Loan Agreement were to be enforced vis-à-vis the assets pledged pursuant to clause 18 thereof"*

This is *Issue 9*. Were the Kijani Funds' rights against KRL limited to the assets pledged under the Loan Agreement? Mr Lewis submitted that the only reading of clause 18 is that the Kijani Funds were entitled to enforce the loan amount against the assets that were pledged. I agree that clause 18 does not limit the amounts that can be recovered by the Kijani Funds from KRL. What it does is require a pledge of the investments made by KRL. The value of such pledge is irrelevant to whether or not the full loan amount is recoverable from KRL. In any event, the clause also contemplates that the security would be "*equal to the loan amount*".

65. In a letter addressed to the directors of KRL and dated the 4 June 2015, Mr Conway, writing as joint controller of Brighton, demanded repayment by KRL of the monies loaned under the Loan Agreement. The liquidators' case is that there have been no or no material repayments of either capital or interest by KRL of the monies loaned by the Kijani Funds. Furthermore, that there are no assets in the liquidation which mean that, in the absence of this or any other claim being successful, it is unlikely that any meaningful repayment will be made.

66. *Issue 10* is: Are any sums due from KRL under the Loan Agreement? Mr Fagan expressly denies this in paragraph 38 of his Defence. Presumably, this is because, as set out above in the Defence summary, Mr Fagan is of the view that the loan was a non-recourse loan, that KRL's liabilities were limited to the assets pledged, and/or that KRL's liabilities were extinguished on the transfer of its shares to Brighton. I have already dismissed the contention on the pledge, and for reasons that will follow later in this judgment, I dismiss the other two contentions as well. In my judgment, the sums loaned to KRL under the Loan Agreement are due to Brighton.

67. In any event, Mr Lewis submitted that the Court should have regard to the joint report by the experts on Mauritian Law which shows that the experts agreed that if the Loan Agreement was found to be null and void, KRL would nevertheless remain liable to repay the sums borrowed. This would be either by way of restitution or under the terms of the individual loans under which payments were made by the Kijani Funds to KRL. I shall return to this.

68. Mr Lavarello's evidence is that the Kijani Funds paid $85,833,401.68 (approximately £53.7 million) to KRL between December 2011 and March 2015. £3.1 million was paid to KRL's Jyske Bank Gibraltar account and £50.6 million was paid to KRL's NatWest Gibraltar account. In addition, the Kijani Funds paid £3.6 million to KTR. This too was controlled and owned by Mr Fagan and Mr Hooper. KTR has not been placed into liquidation. None of the monies advanced to KRL have been repaid.

Kijani Resources Limited (KRL)

69. KRL is a Gibraltar company which received a substantial proportion of the funds invested in the Kijani Funds, ostensibly for the purpose of effecting investments on behalf of the Kijani Funds. KRL was an unregulated company and was not authorised by the GFSC to carry out investment business. At paragraph 78 of his statement, Mr Lavarello says the following:

> *"In order to market financial products to Retail Investors across the European Union, including Gibraltar, an entity is required to obtain the relevant licences and seek prior approval from the GFSC. KRL (and its promoters) circumvented this requirement by establishing an offshore distribution channel via Four Elements and the Kijani Funds in Mauritius and calling it a loan."*

70. As I have just referred to above, Mr Lavarello's analysis of the financial records shows that approximately $85.8 million was received by KRL from the Kijani Funds. At paragraph 264 of his statement, Mr Lavarello sets out a summary of KRL's account movements. Mr Lavarello says:

> "*Of this, almost the entire amount was paid to Fagan, Hooper and other directors appointed by them, including their families, other*

> *companies controlled by them and in the payment of personal expenses, including entertainment, yachts and holidays to fund their luxury lifestyle*."

71. He then sets out the summary of most of the payments made out by KRL in table form which I now reproduce:

Beneficiaries	**USD**	**GBP equiv.**
ALF BVI	42.2 million	26.3 million
Kijani Ghana	21.5 million	13.7 million
Mr Fagan	1.7 million	1.1 million
Mr Hooper	1.6 million	1.0 million
Hierons and Southall	7.4 million	4.6 million
Kijani Suriname	1.5 million	1.0 million
Ratio	2.6 million	1.6 million
Other directors	0.7 million	0.5 million
Saxo Bank	3.0 million	1.8 million
Personal expenses	0.3 million	0.2 million
Silex	0.2 million	0.1 million
Total	**82.7 million**	**51.9 million**

72. The principal beneficiaries of the monies received by KRL were the following: ALF Capital Management Limited ("ALF"), a British Virgin Islands company, received $42,085,977.35. I discuss ALF at paragraphs 123 to 132 of this judgment. Mr Lavarello's evidence was that there was no obvious economic benefit to KRL for the payments made to ALF. Kijani Resources Ghana Limited ("Kijani Ghana"), a Ghanaian company, received $21,305,332.42. (This sum includes payments made directly to Kijani Ghana and payments made to third parties on Kijani Ghana's behalf.) Again, Mr Lavarello's evidence was that there is no known economic benefit to KRL for these payments. I shall say more about Kijani Ghana at paragraphs 133 and 134. City Forex received $8,620,692.86. Most of these monies were paid out to Mr Fagan, Mr Hooper and others for what Mr Lavarello termed "*non-business purposes*". Hierons LLP client account received $6,021,739.80. (Hierons LLP was a UK law firm that provided legal

services to KRL.) Mr Lavarello's evidence at paragraph 240(d) of his statement is that these monies related to "*costs incurred in creating the complex network of related party entities in a wide variety of jurisdictions through which investor funds were dissipated*". Kijani Suriname received $1,475,000.00. Mr Lavarello's evidence is that this was a branch of KRL in Suriname but that they have very little information on its activities. The sum of $2,967,300.00 was transferred to Saxo Bank, but that money was no longer in the account when the liquidators investigated. Both Mr Fagan and Mr Hooper were signatories to the Saxo Bank account.

73. Ms Billington's evidence was that when she started working for Mr Fagan and up to September 2013, payments out of KRL were made by Corinthian Trust Company Ltd ("Corinthian") who provided company management services to KRL, Ratio and Mr Fagan's other companies. She would instruct Corinthian to make payments at the direction of Mr Fagan or Mr Hooper. She was later added as a signatory to the bank accounts and was able to effect the payments herself. Ms Billington repeated a number of times that payments were made only on instructions. She would be instructed by both Mr Fagan and Mr Hooper, but when the latter did so, she had to seek approval from Mr Fagan. Mr Fagan was in ultimate control of both KRL and Ratio.

74. Mr Lavarello estimated that around 80% of the payments by Corinthian were made at Mr Fagan's request. On occasions, when a request came from Mr Hooper, Corinthian would seek Mr Fagan's authority.

75. In 2014, Ms Billington was given the title of Financial Controller, but according to her, this was simply to facilitate communications with the banks on Mr Fagan's behalf. She was also made a director of Ratio for the same reason. She however still acted under Mr Fagan's directions. She was not involved in any investment decisions and was not in any of the meetings with potential investors.

76. In his witness statement, Mr Fagan paints a different picture of Ms Billington. At paragraph 73, Mr Fagan suggests that she had a more significant role. He says:

> *"She was party to every payment made, and she always gave her opinion. However, her monthly management accounts were often late and lacked the accuracy and clarity I would expect. There was also a somewhat relaxed, even careless approach to bank transfers and payments. I regularly found it necessary to challenge her on specific transactions during her time with the companies."*

77. Later at paragraph 77 he says:

> *"…whilst she was not responsible for sourcing potential investments, she did offer opinions on investments that were sourced, based upon other similar types of investments and performance. On a regular basis she would say, 'Guy and Charles [Langton] want to buy more timber, but we have lots of timber and I'm waiting for cash'. I would tell her to tell them that we didn't need any more of that class of investment. In this way she would flag an issue to me and latterly to Mr Hooper, having already formed an initial view. In this way, she was very much part of the decision-making process. As 'Financial Controller' of KRL or 'Financial Director' of Ratio, Mrs Billington was also involved (with Mr Southall) in contract negotiations when this was necessary for finance deals or other investments."*

78. On a balance of probabilities, I find that Ms Billington made or requested payments to be made only when instructed to do so by Mr Fagan and/or Mr Hooper. In reaching this conclusion, I take account of the fact that this is the position that she has maintained throughout, including at the time when she was still 'aligned' with Mr Fagan.

79. By paragraph 8 of his Defence, Mr Fagan denies that he was a direct or indirect beneficial owner of KRL. The liquidators case is that he was, even if it is not strictly relevant to the claims because he was undoubtedly a director of KRL and therefore in control of the company. In any event, *Issue 2* is the following: Was Mr Fagan a direct or indirect beneficial owner of KRL?

80. The evidence of Mr Lavarello, which is based on an analysis of documentary evidence such as bank account opening forms, Annual Returns for the company etc., is the following. From the 30 September 2010, Mr Fagan owned 50% of the shares in Ratio. From the 15 June 2012, he owned 100% of the shares in Ratio. Thereafter, as from the 18 February 2014, Mr Fagan was a 50% indirect owner of Ratio through his family trust, Grand Harbour Trustees Ltd. All this is relevant because during part of the period, Ratio owned shares in KRL. From the 21 December 2010, Ratio owned 25% of KRL's share and Mr Fagan was therefore a 12.5% indirect beneficial owner. From the 4 January 2011, Ratio owned 50% of the shares in KRL and therefore Mr Fagan was a 25% indirect beneficial owner. However, from the 24 November 2011 the position changed. Mr Fagan became the 50% indirect beneficial owner of KRL through his ownership of Baily Holdings Management Limited. I accept Mr Lavarello's evidence and find that Mr Fagan was indeed the direct or indirect owner of KRL at all material times.

81. In paragraph 145 of his statement, Mr Lavarello says that KRL acted as if it was an investment fund and prepared Net Asset Valuation reports ("NAVs"). According to Mr Lavarello, NAV reports are completed for the purposes of investor subscription and redemptions. As is apparent from the term itself, a NAV will provide a snapshot of what a company's assets are worth at any given point in time. The liquidators obtained a number of NAV reports for KRL with dates ranging from the 31 December 2012 to the 8 May 2015. At paragraphs 147 and 148 of his statement Mr Lavarello says the following:

> *"147. [The NAVs] seem to show an increase of at least $1 million per month, however from March 2015, the increase was about $1 million per week - which is not only unlikely given the KRL position, but as my analysis of the movements of funds (discussed below) will show, the values of certain investments that were purportedly increasing were in fact falsified and manipulated, particularly between 2012 to 2015.*
>
> *148. I can therefore say that from shortly after inception, and certainly from 2012 onwards, the purported investments reported in*

KRL's NAVs did not correlate to the reality of the cash movements recorded in the bank statements."

82. The last NAV which is available to the liquidators and which is dated the 8 May 2015 was prepared some six weeks before the appointment of the liquidators. The total net asset value of KRL is expressed to be $136,139,073.43.

83. On the 21 July 2015, Mr Lavarello wrote to Mr Fagan enclosing a notice to the directors of KRL dated the 19 June 2015 requesting a submission of a Statement of Affairs as required by section 240 of the Act. A Statement of Affairs was then prepared by Mr Fagan. Although it is dated the 29 July 2015, the asset values are stated as at the 29 May 2015. There is therefore a three-week time gap between the last NAV and the point in time the Statement of Affairs relates to. In the Statement of Affairs, Mr Fagan states that KRL had assets with a book value of $207,527,468.62, liabilities of $82,032,698.40 and creditors amounting to $122,859.27. This obviously contrasts with the NAV of the 8 May 2015. At paragraph 154 of his statement, Mr Lavarello compares the main asset values in both of these documents and sets these out in tabular format:

Assets	**Last NAV**	**Statement of Affairs**
ALF AG	30,916,446	-
Falcon Bank (Eligere)	-	51,547,546
Beaufort Securities (Eligere and EMM)	-	121,218,202
Eligere / Global Swietenia / Suriname	72,702,511	-
Saxo Bank (Teyuteme and EMM)	6,131,891	22,406,358
Teyuteme	14,250,000	-
Silex Oil	2,500,821	2,534,821
Ratio Sustainability	993,771	993,771
Balrath & Straffan	1,202,828	1,202,828
Pure Ocean Aqua Culture (Highland Trout)	3,642,696	3,642,696
RAM / Kijani Ghana	3,536,347	3,536,347
Brighton	-	293,930

Other debtors	35,930	35,929
Cash at bank	225,832	115,041
Totals in USD	**$136,139,073**	**$207,527,469**

84. As can be seen, there are purported assets that coincide in value on each of the documents, but there are others that are either only listed on one, or which have different values.

85. In relation to the NAVs, Ms Billington explains in her witness statement that she was tasked with preparing these although she had no previous experience in asset valuation. She was involved by Mr Fagan in this in May or June 2013. She was given a spreadsheet and told to update it with figures that she was provided with. At paragraph 20 of her statement she says that at first the information on bank balances was provided by Corinthian but she later had access to the accounts herself. She also received share prices of the various companies KRL was investing in from Mr Hooper. Ms Billington said that it was Mr Fagan alone who was responsible for the details of the investments made by KRL and which were entered into the NAVs. The NAVs were sent on a weekly basis to David Cosgrove of Belvedere in Mauritius.

86. For his part, Mr Fagan also says that Ms Billington was involved in the production of the NAVs. In particular, he refers to the outsourcing of the valuations to Balrath. Mr Fagan asserts that Ms Billington worked for Balrath and assisted in the valuation of assets belonging to the Kijani Funds.

87. It seems to me that I do not have to resolve whether Ms Billington had a more significant role in the preparation of the NAVs than that which she was admitting to. Ultimately, it was Mr Fagan who was the principal behind KRL and who was responsible for the NAVs. The evidence shows that these were grossly overstated and false. Mr Fagan would have known that.

88. Significantly, of the $207 million in assets reported by Mr Fagan in the Statement of Affairs for KRL, the liquidators have only been able to realise

the sum of $1,057,348. At paragraph 160 of his statement, Mr Lavarello says:

> "*Therefore, with the exception of cash at bank and the Highland Trout loan, a relatively minor investment which was sold for $1 million, the other assets recorded on the KRL balance sheet have realised nothing in the liquidation estate. Following our investigation and a review of the KRL operations and asset base, I have determined that the KRL balance sheet has little to no substance. Where I have traced payments and the movement of KRL monies to these entities, it is evident that they have subsequently been dissipated and there are no material tangible assets available to pursue*."

89. He then draws the following conclusions at paragraphs 161 to 164:

> *"161. Our analysis of the "assets" stated in the NAVs is that the valuations applied by KRL in their NAVs were significantly inflated...*
>
> *162. Further, upon investigation of the purported "assets" of KRL, it was evident that many of the companies listed on the NAV were associated with KRL and had a degree of overlap in terms of directorship, shareholders, management or shadow management. In fact, most of these were companies controlled by Fagan, Hooper, Redford or other related parties.*
>
> *163. All of these associated companies which were listed as "investments" on the NAV report consisted almost entirely of shell companies with little to no underlying value. I have been and remain of the opinion that KRL's investments in these companies were merely a mechanism to enable the Respondents to provide the auditors of KRL and auditors and investors of the Kijani Funds with these inflated NAVs based on inflated asset values at the level of KRL. Fraudulent investments in ALF; Eligere / Global Swietenia; Teyuteme and EMM (LP Hill) amongst others, added to the illusion of a healthy fund, making substantial returns on its investments. This further enabled KRL to attract new investors...*
>
> *164.... Fagan, Hooper and Redford would utilise the funds paid by Kijani Funds to KRL into companies controlled by them for their personal purposes with no or no adequate benefit to KRL and thus the investors of the Kijani Funds..."*

90. Mr Lavarello's evidence was that KRL was insolvent from very early on when the first payment went out. That first payment reduced the value of KRL. Although of course it would be right for an investment company to

incur costs and make its profits, first and foremost it would be expected to trade. Mr Lavarello pointed out that profits have to outweigh the costs of running the company. As KRL did not trade, it was insolvent.

91. At paragraph 76 of his principal statement, Mr Lavarello draws the following conclusion:

> *"From our investigations …, it is now clear to the [liquidators] that KRL was not a genuine investment entity but a mechanism to dissipate Kijani Funds investors' monies through multiple layers of related entities with little or no real substance."*

92. Having considered the evidence presented by the liquidators, I conclude that this is the only reasonable inference that can be drawn. (I will set out the liquidators' evidence on the main entities referred to in the NAV and the Statement of Affairs later in this judgment.)

Ratio Limited (Ratio)

93. Mr Fagan was appointed as a director of Ratio on the 30 September 2010. Was he a direct or indirect beneficial owner of this company? This is *Issue 1*. At paragraph 8 of his Defence Mr Fagan says, "*Specifically, Mr Fagan denies the matters alleged at 6(3) and 6(4) and the Applicants are put to strict proof of the same*." At paragraph 6(3) of the Particulars of Claim the liquidators had pleaded that he was a direct beneficial owner of Ratio from the 30 September 2010 to the 13 February 2014 and an indirect beneficial owner thereafter.

94. So what is the evidence? In a NatWest bank account opening form dated the 6 October 2010, Mr Fagan is set out as a 50% shareholder of Ratio. The form is signed by him. This shareholding is also confirmed in the company's Annual Return for the period ending 30 November 2011. However, in the Annual Return for the period ending 30 November 2014, Mr Fagan's shares are said to have been transferred to Grand Harbour Trustees Limited, a Maltese company. In a chart obtained from Corinthian, and which is exhibited by Mr Lavarello, Grand Harbour Trustees Limited is shown as

holding the shares in Ratio on behalf of the Fagan Family Trust. Mr Fagan is listed as a beneficiary of that trust.

95. Indeed, at paragraph 229 of his witness statement Mr Fagan says the following which runs counter to his pleaded Defence:

> "*In 2013, [Corinthian] introduced us to a Malta-based lawyer, Lee Berger. Mr Hooper and I set up Malta family trusts to hold our shares in Ratio. My trust was set up in 2013, and Mr Hooper's in February 2014; he was just a little slower with his paperwork*."

96. There is no doubt that Mr Fagan was a direct, and at times an indirect, beneficial owner of Ratio. The denial in the Defence simply adds fuel to the assertion that he is a dishonest individual.

97. At paragraph 47 of the Defence, Mr Fagan says that the statutory demand served by the liquidators on the 15 February 2016 on Ratio related to amounts which were foreign exchange transactions. Mr Fagan denies that the monies advanced by KRL to Ratio were loans. Mr Lavarello explained in evidence that they had tried numerous times to elicit information from Mr Fagan and Mr Hooper to no avail. Mr Lavarello pointed to how Mr Fagan contacted the liquidators whenever it suited him – for example when he accused Mr Lavarello of making defamatory statements, but it was not possible for contact to be made the other way round.

98. At various points in time, Ratio held a number of bank accounts with NatWest bank. The principal one according to Mr Lavarello was account number ending 6858. At paragraph 280 of his statement, Mr Lavarello says that net receipts of £7,022,610.98 were received into this account. At paragraph 281, he explains that 81% of these monies were received from ALF, KRL, the Kijani Funds directly and KTR. He concludes that the majority of this money was "*likely directly and indirectly derived from the Kijani Funds*".

99. At paragraph 283, Mr Lavarello says that a total of £6,944,507.71 was paid out from the 6858 account. The principal beneficiaries are set out in the following table:

Payments from account ending 6858	**GBP**
Directors, family and related companies	2,336,682.82
Entertainment and travel expenses	1,714,768.20
Investments with stockbrokers	320,354.88
Ratio property at Cannon Lane	490,000.00
Office costs and legal fees	757,395.43
Silex payments and costs	1,008,493.43
Charges, forex and unidentified payments	316,812.95
Total	**£6,944,507.71**

100. At paragraphs 288 to 290 Mr Lavarello sets out his conclusions on the Ratio monies:

> *"288. Over £7 million of the funds received came from KRL either directly or through other related companies (including ALF BVI). Of this amount, over £5 million was paid to Fagan, Hooper and other directors appointed by them, including their families, other companies controlled by them (including £1 million to Silex) and in luxury goods, entertainment, yachts and holidays, most of which was paid between August 2012 and April 2015, a period of only two years and eight months.*
>
> *289. The remaining £2 million was paid in legal fees, rent, salaries and office overheads as part of the elaborate fraud and deception they were portraying to the outside world of being a genuine investment business.*
>
> *290. Therefore, I can confirm that very little genuine trading (sic) through the Ratio bank accounts (if any at all)."*

101. The liquidators first sought a statement of affairs from Ratio's directors on the 1 June 2016. However, it was not until the 19 March 2018 that, Governor's Street Chambers, acting on behalf of Mr Fagan, wrote to the liquidators' solicitors enclosing a draft Statement of Affairs of Ratio. The solicitors however said that due to Mr Fagan not having access to the financial records of the company: " *[Mr Fagan] and his former co-directors were not well placed to draw up a statement of affairs, and still less to vouch for the accuracy and completeness of the information contained*." Be that as

it may, the draft statement of affairs set out Ratio's assets at £4,354,090 and its liabilities at £1,453,229. The list of assets included the Motor Yacht Ratio valued at £2,916,667; the Motor Yacht Whatever valued at £139,452; and the Cannon Lane property valued at £505,564. In relation to these three specific assets, the liquidators made the following realisations: £344,374 for the MY Ratio; £92,000 for the MY Whatever; and £529,135.37 for the Cannon Lane property. According to Mr Lavarello, none of the other assets listed in the draft Statement of Affairs had any realisable value – save for the cash at bank.

102. In relation to the motor yachts, Mr Lavarello's evidence is that in late March 2016 both vessels had been moved to Marina Smir in Morocco. (This was one month after the presentation of the statutory demand but before the hearing placing Ratio into liquidation.) M/Y Ratio was in due course recovered from Morocco by the liquidators. M/Y Whatever had been moved to Estepona in Spain. The liquidators recovered it from there.

103. *Issue 12*: From the sums paid to KRL under the Loan Agreement were payments or loans made to Ratio of £51,500.00, €1,112,824.28 and $374,525.07 by KRL, or did these sums relate to Foreign Exchange transactions? The significance of these particular sums are that they were the sums relied on by the liquidators when they applied to place Ratio into liquidation.

104. At paragraph 47 of his Defence, Mr Fagan says:

> *"On 15 February 2016, the Liquidators of KRL made a statutory demand to [Ratio], for £51,500, 1,112,894.2 euros and USD 374,525.07. The amounts in question related to Foreign Exchange Transactions between the companies, which the Liquidators of KRL would and/or should have known from the bank statements and records in their possession. It is denied that they were loans from KRL to [Ratio]."*

105. In his witness statement, Mr Fagan goes beyond what was pleaded and at paragraph 262 says that these monies "*actually related to foreign*

exchange payments on behalf of KRL, consulting fees and payments due or already paid on behalf of KRL."

106. The liquidators' response to this is that Ratio did not challenge the statutory demand on substantive grounds and simply argued that service had been invalid. Furthermore, the liquidators say there is no evidence that these amounts related to foreign exchange transactions save for the assertion made by Mr Fagan in his witness statement.

107. The difficulty with the first submission is that an application to set aside a statutory demand has to be made within 21 days. The Court does not have the power to extend that time – see section 142 of the Act. In circumstances were Ratio was saying that they had not been properly served (and the demand had not come to their attention) they had to deal with the validity of service first. The liquidators were of course successful in showing that service had been properly effected but the result was that no application to set aside the demand could have been made.

108. In any event, I do agree that beyond the bare assertion by Mr Fagan that these payments were foreign exchange transactions there is no other evidence of this. Consequently, I cannot be satisfied that these were foreign exchange transactions.

The Four Elements and Brighton

109. On the 20 March 2015, the MFSC withdrew authorisation for the Four Elements to act as a Collective Investment Scheme under the relevant Mauritian regulations. The MFSC issued a Communique on the 27 March 2015 detailing how enforcement action had been taken in 2014 and in particular how on the 23 May 2014, the Four Elements had been prohibited from accepting new business and had been directed to:

> *"take remedial actions within a specified timeframe, pursuant to Section 46 (2) (b) and (c) of the Financial Services Act 2007 for breaches under the Securities Act 2005, the Protected Cell Companies Act 1999 and the Securities (Collective Investment*

> *Schemes Act and Closed-End Funds) Regulations 2008, amongst others.*"

Following investigations and inspections, authorisation had been withdrawn on the 20 March 2015.

110. The Communique also refers to the *Offshore Alert* article. It says:

> "*The article published in "Offshore Alert" entitled "EXPOSED: Belvedere Management's massive criminal enterprise" dated 17 March 2015 reflects the regulatory actions taken by regulators worldwide, including FSC Mauritius. The FSC Mauritius reiterates that it is closely monitoring the matter and will take necessary measures to safeguard the good repute of the jurisdiction and the interest of the public/investors*."

111. On the 28 August 2016, the Four Elements was placed into liquidation by the MFSC.

112. Brighton was incorporated on the 15 May 2014, shortly before the MSFC issued the direction on the 23 May 2014. According to Mr Lavarello, on or around November 2014, the Kijani Funds were transferred from the Four Elements to Brighton. The liquidators' case is that this was done to escape the scrutiny of the MSFC. In evidence, Mr Lavarello explained that CIMA welcomed the fund despite them having concerns about it. According to Mr Lavarello, it is common for regulators to do this. They try and get control to see if anything can be salvaged. Mr Lavarello likened it to a financial institution who suspects that funds may be the proceeds of crime. It accepts the money and then freezes it. To do otherwise risks enabling the proceeds to be laundered elsewhere.

113. At paragraphs 109 and 110 of his statement, Mr Lavarello says the following:

> *"109. Between 19 March 2015 and 16 April 2015, there were various exchanges between CIMA and Brighton through its attorneys. Brighton's responses did not assuage CIMA's significant concerns regarding the operations of Brighton. CIMA was particularly concerned that the independent directors of Brighton had resigned, redemptions had been suspended, that there were*

> *allegations of fraud involving the primary Sponsor (Belvedere) and the MFSC had taken regulatory action against Belvedere. Accordingly, CIMA decided that there was a need for an independent person to conduct a comprehensive review of Brighton's affairs and to determine whether its operations were being carried out in a manner prejudicial to investors and creditors.*
>
> *110. On 30 April 2015, Simon Conway and David Walker of PwC Corporate Finance & Recovery (Cayman) Limited ("PwC") were authorised by the CIMA to perform a forensic examination of Brighton and produce a report on their findings"*

114. A report was produced on the 21 May 2015 by David Walker and Mr Conway. At section 6, the authors set out their "*Summary and Conclusions*". They say:

> *"As summarised below, and discussed in detail in this Report, in our view the Fund's management:*
>
> - *Misrepresented the structure and purpose of the Kijani Funds to investors;*
> - *Did not invest in accordance with the Kijani Funds' investment criteria, with a potentially significant adverse impact for investors;*
> - *Relied on misleading valuation methodologies to value the Fund's key assets with a resulting significant overvaluation of the Fund's NAV;*
> - *Recovered no material cash returns on the sole investment of the Kijani Funds (i.e. the KRL Loan), and therefore met redemption requests through the proceeds of new subscriptions; and*
> - *Made purported currency trading related payments of approximately US$2m to a substantial investor in the Fund and a possible affiliate of Belvedere.*
>
> *In our view, the Fund's activities outlined above represent potential indicators of a fraudulent scheme*."

115. On the 1 June 2015, Mr Conway and Mr Walker were appointed joint controllers of Brighton by the CIMA. They demanded repayment by KRL of the loan amount of $81,771,238.02 (which the liquidators now say should have been $85,883,401.68) on the 4 June 2015. This was not repaid and KRL was placed into liquidation on the 19 June 2015. Brighton was wound up by Order of the Grand Court of the Cayman Islands on the 6 October 2015.

116. At paragraph 39 of Mr Fagan's Defence, he states:

> "*Mr Fagan avers that the Directors of [Brighton] wrote to KRL on 29 April 2015 requesting the repayment of the loan ($81,769,640.33) under the terms of the original agreement assigned from the [Four Elements]. Accordingly, the shares in KRL and all is assets were transferred to [Brighton]*."

117. The Defence further provides that Brighton resolved on the 22 May 2015 that the monies lent to KRL by the Kijani Funds pursuant to the Loan Agreement had been, in effect, repaid by the transfer of KRL's shares to Brighton.

118. *Issue 11*: Was any debt owed to Brighton pursuant to the Loan Agreement satisfied by the transfer of the shares in KRL to Brighton?

119. The liquidators' answer to this is the following. Firstly, they point out that if the transfer of shares took place on the 22 May 2015 as alleged, then this was immediately before Mr Conway and Mr Walker were appointed joint controllers of Brighton on the 1 June 2015. It would also be after Mr Conway and Mr Walker had been authorised by the CIMA to examine Brighton's affairs – which occurred on the 30 April 2015.

120. Secondly, it is said that in a Resolution dated the 29 April 2015 by the Directors of Brighton in which it was decided to recall the loans made to KRL the following is stated:

> "*…the loans will be repaid in specie with all assets then being held at fund level… The valuation ascribed to the assets to be repaid in specie was US$135,356,655.80 as at 24th April 2015*"

Mr Lewis submitted that this extract shows that the loan was to be paid in the future. I am not sure that this adds anything to the argument because the transfer of shares is said to have taken place subsequently on the 22 May 2015.

121. Thirdly, the liquidators point out that the letter of the 4 June 2015, by which Mr Conway demanded repayment of the loan amounts on behalf

of Brighton was followed by a conversation between Mr Fagan, Mr Hooper and Mr Conway on the 10 June 2015. In that conversation, Mr Fagan did not say that the repayment to Brighton had been effected by the transfer of KRL's shares some weeks earlier. Instead, in the conversation, Mr Fagan was quite clearly proceeding on the basis that KRL had assets and that the loan would be repaid. This was in direct contradiction to what is now being said. For example, the transcript includes the following:

> *"Over a period of time that the fund has evolved the underlying asset has moved into a more equity type base but those equities were always intended to be liquidated on a T60 basis. So we said within 60 days we would be able to return the cash or move the assets back to cash. When the fund moved to the Caymans, I understand that the terms were changed to T30, which means a 30 day liquidity. Again that is not something that is helpful to us but we are not sitting in physical cash trading equities on an exchange that tomorrow we can in effect liquid tomorrow. So in answer to your question, we are not given the end position to send back 130 million tomorrow. However, if you are happy for us to evidence where the investments are and where they will sit, we will be in a position to return those, money I think in full and potentially with additional returns. It is not going to happen, lets say within a five day period."*

This extract clearly shows that KRL's liability to Brighton had not been repaid in specie as is now being alleged.

122. Fourthly, Mr Lewis submitted that the transfer of shares in an insolvent company would not have resulted in a repayment in specie. The repayment would only have been to the extent of the value of the assets transferred. I agree.

ALF Capital Management Limited

123. ALF Capital Management Limited (which I refer to as "ALF" but is referred to by the liquidators as "ALF BVI") is a BVI company incorporated on 7 July 2011. By an agreement made between ALF and KRL dated the 19 December 2011, ALF entered into a "Commission Agreement" with KRL whereby ALF would receive commissions for introducing potential investors to KRL. ALF and Carlby Services Ltd entered into a second agreement on the 1 April 2014. By this agreement, Carlby was engaged to

provide consultancy services to ALF. (Carlby was also owned and controlled by Mr Fagan.) At paragraph 219(d) of his witness statement, Mr Lavarello says:

> "*…I believe that both the agreements mentioned above are in fact sham agreements as no real service was provided by ALF BVI to KRL nor were there any services provided by Carlby to ALF BVI. I believe the view that these were sham arrangements is supported by the commercial incoherence and complete lack of disclosure of the commission structures referenced in the agreements and account opening forms; specifically:*
>
> > *(a) Any investment fund which pays out approximately 51% of its investment capital in the form of commissions for introducing investments could not be viable, particularly in circumstances where only negligible actual investments had ever been made;*
> >
> > *(b) There is a disconnect between whether the service provided by ALF BVI was to introduce investments or investors. If the latter, then the commissions paid to ALF BVI would represent an additional layer of introduction fees paid from Kijani Funds investor monies which were not disclosed by the offshore regulated entities;*
> >
> > *(c) The KRL audited financial statements and NAV reports characterised the monies passed to ALF BVI as representing KRL's main investment position, and there was no disclosure of commission expenses nor the related party nature of the transactions."*

124. According to Mr Lavarello, a total of £26,336,372 ($41,249,904) flowed from KRL to ALF. The sum of £1,145,654.36 was returned to KRL leaving a net amount of approximately £25 million. ALF was therefore the largest recipient of the Kijani Funds monies from KRL. Mr Lavarello's evidence is that ALF held very few, if any, genuine underlying assets. At paragraph 304 of his statement, Mr Lavarello says the following:

> *"Other than to the extent that monies passed through the accounts to other entities that are mentioned in this statement and are controlled by the Respondents, I have not been able to identify any underlying investments owned by ALF BVI and I have received no assistance or information from either of the Respondents to assist me with the recovery of any underlying investments as they might exist. Notwithstanding comments to the contrary, I believe that the payments from KRL to ALF BVI do not represent the purchase of*

> *any equity interest for the benefit of the Kijani Funds and that ALF BVI was used primarily as the vehicle to lay and dissipate monies from KRL, which as I have shown, were further dissipated through numerous related companies' and individual accounts of Fagan, Hooper and their associates."*

125. Mr Fagan denies that he was a director or had any interest in ALF. (This is *Issue 5*.) In the private examination that took place in late 2017, it was put to him by Mr Conway that ALF had been established by him and that he was a director and its owner. Mr Fagan provides the following response at page 19 of the transcript:

> "*Categorically not the case. On oath. Categorically not the case…*"

126. Mr Fagan was then asked why $40 million had been sent to ALF. His reply at page 22 of the transcript was the following:

> *"Well it's to identify and invest in potential commodity activities. And yeah, there would've been some oversight from me, but the, again the, I mean, ALF Capital Management, I'm not a beneficial owner, I'm not an investor, I don't control the bank account. I mean, somebody says to me, we made –"*

He then told the liquidators that it was Corinthian who controlled the company.

127. In his Defence Mr Fagan denies that he was a beneficial owner and director and passes all blame for ALF to others. At paragraph 25 he says:

> *"Mr Fagan has at no time been a beneficial owner of Alf Capital Management Ltd. Mr Fagan became aware in 2019 that the companies' licensed company manager, Corinthian Trust Company Ltd appeared to have been using his personal details to open bank accounts with RBSI for their other clients without Mr Fagan's permission or knowledge."*

128. At paragraph 151 of his witness statement, Mr Fagan says the following:

> "*ALF Capital Management Ltd, BVI - this was an investment special purpose vehicle ('SPV') for KRL to ring-fence certain types of investment and the associated costs. It held cash shares and*

> *performed physical commodity trading activities. It traded in plastic pellets, timber, hardwood and recycled paper. Mrs Billington would have day-to-day understanding and control of the money going out of the associated accounts. Physical trading of commodity assets would have been performed by the Langtons. I cannot now recall who the directors were, although I was not knowingly one of them. I say 'not knowingly' because of well-founded worries about the misuse of my personal details as a result of the action of CTC which I have described below. I am therefore not completely sure what the records would show. Its assets and licences were ultimately migrated to Eligere and Teyuteme Oil*."

129. I agree with the liquidators that Mr Fagan's contentions on not controlling or owning ALF are plainly not true. There is overwhelming documentary evidence which supports the liquidators' case that Mr Fagan was very much in control of ALF and was its beneficial owner. In his closing note, Mr Lewis quite aptly referred to this issue as the *litmus test* of Mr Fagan's dishonesty.

130. In a letter dated the 4 November 2011 addressed to ALF and signed by Mr Fagan, Mr Fagan consents to act as a director of the company "*with immediate effect*". There is then an agreement dated the 19 December 2011 between KRL and ALF whereby ALF was engaged to introduce business to KRL. Mr Fagan signs this agreement on behalf of ALF. In Minutes of a Meeting of ALF held on the 28 February 2012, Mr Fagan signs as Chairman. In Minutes of a Meeting of ALF held on the 30 September 2013, Mr Fagan again signs as Chairman. In those Minutes, it is recorded that the directors of the company resolved to change the signing authorities for ALF's NatWest Gibraltar bank accounts to any one of Mr Fagan, Mr Hooper or Ms Billington. There are other such examples. From these I would highlight a Certificate of Incumbency of ALF issued by Mossack Fonseca of the BVI dated the 8 September 2014 which provides that the directors and shareholders of the company are Mr Fagan and Mr Hooper.

131. On the 5 November 2014, Mr Fagan and Mr Hooper's shares in ALF were transferred to Corinthian. At paragraph 303 of his principal statement, Mr Lavarello says:

> *"On 5 November 2014, after: (a) BDO Mauritius had qualified the audited accounts of Four Elements; and (b) The MFSC had issued a warning stating that they had commenced enforcement action against Four Elements; Fagan and Hooper transferred the entire shareholding in ALF BVI to Corinthian who were holding those shares in trust for the Kijani Funds. The transfer of this shareholding was done for nil consideration. In my opinion, this was an attempt to distance themselves from ALF BVI, despite still controlling the bank accounts and management of ALF BVI through their directorship."*

132. At the hearing, Mr Lavarello recounted a conversation about ALF he had with Philip Cartwright - the individual at Corinthian dealing with Mr Fagan's businesses at the material times. Mr Cartwright had told him that the letters "ALF" were an acronym for "*aggressive little fucker*". Mr Lavarello suggested that this showed Mr Fagan's intent. That the company was set up for the purpose of taking money out of KRL. Whilst I do not doubt that this conversation took place, I do not place any evidential value on what Mr Cartwright is reported to have said.

Kijani Ghana

133. In both the NAV of the 8 May 2015 and the Statement of Affairs of the 29 May 2015, Kijani Ghana was valued at $3,536,347. The financial analysis conducted by Mr Lavarello shows that Kijani Ghana received $21,305,332.42 from KRL. (This sum includes payments made directly to Kijani Ghana and payments made to third parties on Kijani Ghana's behalf.) It was the second largest recipient of KRL's funds. According to the liquidators, there is no known economic benefit to KRL for these payments.

134. Mr Lavarello's evidence was that he had no information on this company, no share register and no minute book. He does however say that KRL paid the sum of $7,001,961.18 to an entity called Bar Purity on behalf of Kijani Ghana. At paragraphs 495 and 496 of his statement he says the following:

> "*495. Bar Purity was a registered gold exporter in Ghana, however in December 2015 three individuals connected to Bar Purity appeared before an Accra Circuit Court on charges of fraud over a*

> *gold scam. The accused were also found to have been threatening their victims…*
>
> *496. Whilst it is unclear as to what investment KRL had in Bar Purity, what this investment is worth, and what happened to the over $7 million paid, it seems unlikely that any of these monies will ever be recovered*."

Silex Oil

135. One of KRL's purported investments set out by Mr Fagan in the Statement of Affairs was 'Silex Oil'. The value attributed to Silex Oil in that document was $2.5 million. It was also listed in KRL's 2014 audited financial statements with a value of $1,838,069. The liquidators identified that a company called Silex Administraciones SL ("Silex Spain") owned a property in Marbella, Spain and an olive oil refinery in Jaen, Spain.

136. From the 22 May 2013 to the 10 November 2015, Ratio owned the shares in Silex Spain. On the 10 November 2015, the shares in Silex Spain were transferred to Silex (UK) PLC ("Silex UK"). William Redford, the fourth respondent in this claim was a director and the majority shareholder of Silex UK, either directly or through companies he owned. The transfer of the shares in Silex Spain from Ratio to Silex UK appears to have been made for no consideration. Mr Lavarello's evidence is that the transfer was effected at a time when "*there was a high level of scrutiny and focus on Brighton, the Kijani Funds and KRL*." At paragraph 356 of his statement Mr Lavarello says the following:

> *"Therefore, considering the timing of Ratio's transfer of its shareholding in Silex UK, the entities and personnel these shareholding was transferred to (many who were either wilful participants in the dissipation of KRL's assets such as Redford and Fortun, whilst some of these shareholders were unaware of the these transfer of shares to them such as Davis whilst other shareholders appeared to be dormant companies which were subsequently struck off or dissolved around the time or shortly after the transfer had taken place such as Amarok and Ark), I verily believe that this was just another attempt by the Respondents and their associates to distance valuable assets from the creditors of KRL and* Ratio."

137. Mr Lavarello's analysis of the banking records shows that KRL, Ratio and ALF made payments of $166,355.96; €1,846,079.60; and £359,103.68 to the Silex companies. This he says evidences that Silex Spain and Silex UK were in fact owned by Ratio.

138. In January 2016, Silex UK listed a bond on the Cyprus Stock Exchange. Its aim was to raise €22.5 million. In the event, around €7 million was raised. However, on the 22 August 2016 the Cyprus Stock Exchange suspended the trading because it was not maintaining "*Nominated Advisor services*", a requirement under the relevant Cypriot laws. Mr Lavarello's evidence was that he had tried to warn the Cypriot Stock Exchange by contacting the Gibraltar police and the GFSC. However, it was reported back to Mr Lavarello that the Stock Exchange were satisfied that Silex UK was not connected to KRL or Ratio because the shares were held by Mr Redford. As soon as the bonds were raised, the liquidators got a call from the agents acting for Silex who informed them that they were concerned about Silex UK's activities because €3.5 million had been taken as commissions. The result of the listing of the bond by Silex UK was that a further €7 million of investors' funds were lost.

139. On the 3 October 2017, Butler J granted a worldwide freezing injunction restraining Mr Redford and others from disposing of any assets belonging to Silex UK and requiring them to provide the liquidators with information on the company, including its assets. On the 30 November 2018, Butler J found Mr Redford to be in contempt for having failed to provide the information required by the 3 October 2017 Order. He was sentenced to 16 months' imprisonment. Mr Redford has not surrendered to serve this sentence.

140. Although the oil refinery was an asset with some value, this was mortgaged to a Spanish company and the monies raised dissipated. Mr Lavarello confirmed that no recovery was made from the Silex companies.

Eligere Investments PLC

141. Eligere Investments PLC ("Eligere") was a UK company incorporated on the 6 March 2013. Eligere took over purported investments made by KRL in the timber trade in Suriname. A number of payments had been made by KRL to an entity named Kijani Suriname. By the 5 September 2014, a net total of $1,475,000 had been made. The investments were then taken over by another related company, Global Swietenia Limited, and subsequently transferred to Eligere.

142. In the NAV calculation for KRL dated the 8 May 2015, Eligere is listed as being worth approximately $72.7 million (a valuation which is expressly stated to have been discounted by 40%). However, Mr Lavarello's evidence is that the company was worthless. At paragraph 459 of his statement, Mr Lavarello sets out the following in relation to Eligere:

> *"So, as of 24 April 2015 the KRL investment (both directly and indirectly through ALF AG) in Eligere was valued at $102,428,965.24. This was the valuation given to a company that was making losses of over £200,000 per annum, had net liabilities of almost £0.5 million, had never traded nor generated any income and had limited to no confirmed assets of any kind."*

And then at paragraph 463, Mr Lavarello says:

> *"On 13 April 2017 Eligere was placed into voluntary liquidation in the UK. The Statement of affairs filed by Eligere's directors confirmed that Eligere never had any genuine assets of substance, despite being valued by KRL's directors at $102,428,965.24. Eligere's liquidation resulted in no realisations."*

Teyuteme Oil PLC

143. Teyuteme Oil PLC ("Teyuteme") was a UK company which was purportedly set up to invest in different elements of oil production in emerging markets worldwide. Mr Lavarello's evidence is that he believes it to have been 100% owned by KRL even though in some documents, KRL is said to only own 50% of its shares.

144. In any case, in KRL's NAV of the 8 May 2015, the value of KRL's interest in Teyuteme is said to be approximately $20 million. However, when the company was placed into liquidation on the 26 July 2017, it was found that it was worthless. It had never traded. At paragraph 530 of his statement, Mr Lavarello refers to the 'Liquidator's Final Account' in the Teyuteme liquidation where the following is stated:

> "*The Company has never traded and its sole activity was the acquisition of West Africa Oil Trading Company Inc ("West African") on 31 October 2014. Non-cash consideration of 1,000 shares of US$1 each in West African Oil were received for 10,000,000 shares of £1 each in the Company. West African has been dormant since acquisition*."

145. Mr Lavarello explained that this was a common way of committing a fraud. Fraudsters create a false value by selling company A to company B for a large sum even though the companies are in fact worthless and do no legitimate trading.

Highland Trout

146. Highland Trout (Proprietary) Ltd was a commercial fish farm in South Africa owned by Pure Ocean Aquaculture SA. The liquidators believe that this was the only genuine investment made by KRL which was still under KRL's control at the time of their appointment.

147. Pursuant to a Loan Agreement dated the 28 October 2014, KRL advanced to Highland Trout a loan of $3.5 million. It is Mr Lavarello's understanding that a proportion of the loan had been repaid but that the sum of approximately $2.5 million in capital and interest was outstanding as at the date of his appointment.

148. On the 17 April 2015 (two months before the liquidators were appointed), KRL's interest in the loan with Highland Trout was purportedly transferred to Eligere on the execution by KRL and Eligere of an "*Amended Agreement*". There is no record of any consideration having been paid by Eligere for the acquisition of the loan. Mr Lavarello's evidence is that this

was simply an attempt by Mr Fagan and his associates to keep an asset out of the liquidators' reach at a time when KRL was clearly hopelessly insolvent. This attempted assignment was challenged by the liquidators who considered that, amongst other things, it was a transaction at an undervalue contrary to the provisions of section 250 of the Act. The liquidators sold KRL's interest in the loan to a third party for $1 million. The funds were then placed in escrow pending an application to this Court for a declaration setting aside the assignment to Eligere. The declaration was granted by Ramagge Prescott J on the 30 August 2017.

Emerging Market Minerals PLC

149. Emerging Market Minerals PLC ("EMM") was a UK company (previously called LP Hill PLC). EMM had two subsidiaries. Its only asset was the goodwill in the two subsidiaries. However, neither of the subsidiaries actually traded. KRL had subscribed for one million shares in EMM for £405,000.

150. In KRL's NAV of the 24 October 2014 the investment in EMM was valued at $3,052,240 and a further $459,580 was said to be held through Saxo Bank. Mr Lavarello however says that there were no such assets. At paragraph 552 of his statement, Mr Lavarello says:

> *"[EMM] was placed into liquidation on 26 June 2017 following a court order brought by a creditors' petition, with A Hannon being appointed as Official Receiver and Liquidator. Once again the liquidator reported that there were no asset realisations and there are no distributions in the liquidation."*

151. Mr Lavarello cited the purported investment in EMM as another example of those behind KRL fictitiously creating valuable assets. Doing this enabled them to perpetuate the wider fraud.

Use of other companies

152. Mr Lavarello's evidence is that Mr Fagan and others used a number of companies for moving the Kijani Funds' monies around in order to make

it difficult for the monies to be traced. At paragraphs 633 and 634 of his statement, Mr Lavarello says:

> *"633. … Most of these companies conducted no real business and I believe their sole purpose was to enable Fagan, Hooper and their associates in extracting monies from the Kijani Funds in the form of false fees and commissions from KRL, Ratio and ALF BVI.*
>
> *634. Furthermore, we have seen that it was common practice for the UBOs of these companies to change, such that the companies and their bank accounts were recycled so that Fagan and Hooper would not have to go through the account opening process which may have resulted in difficult questions being asked by the banks in question. This custom became so commonplace that Corinthian employees asked no questions as to why UBOs were changing, with some companies recorded as having four or five different UBOs in the same year. This led to confusion at Corinthian with some recorded UBOs not matching with the information sent to the banks."*

153. Mr Lavarello also explains in his statement that many of the companies used in the overall fraudulent scheme had similar names. For example, there was Global Swietenia Limited incorporated in Gibraltar and a company with the exact same name incorporated in the BVI. He postulates that this was done to add difficulty to any investigation and tracing of assets. Companies' names were also changed for no apparent purpose and there was significant overlap between the directorships, shareholding and management of the related entities. Again, all of this was said to be designed to add complexity to any tracing exercise.

Mr Fanshawe's expert accounting report

154. Mr Fanshawe first produced a report dated the 26 April 2024. This was said to be a draft report which needed to be updated once Mr Fanshawe was provided with further documents, in particular with Mr Lavarello's "*detailed financial analysis*". He then submitted a final report dated the 11 October 2024. Mr Fanshawe and Mr Lavarello were required to discuss their respective reports and either agree matters or file a joint statement setting out the parts of their evidence which were agreed and those which were not. This did not happen. According to Mr Lavarello, Mr Fanshawe indicated to him that he was awaiting instructions from Mr Fagan.

155. As Mr Fagan did not participate in the final hearing, Mr Fanshawe did not give evidence. Nevertheless, Mr Lewis submitted that the Court should have regard to his report because it shows that he broadly accepted Mr Lavarello's analysis.

156. Section 4 of his report is entitled "*Review of the claim*". At paragraph 4.16 Mr Fanshawe compares his analysis to that undertaken by Mr Lavarello which he then sets out in four sub-paragraphs. In sub-paragraph (a), Mr Fanshawe deals with the payments received by KRL pursuant to the Loan Agreement. He says, "*I have been able to trace monies totalling $78,807,319 compared to $81,771,238 stated in the [Particulars of Claim]*." He then says that he cannot determine why there is a difference but accepts that he may not have had sight of all relevant bank statements. In evidence, Mr Lavarello said that the differences are a result of Mr Fanshawe not having taken into account the payments made to KRL via its Jyske Bank account.

157. At sub-paragraph (b), Mr Fanshawe accepts that the payments made to ALF are "*broadly comparable*". He attributes differences to "*small categorisation differences and/or currency differences*."

158. At sub-paragraph (c), Mr Fanshawe summarises his analysis on payments made by KRL to Ratio. He says that his analysis is "*significantly different*" to that undertaken by Mr Lavarello. He states:

> *"The USD amount of $446,025 is broadly comparable, but I have not been able to identify any of the €1,112,824 or £51,500 amounts referred to. To investigate this further, I would need to review the Applicants' analysis and/or copies of any bank statements that they have relied upon but not disclosed."*

159. The liquidators' response to this is that full particulars are contained in Mr Lavarello's statement and that Mr Fanshawe appears to have based his comment on the figures contained in the Particulars of Claim and not on the updated figures. This seems to be the right response because Mr Fanshawe also says the following at sub-paragraph (c):

> *"The Applicants have provided what appears to be a connected analysis at Exhibit ECL1, but the numbers within that analysis do not appear to match the claim either."*

160. At sub-paragraph (d), Mr Fanshawe deals with the investments or purported investments made by KRL. He says:

> *"Investments in various entities – the claim provides little detail in respect of the realisation of assets/investments, despite the alleged overstatement of same and alleged misapplication of the index monies being fundamental to this matter."*

161. It was submitted on behalf of the liquidators that Mr Fanshawe does not address Mr Lavarello's conclusion that KRL's assets in the Net Asset Valuations (NAVs) were overstated. At paragraph 4.41 of his report, Mr Fanshawe says:

> *"Lavarello 1 goes into significant detail as to why the majority of the assets within the NAV were, in his view, overstated. My view is that each should be considered but, given the volume detail and supporting documents, it will be more efficient to do this within the format of joint discussions and then to each provide concise summaries within the joint statement."*

As has already been observed, no such joint discussion took place. I accept that this was not for Mr Lavarello's want of trying.

162. The point was made on behalf of the liquidators that despite Mr Fanshawe having the benefit of Mr Fagan's instructions; access to all the relevant documentation provided by Mr Lavarello; and Mr Lavarello's conclusions, he does not account for how the monies advanced by the Kijani Funds were employed.

Evidence of Mauritian Law

163. The parties both instructed experts on Mauritian law in relation to the Loan Agreement. The liquidators instructed Yannick Fok of Eversheds Sutherland (Mauritius). He produced a report dated the 29 August 2023, which was subsequently revised on the 26 January 2024. Mr Fagan

instructed Dentons Mauritius LLP, and a report was prepared by Sivakumaren Maredemootoo and Emmanuel Luchmun dated the 11 December 2023. In accordance with directions made by the Court, the experts (Mr Fok and Mr Luchmun) then provided a joint statement on the 6 May 2024 setting out areas of agreement and disagreement. The result was that the experts were in broad agreement as to the issues which are relevant to the claims. Although I gave permission for both to give concurrent evidence at the trial, in light of Mr Fagan's non-attendance, only Mr Fok gave evidence. He did so via video link from his office in Mauritius.

164. In any event, it is instructive to have regard to the joint statement. From the section entitled "*Issues that have been agreed*", I would highlight the following. The experts say that the term 'loan agreement' is a misnomer in this case. The Loan Agreement is a master agreement whose terms would apply to individual loans and would be "*supplemented by the terms specific for each loan*". More significantly, they say that "*there is a strong argument*" that the Loan Agreement was not a legally valid document. They explain their reasons at paragraphs 6.4 to 6.6:

> *"6.4 Under Mauritian law, the rule is that all agreements must meet the condition of 'objet certain'… In relation to a master agreement, an 'objet certain' implies that the amount to be lent and repaid over subsequent agreements must be certain or ascertainable ex-facie the terms of the master agreement….*
>
> *6.5 The laws of Mauritius also provide that agreements must have a 'cause licite'. An obligation without a cause, or with a false cause, or with an unlawful cause, is without effect….*
>
> *6.6 An agreement lacking an 'objet certain' or a 'cause licite' under the laws of Mauritius is null and void…. The borrower would have to return the amounts received from the lender…"*

165. In answer to questions by Mr Lewis, Mr Fok confirmed a number of points. Firstly, that any individual loan payments under a master agreement were subject to the terms of the master agreement. Therefore, the individual payments would all have been subject to clause 3.1 of the Loan Agreement - the provision which set out the purpose of the loans. Mr Fok's opinion was that this provision restricted the use of the Kijani Funds' monies. Mr Fok

also said that until the Loan Agreement was declared void by a Court, it remained in place and valid. More importantly, Mr Fok said that if the Loan Agreement were to be set aside, then KRL would have to return the monies it was loaned. There would have to be restitution.

166. The experts also dealt with the question of the Mauritius choice of law and jurisdiction clauses in the Loan Agreement. *Issue 7* of the list of issues is whether the Mauritius choice of law and jurisdiction clauses in the Loan Agreement apply to this claim and, if so, what are their effect. At paragraph 6.09 of the joint statement the experts say that the provision dealing with choice of law would only apply to a dispute between the parties to the agreement. At paragraph 6.10 they say that the only persons bound by the choice of court provision are the parties to the agreement and expressly state that it would not be applicable to the proceedings before this Court.

167. I agree with Mr Lewis that the jurisdiction provisions in the Loan Agreement cannot apply to these proceedings in Gibraltar. They are proceedings brought by the companies against their former directors. Furthermore, Mr Fagan has submitted to this Court's jurisdiction.

168. The joint statement by the experts in Mauritian law is also relevant to *Issue 8.* Was the Loan Agreement a non-recourse loan, so that the effect of losses made by KRL on investments made using funds from the Loan Agreement was to reduce the amounts repayable by KRL and that no interest would be payable? In Mr Fagan's Defence, the following is pleaded:

> *"34B [The Loan Agreement] was, in effect, a non-recourse loan made by the Kijani Fund to KRL whereby any losses made by KRL on investments made using funds provided pursuant to the KRL Loan Agreement would operate to reduce the amount repayable by KRL, and no interest would be payable therein: see clause 6.3 of the KRL Loan Agreement".*

169. In his witness statement, Mr Fagan addresses this point further. At paragraph 34 he says:

> *"In simple terms, the Loan Agreement was a facility to allow the flow of funds between KCF and KRL without having to draw up resolutions and investment agreements for each payment. It was not a loan as a layperson might think of it. For example, there was no fixed sum to be advanced, no interest rate in percentage terms, no security and no fixed repayment schedule or deadline. Instead, it was effectively a running account credit facility on a nonrecourse basis… KCF could also request the return of some or all of the loaned funds if it so chose on five business days' notice (clause 8). However, as it was 'non-recourse', the repayment terms provided that KRL was only ever obliged to repay the value of the invested funds at the particular time of repayment. If there was a profit, then it would obviously receive the loaned money plus the profit as 'interest'; if the value of the funds had reduced, KRL was only obliged to repay whatever value it had (clause 6.3)."*

170. Clause 6.3 of the Loan Agreement provides as follows:

> *"In the event that the Borrower suffers an overall loss at anytime in relation to its investments the Loan Amount repayable to the Lender at that time shall be reduced to the value of such investments and no interest on such amounts shall be payable."*

171. In the joint statement at paragraph 6.8, the experts say that clause 6.3 "*potentially limits the amount due in the event [KRL] suffers from a loss on its investments*". The simple point was made on behalf of the liquidators that losses have to be incurred in its *investments* and not through theft. I agree that this must be the only possible interpretation.

Mr Fagan's witnesses

172. As I have already stated, Mr Fagan filed witness statements by five persons in support of his defence. On the 6 November 2024, I heard an application made on behalf of Mr Fagan for these witnesses to give their evidence remotely. For reasons which I gave in an ex tempore ruling, I refused permission. Ultimately, that did not matter as Mr Fagan has not himself attended the hearing. Nevertheless, I will go through what these witnesses say.

173. David Cosgrove is a resident of South Africa. He was a director of the Four Elements and of Belvedere, the company that administered the

Four Elements. According to Mr Lavarello, Mr Cosgrove was "*the primary promotor behind the establishment and marketing of the Kijani Funds*."

174. Mr Cosgrove explains in his witness statement that the loan arrangement between the Kijani Funds and KRL was in place as the "*easiest mechanism to invest funds into KRL*". (Mr Lavarello in his evidence confirmed that the loan arrangement meant that KRL did not have to be licensed by the GFSC as it was not receiving investors' funds directly but was instead borrowing funds in order to invest.) Mr Cosgrove says that the directors of the Four Elements "*had little input if any regarding the investments*". He then says that "*due diligence was carried out monthly, to make sure that [the Kijani Funds] were operating within the mandate*".

175. Mr Cosgrove also refers to the "*Offshore Alert Blog*" and says that this was the start of the process that led to Brighton and the Kijani Funds being investigated and was "*the start of the decline*". He says that the information reported in the blog was incorrect and that the Four Elements was not part of a Ponzi scheme.

176. At paragraph 15 of his statement, Mr Cosgrove then says: "*As far as I am aware I have been cleared in every jurisdiction I operated in*". However, Mr Lavarello produced a Public Notice issued by the MSFC on the 24 August 2016. The Notice says that the Enforcement Committee of the MSFC had concluded that Ms Cosgrove was "*not a fit and proper person*". He was disqualified from holding any position as an officer of any licensed entity for a period of five years as from the 15 September 2016. The Notice details numerous regulatory infringements by five companies of which Mr Cosgrove was a director, including the Four Elements and Belvedere. The notice says that the Enforcement Committee had received written representations from Mr Cosgrove, so he was clearly aware of that process.

177. I attach no evidential value to Mr Cosgrove's statement.

178. Ian Hamilton resides in Dubai. He was involved in a plastics recycling plant project through Ratio Sustainability Ltd. This was a company into which KRL is said to have invested. Mr Hamilton says that by 2014 they had "*completed the preparatory stages and were on target to launch commercial operations in 2015*". At paragraph 18 of his witness statement Mr Hamilton says:

> "*The strategic intention behind the flagship plant was to serve as a model and case study for further expansion into Saudi Arabia, where we had identified opportunities to establish over 20 similar plants. This expansion was targeted to achieve a valuation of $2 billion USD over the next five years. This ambitious growth plan was rooted in our initial success and the robustness of our operational and financial models, aimed at significantly scaling our impact on recycling and sustainability in the region*."

179. In terms of why the project failed, Mr Hamilton says at paragraph 19:

> "*During the critical phase of moving towards operational readiness, we encountered a significant and debilitating legal challenge: articles appeared negatively against Kijani by Offshore Alert and PwC was subsequently appointed to liquidate companies. This action, which appeared to be absolutely baseless, profoundly impacted our financial operations. They not only halted our access to necessary funds but also emerged as the absolute and single reason for the collapse of the project as the negativity on the articles and the restrictions flowing from the liquidations damaged the ability to find other finance options when Ratio were unable to meet the financial obligations the project had committed to*."

180. Checks carried out by the liquidators revealed that Mr Hamilton had been found in May 2016 by the UK Insolvency Service to have caused a company, Industry RE Ltd, to operate with a want of commercial probity. The World Check profile includes a Press Release by the UK Insolvency Service which says the following:

> *"Under Mr Hamilton's sole control [Industry RE Ltd] operated a number of 'alternative investment' scams between 2009 and 2013 that have caused losses of at least £13.3 million to members of the public. The main scams were a money circulation scheme and selling interests in land in Dominica that the company never owned."*

181. The Press Release also states that Mr Hamilton had: "*systematically [taken] money from consumers on the basis of misleading statements made to consumers*." He was disqualified for the maximum period of 15 years.

182. As with Mr Cosgrove, it would be inappropriate in the circumstances to give any evidential weight to Mr Hamilton's statement.

183. Michael Fortun was a non-executive director of Silex UK and Teyuteme. Both were investment vehicles in which KRL purportedly invested. Mr Fortun says that Silex UK's principal asset was its shares in Silex Spain. He also explains that Silex UK was listed in the Cypriot stock exchange. They listed £12m worth of bonds and raised £6m with the intention of getting "*the refinery to run to its full potential*". However, the OffshoreAlert article and the intervention of liquidators in Silex UK prevented this. In relation to Teyuteme, Mr Fortun says that this company was listed in the Dusseldorf exchange and traded in the oil market.

184. At paragraph 21 Mr Fortun says:

> *"I was a director of two actively trading companies, one to be listed and one already trading on the Düsseldorf exchange. It came with great surprise that the liquidators never contacted me to understand the nature of the businesses. My understanding is that when administrators are appointed, they are supposed to gain control of all of the assets and manage them to maximise potential returns to creditors. Silex and Teyuteme were apparently just abandoned, unable to trade and losing all their value, with significant losses to creditors and shareholders alike…"*

185. Of course, the evidence of Mr Lavarello was that Silex UK took over the oil refinery from Silex Spain for no consideration and that the listing in the Cypriot stock exchange was a further fraud which caused other investors to lose out. Mr Lavarello describes Mr Fortun as "*a known associate*" of Mr Fagan and Mr Hooper.

186. Nick Michaels is an accountant who at the material time was a director of Alfred Henry Corporate Finance Ltd. He assisted Eligere and Silex UK with their listings on the Cypriot Stock Exchange. He asserts that

it was not a straightforward process and that the Stock Exchange were "*very thorough with their due diligence*". He describes the Silex UK listing as successful and that he had nothing to be concerned about.

187. Paul Rodger was a consultant to Ratio. He assisted with consultancy on the Dubai plastics recycling plant. At paragraph 14 of his witness statement he says:

> *"I was in Dubai five days per week at the beginning of 2015. We were about to start the construction phase as we had obtained all of the licenses and the site drilling and testing. In around February 2015 invoices and rent payments stopped being paid. This was not an area of the business I was involved in so I don't know any more about what was going on. I was just told it was a temporary situation on appointment, of controllers to the Kijani fund, the ultimate investors."*

188. Then at paragraph 16, he says the following.

> *"During my time consulting for Ratio, I also had meetings with Nick Michaels of Alfred Henry, an FCA regulated company, at his office in London. These meetings were to assist with the transfer of companies and fixed assets into a plc called Eligere, in exchange for shares in that plc (otherwise known as reversing). These assets were a number of timber deals in Surinam and were owned by the Kijani fund or its nominees. This involved an independent valuation by a separate FCA regulated company called EGR. All of the assets reversing into Eligere were valued at over £117m."*

189. I have already referred to how the evidence of Mr Lavarello was that Eligere never had any genuine assets of substance and that no realisations were made in its liquidation.

Books and records of KRL and Ratio

190. A critical element of the liquidators' case is that they have had limited access to the books and records of KRL and Ratio. Mr Lavarello's evidence was that he had only been able to obtain information and records from Corinthian and from some of the banks. He had received no information or assistance form Mr Fagan or Mr Hooper. Although Mr Fagan had worked out of three different properties in Gibraltar (at City Mill lane,

Queensway Quay and Cannon Lane), they had been emptied by the time the liquidators had been appointed and no documents were found.

191. The assertion is made in Mr Fagan's witness statement that the majority of the companies' records were in hardcopy and had been moved to Dubai. However, he says that the premises in which they were being kept were repossessed and all records were lost. He blames the liquidators for not taking steps to preserve these records despite having told them that this was necessary. He details all of this in a section in his witness statement entitled "*Liquidators' loss of the paper records*". At paragraph 210 he says the following:

> "*The statutory records for KRL would have remained with [Corinthian] in Gibraltar. All of the other day-to-day company records, including the physical trading records, the records on in-house counsel, bank statements, HR records, etc., were sent to Dubai. In addition, all of the Hierons files relating to KRL were sent in 14 shipping boxes, similar to the size of a cardboard filing cabinet draw*."

192. Then at paragraphs 215 and 216 he sets out what he says he told the liquidators. At paragraph 215, he says that he had "*a general conversation about the liquidation*" on the 11 June 2015 with Mr Conway. (This must be a reference to the conversation which took place on the 10 June 2015, the transcript of which was exhibited to Mr Lavarello's sixth witness statement.) He then says the following in paragraph 216:

> *"216. The liquidators said they had been appointed and were looking into [the Kijani Funds] and its assets as well as KRL. I took great pains to make clear how important it was for the liquidators to pay the rent in Dubai in order to preserve the physical records. I was extremely surprised when they said they didn't need them. I explained the importance of those records, but they were adamant that they knew what steps they needed to take, and that they would be able to rely on electronic records in the fullness of time..."*

193. These assertions in the witness statement expanded upon what Mr Fagan had said in his Defence. At paragraph 67 he says:

> *"Mr Fagan avers that at all times he carried out his duties to keep and preserve documents of the nature referred to in paragraph 38(3) [of the POC], which were lost and destroyed by the actions or omissions of the Applicants."*

194. This contrasts sharply with the evidence of the liquidators. Mr Lavarello denied having been informed by Mr Fagan that there was a risk to the companies' records if he did not take any particular action and denied that any request for payment of rent was made. According to Mr Lavarello, he repeatedly asked for the records but received no meaningful reply from either Mr Fagan or Mr Hooper. I have no hesitation in accepting Mr Lavarello's evidence on this and reject outright the suggestion that it was somehow the liquidators that are to blame for the fact that no records are available. In reaching this conclusion, I take account not only of the fact that I consider Mr Lavarello to be a witness of truth, but also of the following documented evidence.

195. The transcript of the conversation between Mr Fagan, Mr Hooper and Mr Conway of the 10 June 2015 does not have any reference to Mr Conway being advised that records would be lost if arrangements were not made. Mr Conway does ask about the records and he is told that they are with the auditors and in Dubai. The following are the relevant exchanges:

> *"Mr Conway: Where are the records of the company? Where are the physical records of the company and the server that holds all of the electronic records?*
>
> *Mr Fagan: well they…We are using a remote hosting with Go Daddy. The physical records of the company we will have the minutes and documents, which will be held at the registered office.*
>
> *Mr Conway: Well I am thinking of the operational records. So all the transaction documents when you were making these investments, the financial records and so forth. Where are all of these held? Because it would be unusual if –*
>
> *Mr Fagan: well they would mainly be between the auditors and Dubai*

> *Mr Conway:* *Well it, auditors don't tend to hold the financial records of a company, so.*
>
> *Mr Fagan:* *When you say financial records. The annual financial records are held by the auditor. The transactions stuff in terms of contracts etcetera will be in Dubai, some of the paperwork will be held in Ghana where we have some of the activities, some will be in South Africa, some in Pan [Marimbo](sic), In Suriname ."*

196. There is then a discussion about what the exact address in Dubai is, but there are no references to any issues with the property or with access to the records said to have been kept there.

197. The above is referred to by Mr Conway in his Controllership Report relating to Brighton dated the 26 June 2015. At paragraph 2.2.1 in a section entitled "*Communication with KRL directors*", Mr Conway says the following:

> "*On this initial call, the KRL Directors were unable to provide the Controllers with any high level indication of how the US$82 million loaned to KRL had been spent between its underlying investments, and at what times. They were also unable to provide the Controllers with a definitive answer on the location of KRL's books and records*."

198. On the 19 June 2015, Mr Conway sent Mr Fagan a Notice pursuant to section 240(1) of the Insolvency Act requiring him to "*confirm the location of and provide full access to all statutory, financial, operational, electronic and any other records of the company*." This was not responded to. Mr Lavarello then sent Mr Fagan and Mr Hooper two letters dated the 21 July 2015 and the 26 January 2016 again asking for the books and records. These were sent by email. Mr Hooper responded to the 26 January 2016 email by offering to meet. Mr Lavarello agreed to do so but asked whether the questions he put in his letter (which included a question on the books and records) could be answered in any event. The exchanges end with Mr Lavarello sending an email on the 29 January 2016 which includes the following:

> *"But I am most interested that you say that you will be coming to Gibraltar to locate the bank records.* ***I require all of the bank records as well as all of the accounting books and records****. This is something that I have asked for five times now and I have not had a suitable answer. Can you please tell me where the bank and accounting records are and who has them? Who do I need to speak to get them?"* [Highlighting in the original.]

199. Mr Hooper responded on the same day, saying:

> *"Due to bank accounts being frozen premises were repossessed! I will have to be doing my own detective work. A lot of information was sent to the new head office in Dubai but unfortunately due to lack of payment that office was repossessed also. I will keep you posted on my investigations."*

200. Both of these emails were copied to Mr Fagan. According to Mr Lavarello, this was the first time that repossession of the Dubai offices was mentioned. There is of course no assertion in the email that this was somehow the liquidators' fault.

201. Finally, there is the record of the private examination of Mr Fagan which took place on the 21 September 2017. Whilst there is a reference to the Dubai offices being repossessed there is no attribution of fault to the liquidators. Mr Fagan said the following:

> *"There was an, there was, there was a, there was a, there was a genuine time there when documents were lost, where offices and records were missing. And in Dubai you don't pay they don't care. Take the office out, empty it, the whole lot and virtually all of our records had been relocated to Dubai and a lot of the stuff is not available. The IT guy then doesn't get paid, takes the servers back, wipes the servers, he doesn't care. Well, you know, these, these people are not, they're, they're, they're practical people, that, that's how they carry on. And in, in the same way that you're frustrated there's so much, I think and, and if it doesn't exist here it must be in Mauritius on the (inaudible), there must be so much more information between the auditors in the UK, the bank records in Gibraltar and the historic records in Mauritius would give a, a fuller picture…"*

202. At paragraph 136 of his principal statement, Mr Lavarello comes to the following conclusion:

> *"Accordingly, I became and still remain of the opinion that the directors have deliberately sought to prevent us from obtaining the company's books and records in order to prevent investigation regarding their conduct and the suspected fraudulent activities that have been conducted by KRL and Ratio and their related entities. I believe that where such books and records did exist, to the extent that there was any compliance with the Companies Act to maintain proper books and records, these have deliberately been put beyond any recovery action of the liquidators and/ or have been destroyed."*

203. Mr Lavarello also pointed out that Mr Fagan and Mr Hooper in communications with the liquidators had continued sending emails on their *kijani.com* email addresses. This showed that even if they did not have access to hard copy documents, they still had access to their emails. However, no email records were provided to the liquidators. Mr Lavarello said that email hosting sites are not expensive. He suggested that any responsible director would have paid the modest fees himself to ensure that the information was not lost.

THE CLAIMS

The Misfeasance Claim

204. The Misfeasance Claim is brought pursuant to section 258 of the Act. The heading to the section is entitled "*Summary remedy against delinquent officers and others*". The relevant parts of this section are the following:

> *"258(1) On the application of the liquidator of a relevant company, the Court may make an order under subsection (3) where it is satisfied that a person specified in subsection (2)–*
>
> *(a) has misapplied or retained, or become accountable for any money or other assets of the company; or*
>
> *(b) has been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.*
>
> *(2) An order under subsection (3) may be made against a person–*
>
> *(a) who is or has been an officer of the company;*
> *...*

> *(3) Where subsection (1) applies, the Court may make one or more of the following orders against the person–*
>
> > *(a) that he repays, restores or accounts for the money or other assets, or any part of it;*
> >
> > *(b) that he pays to the company as compensation for the misfeasance or breach of duty in such sum as the Court considers just; and*
> >
> > *(c) that he pays interest to the company at such rate as the Court considers just.*
>
> *(4) The Court shall not make an order under subsection (3) unless it has given the person the opportunity–*
>
> > *(a) to give evidence, call witnesses and bring other evidence in relation to the application; and*
> >
> > *(b) to be represented, at his own expense, by a legal practitioner who may put to him, or to other witnesses, such questions as the Court may allow for the purpose of explaining or qualifying any answers or evidence given*."

(A "*relevant company*" is defined in section 257 as "*a company that has gone into insolvent liquidation*".)

205. The equivalent provision in England and Wales is section 212 of the Insolvency Act 1986. *McPherson & Keay - The Law of Company Liquidation, 5th Ed.*, explains at paragraphs 16-007-16-009 that the term misfeasance in section 212 of the English Act relates to acts which are wrongful, according to the established rules of law or equity. The authors quote from the judgment of Mason J in the Australian High Court in *Walker v Wimborne* (1976) 3 A.C.L.R. 529 where in relation to the Australian equivalent the judge said:

> *"However, it is well established that 'misfeasance' in this context means 'misfeasance' in the nature of a breach of trust, that is to say, it refers to something which the officer … has done wrongly by misapplying or retaining in his own hands any moneys of the company or by which the company's property has been wasted, or the company's credit improperly pledged."*

206. At paragraph 36 of the Particulars of Claim, the liquidators say that, in the context of this claim, Mr Fagan owed four distinct duties to KRL and to Ratio. First, a duty to act in accordance with the company's constitution and to only exercise his powers for the purposes for which they were conferred. Second, a duty to act in a way which he considered, in good faith, would be most likely to promote the success of the company. Third, a duty to exercise reasonable care, skill and diligence. Fourth, a duty to consider and act in the interests of creditors where he knew or should have known that the company was or was likely to become insolvent. In his Defence, Mr Fagan admitted that he owed the first three of these duties to the companies. In relation to the fourth, he admitted the duty is owed as a matter of law, but denied that the circumstances were such that this duty arose.

207. The liquidators also say, and they are right, that directors (and others) owe a duty to keep and preserve a record of the use to which a company's money has been put. (This obligation is imposed by section 239 of the Companies Act 2014.)

208. Although in England and Wales the general duties of directors are codified in the Companies Act 2006, this is not so in Gibraltar. However, the duties are based on rules of equity which had been in place before the codification and those equitable rules continue to apply here. The first duty is essentially concerned with the proper exercise of the powers conferred on a director. In *Eclairs Group Ltd v JKX Oil & Gas plc* [2016] 3 All ER 641 Lord Sumption discussed the "*proper purpose rule*" and at paragraph 15 said:

> *"The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective*."

209. In their written submissions, counsel for the liquidators gave a number of examples of what courts in England and Wales have found breaches of the *proper purpose* duty to include. In *Bishopsgate Investment*

Management Ltd v Maxwell (No 2) [1993] B.C.C. 120, Hoffman LJ determined that the defendant had been:

> "*in breach of his fiduciary duty because he gave away the company's assets for no consideration to a private family company of which he was a director. This was prima facie a use of his powers as a director for an improper purpose and in my judgment the burden was upon him to demonstrate the propriety of the transaction*."

210. In *Re HLC Environmental Projects Ltd* [2014] B.C.C. 337 John Randall QC, sitting as a deputy High Court judge, found that the defendant had authorised payments to be made to assist himself personally, without giving any consideration to the best interests of the company's creditors and that this was a breach of the proper purpose duty.

211. The third example was the decision of Chadwick LJ in *MacPherson v European Strategic Bureau Ltd* [2000] 2 B.C.L.C. 683 where the learned judge determined that an agreement to pay consultancy fees had not been entered for the benefit, or to promote the prosperity of, the company.

212. All three examples are clearly relevant to this case. The evidence shows that this is how Mr Fagan conducted the affairs of KRL and Ratio.

213. The second duty is the duty to act in a way which is most likely to promote the success of the company. Counsel referred to *Re Regentcrest plc v Cohen* [2001] 2 B.C.L.C. 80 where at paragraph 120 Jonathan Parker J said:

> "*The duty imposed on directors to act bona fide in the interests of the company is a subjective one …. The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test*."

214. However, as the judge said in the *Re HLC Environmental Projects* case, at paragraph 92(b):

> *"the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company."*

215. Counsel for the liquidators submitted that the absence of documentary records demonstrating that Mr Fagan considered the interests of KRL and Ratio in paying out money, and the fact that the material interests of the Kijani Funds were clearly overlooked, brings the case within the exception. I agree. Viewed objectively, the transactions entered into by Mr Fagan, or at his behest, were not aimed at promoting the success of the company.

216. The third duty, that which requires directors to exercise reasonable care, skill and diligence, was explained by the English Court of Appeal in *Optaglio Ltd v Tethal* [2015] EWCA Civ 1002. In that case, the company brought a claim against two of its directors. It was said that they had acted negligently, and below the level of skill, care and competence required of directors, when they withdrew a patent application which had been filed for the company's benefit. At first instance the judge granted summary judgment in favour of the directors. An appeal against this order was upheld, with Floyd LJ saying the following at paragraph 23:

> *"Optaglio's case is that the withdrawal of the application was negligent and that the defendants fell below the level of skill, care and competence required of directors, either under their service contracts or pursuant to section 174 of the Companies Act 2006. It is common ground that the test to be applied is a high one. It must be shown that the decision complained of went beyond a mere error of commercial judgment. It must be one which no reasonable director could have reached."*

217. The fourth duty is the duty to consider and act in accordance with creditors' interests. The liquidators rely *on BTI 2014 LLC v Sequana SA &*

ors [2022] UKSC 25. There the Supreme Court held that there was a common law rule that the best interests of a company should in some circumstances prior to the company's insolvency include a duty to consider its creditors' interests, to give them appropriate weight, and to balance them against shareholders' interests where they might conflict.

218. The liquidators also say that a director acts as a quasi-trustee of the company's assets. So, in relation to transactions entered into by the companies at a director's behest, it falls upon that director to justify the transaction. For this proposition, counsel relied on *Re Snelling House Ltd (In Liquidation)* [2012] EWHC 440 (Ch) where Mr G Moss QC, sitting as a deputy High Court judge, said at paragraph 40:

> "*Where directors cause their company to dispose of assets, e.g. by paying out sums of cash, the onus is on them as trustees of the company's assets to justify those payments … This is particularly so when directors cause payments to be made to themselves or family members or otherwise for the benefit of any of them*."

219. This closely follows what was said by Newey J in *GHLM Trading v Maroo* at paragraph 148:

> *"The close analogy between directors and trustees suggests, to my mind, that, much as a trustee 'must show what he has done with [trust] property', it is incumbent on a director to explain what has become of company property in his hands."*

220. The onus is on the liquidators to first prove that a transaction has been made or a benefit received. Once that burden has been discharged, it is for the director to explain the transaction (see *Aston Risk Management Ltd v Jones* [2023] B.C.C. 807 at 192).

221. As to the duty to keep and preserve books of account, I have already referred to the statutory duty contained in section 239 of the Companies Act. (I pause to note that this and the following provisions came into force on the 1 November 2014. Before that, there were similar provisions in the old Companies Act 1930.) Section 239 provides as follows:

> *"239(1) Subject to section 243, every company shall cause to be kept for a period of 5 years proper books of account with respect to–*
>
> > *(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;*
> >
> > *(b) all sales and purchases of goods and services by the company; and*
> >
> > *(c) the assets and liabilities of the company.*
>
> *(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall at all times be open to inspection by the directors."*

(Sub-sections (3) creates an offence, committed by a person who fails to take all reasonable steps to secure compliance by the company with the requirements of the section or wilfully causes the company to default in its obligations.)

222. Section 401 of the Companies Act creates a further offence of failing to keep proper accounts. Where a company is being wound up and it is shown that proper books of account were not kept throughout the period of two years before the commencement of the winding up, then the company's directors and officers are guilty of an offence if they were "*knowingly a party to or connived at the default of the company*".

223. "*Proper books of account*" are defined in section 2(1) of Companies Act as follows:

> *"…such books or accounts as are necessary to exhibit and explain the transactions and financial position of the trade or business of the company and includes books containing entries from day to day of all cash received and cash paid and any contracts, invoices or other underlying documentation significant to the trade or business of the company. If the company's business involves dealing in goods, this also includes statements of annual stocktaking and, except in the case of goods sold by way of ordinary retail trade, statements of all goods sold and purchased showing sufficient detail to enable those goods, buyers and sellers to be identified."*

224. At section 263B, the Act also creates an offence committed by persons who, being a past or present officer of the company, do not assist the liquidators. This includes not delivering up all books and papers which are in his custody or which are under his control.

225. *Re Mumtaz Properties* [2012] 2 B.C.L.C. 109 concerned the winding-up of what had been a family property development and letting company. The liquidator sought to ascertain the whereabouts of the books and records of the company but the respondents failed to produce them. In the course of her judgment dismissing the appeal brought by the respondents, Arden LJ said the following in relation to the absence of documentation:

> *"[17] Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available."*

226. *Issue 15(a)* is whether Mr Fagan acted in breach of his duties as a director of KRL by causing or permitting KRL to borrow approximately $85 million from the Kijani Funds between December 2011 and November 2014?

227. At paragraph 29 of his Defence, Mr Fagan asserts that the Investment Objectives and the Investment Strategy contained in the offering document for the Kijani Commodity Fund (USD) are outside of his knowledge. He also asserts that the investment objectives of the Fund are irrelevant to the claims being made by the liquidators. Further, in answer to the allegation at paragraph 38 of the Particulars of Claim that he had acted in breach of his duty to KRL by causing or permitting KRL to borrow the loan amounts when these were in breach of the investment strategy in the offering documents, Mr Fagan pleads, at paragraph 61 of his Defence, that

the investments were made in line with the Loan Agreement. Mr Lewis submitted that these two contentions were inconsistent. It is quite obvious that they are. The Loan Agreement required KRL to use all monies borrowed in accordance with the Investment Strategy of the Kijani Funds (as per paragraph 3.1 of the Loan Agreement).

228. I agree with the liquidators that Mr Fagan acted in breach of his fiduciary duties to KRL by permitting KRL to borrow the $85 million from the Kijani Funds since the loan did not fall within the investment purposes of the Kijani Funds. The Kijani Funds Offering Document required a particular investment strategy, it was to be secure, and the investments were to remain "*fundamentally liquid at all times*". Mr Fagan did not do any of that. The evidence shows that large sums of monies were paid out to companies owned, controlled or related to Mr Fagan. The monies were dissipated with only a small proportion of these being applied towards the purchase of assets or investments.

229. *Issue 15(b)* is: did Mr Fagan act in breach of his duties as a director of KRL by causing or permitting almost all of the approximately $85 million received by KRL under the Loan Agreement to be dissipated in return for which KRL received assets of negligible value (in the form of tradeable investments)? The assertion to this effect by the liquidators is contained in paragraph 38(2) of the Particulars of Claim. In three sub-paragraphs, the liquidators refer to the payments made to ALF, the payments made to Ratio and then at sub-paragraph (c), payments made to other entities.

230. At paragraphs 63 to 65 of his Defence, Mr Fagan says the following:

> "*63. In regard to payments referred to in paragraph 38(2)(a) Mr Fagan received no benefit from them, for the reasons set out at paragraph 25 of these Points of Defence.*
>
> *64. As to 38(2)(b) is not admitted (sic) and is factually inaccurate. Mr Fagan refers to the matters set out at paragraphs 46 and 47 of these Points of Defence. The Applicants are put to strict proof of the matters alleged same (sic).*

> *65. As to 38(2)(c) the matters referred to therein lack any or any sufficient degree of particularity to allow Mr Fagan to reply*."

231. From the above, I would make two important observations. The first that there is no denial of the fact that the payments to ALF or Ratio were made. The second is that he does not say that valuable assets were in fact obtained in return for the payments.

232. I have already dismissed Mr Fagan's contentions that he had no beneficial interest in ALF. As to Ratio, it was clearly a vehicle for the dissipation of funds forwarded to it by KRL. Mr Fagan has not provided an account or any evidence to demonstrate that genuine investments were in fact being made. The modest realisations speak for themselves.

233. *Issue 15(c)* is: Did Mr Fagan act in breach of his duties as a director of KRL by failing to keep or preserve adequate records or documents in order to evidence investments? (*Issue 17(f)* asks the same question in relation to Mr Fagan's duties as director of Ratio.) In light of the evidence that I have detailed earlier in this judgment, the questions can only be answered in the affirmative.

234. *Issue 15(d)* is whether Mr Fagan breached his duties to KRL by causing or permitting Net Asset Valuations to be prepared which grossly overstated the value of the investments held by KRL to mislead investors?

235. This has been discussed in the course of this judgment. I have found that Mr Fagan, as KRL's principal, was responsible for the preparation of the NAVs and would have known that these were being grossly overstated. It suffices to compare the NAV of the 8 May 2015, which valued KRL's assets at $136.1 million, to the realisations made to date in KRL's liquidation which are of approximately $1 million.

236. I am satisfied that Mr Fagan breached his duties to KRL by causing or permitting the stating of asset values for KRL's purported assets which were grossly overstated. This misled investors into believing that their

investments were safe and increasing in value, when in reality the monies were being dissipated.

237. *Issue 15(e)* is whether Mr Fagan breached his duties to KRL by causing or permitting the purported transfer for no value of the loan by KRL to Highland Trust to Eligere? In his Defence, Mr Fagan limits himself to saying that the "*detailed contractual records*" were held by Richard Southall, KRL's lawyer at Hierons LLP. He then says the following at paragraph 70.1:

> *"Mr Southall drafted and carried out the appropriate due diligence on the HT loan and the 'transfer' referred to in the first sentence of paragraph 38(5) made by Mrs Billington. No admissions are made as to paragraph 38(5)."*

238. The implication in this paragraph is that it was Ms Billington who made and decided to make the transfer. In any case, Mr Fagan seems to acknowledge that the loan to Highland Trout was purportedly transferred to Eligere. However, somewhat bizarrely, in his witness statement Mr Fagan feigns surprise at the liquidators not having been able to recover the investments in Highland Trout. At paragraph 146 he says:

> *"….These investments were in fact excellent opportunities. I believe that all of these businesses have gone from strength to strength in the last ten years. It seems to me incredible that the liquidators have been completely unable to recover any of the valuable investments that were made in them."*

239. I also have regard to the Order of Ramagge Prescott J of the 30 August 2017 in which the learned judge declared that the loan agreement of the 28 October 2014 between KRL and Highland Trout had not been transferred to Eligere.

240. I am satisfied that Mr Fagan breached his duties to KRL by causing or permitting the purported transfer for no consideration of the Highland Trust loan to Eligere. At the time, he was still KRL's principal. It was clearly done with the aim of keeping realisable assets out of the reach of the liquidators.

241. The liquidators seek compensation on behalf of KRL in the sum equal to the total payments made by KRL during the time that Mr Fagan was a director of the company. The Court can order that compensation be paid pursuant to section 258(3)(b) of the Act in such sums as the Court considers just. Mr Fagan's liability to pay this compensation is *Issue 16(b)*.

242. In the Particulars of Claim, the liquidators claimed compensation in a higher sum, namely $134,223,709 this being what was described as the deficiency in the liquidation (*Issue 16(a)*). This is not being pursued as the liquidators say that this sum was based on a fictional overstatement by Mr Fagan of KRL's assets. They simply therefore now pursue compensation in the amount of the payments made.

243. The grand total of payments out made by KRL in pounds sterling is £56,201,905.10. I shall order that Mr Fagan pay compensation in this amount.

244. *Issue 17(a)* is whether Mr Fagan acted in breach of his duties as a director of Ratio by causing or permitting almost all of the monies received by Ratio to be dissipated in return for assets of negligible value? At paragraph 75 of the Defence this is denied. Mr Fagan then asserts the following:

> *"75.1 [Mr Fagan] avers that all monies received by the company were so received on own account and not for investment whether as own risk investment or on behalf of any third party. Assets purchased were so purchased for their utility in order to facilitate the business, as a consultant, of [Ratio].*
>
> *75.2 avers that the figures in Appendix B speak for themselves with the investments in property and otherwise being made at market value and their evaluation in many instances being as high if not higher post liquidation than its value as recorded for internal purposes immediately prior to the commencement of the winding-up."*

245. There were net payments out of Ratio of £5,785,368.32. Mr Lavarello's evidence was that apart from payments relating to Silex, all

other payments were for office or personal expenses. These include payments of over £1 million on Motor Yacht 'Ratio' and £200,000 on Motor Yacht 'Whatever'. The expenses of the Captain and crew of the yachts were also paid out of Ratio's funds. There were at least six crew members according to Mr Lavarello. Not only did this drive Ratio into insolvency but it meant that Mr Fagan was not acting in a way that would benefit the promotion or success of the company. (*Issue 17(b)* asks whether Mr Fagan breached his duties by causing or permitting Ratio to make payments to entities for his personal benefit. The amounts said to have been paid for his personal benefit or to those to whom he was closely connected, like his wife or brother, amounted to £3,878,193.46. *Issue 17(c)* relates to causing or permitting cash withdrawals of $10,200, €156,468 and £4,500 for no benefit to Ratio. The liquidators say that these payments are unaccounted for. *Issue 17(d)* relates to causing or permitting payments to FairFx of $192,000, €107,904 and £402,000. Mr Lavarello's evidence is that Mr Fagan was a signatory to the FairFx account. He has not accounted for the payments made. *Issue 17(e)* relates to causing or permitting Ratio's money to be used to purchase luxury items and fund a luxury lifestyle. All of the payments referred to in issues 17(b) to 17(e) are said to have been made for no benefit to Ratio.)

246. Mr Fagan says the following at paragraph 282:

> *"The claim against RL typifies the complete lack of understanding and investigation on the part of the liquidators. I have explained in detail above the business of Ratio as an independent consulting firm receiving fees for advice and then its business dealing in foreign exchange. I have also explained that the company was also used to hold assets on behalf of me and Mr Hooper, and therefore received money from KTR drawn from our personal remuneration. It is obvious that the payments received by Ratio were not loans or investments, but transactions in accordance with these aspects of its operations."*

247. There is no evidence to support Mr Fagan's assertions. Causing or permitting funds to be dissipated for no consideration or benefit to Ratio was a breach of Mr Fagan's duty to the company. It failed to promote Ratio's success and was a failure to act in good faith.

248. *Issue 17(g)* is: did Mr Fagan act in breach of his duties as a director of Ratio by causing or permitting the transfer of shares in Silex Spain to Silex UK for no consideration? The defence contains a bare denial of this at paragraph 77.

249. I answer this issue in the affirmative. Having considered the evidence of the liquidators, I have no doubt that Mr Fagan did so to keep the asset out of the liquidators' reach. He thereby failed to act in the best interests of Ratio's creditors.

250. *Issue 18(a):* Is Mr Fagan liable pursuant to section 258(3) of the Insolvency Act to pay compensation equal to the total payments made by Ratio during the currency of his directorship? I have no hesitation in concluding that he is. I shall order that Mr Fagan pay compensation in the sum of £5,785,368.32.

The Fraudulent Trading Claim

251. The Fraudulent Trading Claim is brought pursuant to section 259 of the Act. This provides as follows:

> *"259(1) On the application of the liquidator of a relevant company, the Court may make an order under subsection (2) where it is satisfied that, at any time before the commencement of the liquidation of the company, any of its business has been carried on–*
>
> > *(a) with intent to defraud creditors of the company or creditors of any other person; or*
> >
> > *(b) for any fraudulent purpose.*
>
> *(2) Where subsection (1) applies, the Court may declare that any person who was knowingly a party to the carrying on of the business in such manner is liable to make such contribution, if any, to the company's assets as the Court considers proper."*

252. The liquidators accept that for liability to be established under this second claim, the Court must have first necessarily determined that the alleged breaches of the Misfeasance Claim are made out. It was however

submitted that it is important for the Court to nevertheless consider the Fraudulent Trading Claim as this could have an impact on the limitation defence raised by Mr Fagan as well as on the relief claimed by Mr Fagan pursuant to section 477 of the Companies Act.

253. In *Re Bank of Credit and Commerce International SA & Ors Morris & Ors v State Bank of India* [2003] B.C.C. 735, Patten J said the following in relation to section 213 of the UK Insolvency Act (the equivalent UK provision) at paragraph 11:

> "*The liquidators' claim against SBI is brought under s.213 of the Insolvency Act 1986 … There are therefore three elements to be established: (1) that the business of the company in liquidation has been carried on with intent to defraud the creditors of the company or for any other fraudulent purpose; (2) that the defendant sought to be made liable (in this case SBI) participated in the carrying on of the business of the company in that manner; and (3) that it did so knowingly: i.e. with knowledge that the transactions it was participating in were intended to defraud the creditors of the company or were in some other way fraudulent."*

254. In *Re Patrick and Lyon Ltd* [1933] Ch. 786 Maugham J, when discussing section 275 of the UK Companies Act 1929 which was, insofar as is material, in similar terms to the modern provision, said the following at page 790:

> *"…the words 'defraud' and 'fraudulent purpose', where they appear in the section in question, are words which connote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame"*

255. In terms of the third limb, 'knowledge', counsel relied on *Re Overnight Ltd (in liquidation) (No.2)* [2010] B.C.C. 796. There, Roth J said the following at paragraphs 11 and 12 of his judgment:

> *"11. …. The question of what is required by "knowledge", in the context of the test for dishonesty in a civil statute, was considered by the Privy Council in Barlow Clowes International Ltd (in liq.) v Eurotrust International Ltd [2005] UKPC 37; [2006] 1 W.L.R. 1476. Lord Hoffmann there stated (at [10]):*

> *"Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."*

And later in the judgment he explained further (at [15]):

> *"The reference to 'what he knows would offend normally accepted standards of honest conduct' meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were."*

> *12. Knowledge for this purpose includes shutting one's eyes to the obvious…"*

256. *Issue 19* and *Issue 20* are: Were the business of KRL and Ratio carried on with intent to defraud creditors or for a fraudulent purpose? This is of course denied by Mr Fagan. Further, *Issue 21* is: Was Mr Fagan knowingly party to the carrying on of the business of KRL and RL with intent to defraud creditors and for a fraudulent purpose? This too is denied by Mr Fagan.

257. Mr Fagan used the Kijani Funds loan monies for purposes which were contrary to the objectives of the funds. He dissipated the monies for his and his associates' personal use. KRL received assets of negligible value in return. Furthermore, as Mr Lavarello states at paragraph 888:

> *"The NAVs prepared over several years by Fagan and Hooper for KRL were grossly and knowingly overstated in that the value of the investments held were inflated to induce further investments. The First and Second Respondents clearly intended to repeatedly mislead investors and an ordinary decent person would deem such behaviour as dishonest."*

258. In my judgment, the only reasonable inference to be drawn on the evidence is that the business of KRL and Ratio was carried on with intent to defraud creditors or for a fraudulent purpose - and Mr Fagan was a knowing party to this.

259. *Issue 22*: Is Mr Fagan liable pursuant to section 259(2) of the Insolvency Act to contribute to the assets of KRL and Ratio and, if so, in what amount? The loss being claimed is the same as the loss arising from the breaches of fiduciary duty. In my judgment, Mr Fagan would also be liable to contribute to the assets of KRL and Ratio in like sum under this provision.

The Insolvent Trading Claim

260. The Insolvent Trading Claim is brought pursuant to section 260 of the Act. The relevant parts of this section are the following:

> *"260(1) On the application of the liquidator of a relevant company, the Court may make an order under subsection (2) against a person who is or has been a director of the company if it is satisfied that–*
>
> > *(a) at any time before the commencement of the liquidation of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and*
> >
> > *(b) he was a director of the company at that time.*
>
> *(2) Subject to subsection (3), where subsection (1) applies, the Court may order that that the person concerned makes such contribution, if any, to the company's assets as the Court considers proper.*
>
> *(3) The Court shall not make an order against a person under subsection (2) if it is satisfied that after he first knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation, he took every step reasonably open to him to minimise the loss to the company's creditors.*
>
> *(4) For the purposes of subsections (1) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps reasonably open to him which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both–*
>
> > *(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same*

> *functions as are carried out by that director in relation to the company; and*
>
> *(b) the general knowledge, skill and experience that that director has.*
>
> *(5) The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any function which he does not carry out but which has been entrusted to him.*"

261. A relevant company is a company that has gone into insolvent liquidation.

262. The liquidators have to establish that Mr Fagan knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation. (Mr Fagan does not plead in his Defence that he took every step reasonably open to him to minimise the loss to the company's creditors. The evidence would not have supported such a pleading. Therefore, sub-section (3) does not come into play.)

263. Counsel referred to *Wright & ors v Chappell & ors* [2024] EWHC 2166 (Ch), a case involving claims brought by four companies in the British Home Stores Group against their former directors. Dealing with the English equivalent of section 260, Leech J said the following at paragraph 466 of his judgment:

> "*In deciding whether Mr Chandler or Mr Henningson should have known that the Companies had no real prospect of avoiding insolvent liquidation or administration, S.214(4)(a) requires the Court to apply the standard of a reasonably diligent person having both the general knowledge, skill and experience reasonably expected of a person carrying out the same functions but also the general knowledge, skill and experience of Mr Chandler and Mr Henningson themselves*."

In other words, the requirement in sub-section (1) that Mr Fagan must have known, or ought to have concluded, that there was no reasonable prospect that KRL and/or Ratio would avoid going into insolvent liquidation may be satisfied in one of two ways. Firstly, by showing actual knowledge on his

part. Secondly, by showing that he should have so concluded after an objective evaluation of the facts.

264. In paragraph 83 of the Defence, Mr Fagan asserts that KRL had many valuable assets and the liquidators failed to collect these. Mr Lavarello's response was that they had repeatedly asked both Mr Fagan and Mr Hooper for information on any such assets or investments but had never received any meaningful replies. When Mr Fagan had instructed Governor's Street Chambers, questions were put to Mr Fagan through his solicitors but no replies were forthcoming.

265. Issue 14: Was Mr Fagan aware, or ought he to have been aware, that KRL and Ratio were insolvent? *Issues 23 and 25* are of a similar vein: Did Mr Fagan know, or ought he to have known, that there was no reasonable prospect of KRL avoiding insolvent liquidation from December 2011? And, did Mr Fagan know, or ought he to have known, that there was no reasonable prospect of Ratio avoiding insolvent liquidation from November 2012?

266. Mr Fagan says the following in his witness statement at paragraphs 200 and 201:

> *"200 ....However, as and when it was required to be repaid as part of the restructuring, KRL was only obliged to repay whatever value it held at that time. If that value had in fact been $0 then KRL could still not be considered insolvent because it would then not have been obliged to make any repayment. In any event, the Pledge meant that KCF was already the beneficial owner. The consequence of this fact was that it was legal ownership of its own investments that was being demanded. KCF had also become the owner of KRL under the share transfer in 2014. This meant that KRL could repay the loan simply by transferring the ownership of the investments, which is exactly what would have happened had the liquidators not interfered.*
>
> *201. Even if there was hypothetically a need to realise the assets, that could have been achieved. At the time of the calculation of the last investment valuation, the cash balances were small, but in terms of realisable assets, they were mainly equities and exchange-traded items. Even in poor market conditions, if we considered the equity disposal as directors of KTR, we would feel comfortable we could liquidate quickly over a reasonable period. The PLCs that we were operating through at that point were pregnant with assets and value.*

> *The key point here is that at the point of liquidation, the fund was gated and solvent, so there was no need for a 'fire sale'. KRL held cash at Balrath and Saxo Bank. There were funds at Jyske bank and NatWest. KRL had in fact already sent over $400k to KCF to enable the directors to pay legal fees. All shares and equities would be realisable. Commodity finance agreements would be liquid, subject to the terms of the agreements. The Silex, Eligere and Teyuteme Oil investments would have been returned to cash over a 90-to-120-day period, allowing those PLCs to buy back and or facilitate a placement of KCFs interests with other investors. I know that William Redford was actively pursuing this whilst the appeal against the Controllership and Liquidation of Brighton was ongoing."*

267. In the Defence Mr Fagan relies on the following contentions: that the Loan Agreement was a non-recourse loan; that KRL's obligations were limited to the assets pledged; and that any debt by KRL was satisfied when its shares were transferred to Brighton. In those premises, it is said that KRL could not have been insolvent. All of this is articulated by Mr Fagan in paragraph 287 of his witness statement:

> *"The claim of insolvent trading in respect of KRL is not substantiated. It is common ground that the repayment obligations under the Loan were limited to the value of the assets that it held from time to time. To that extent, it was a non-recourse loan which was put in place merely to facilitate the transfer of funds to and from KRL and KCF. It therefore does not make sense to assert that KRL did not have enough assets to meet any repayment obligations. It is also untrue to say that no repayment was ever made. In respect of interest, no standalone demand was made. Therefore, no obligation arose. When the directors of Brighton did resolve to recall the loan as part of the restructuring, they were already owners of KRL and beneficial owners of the investments. The repayment obligation would have been fully discharged by the transfer of the legal ownership of the investments which was about to be executed when the liquidators intervened."*

268. I have dismissed all these contentions when discussing *Issues 8, 9* and *11*. In any event, Mr Lavarello's evidence, which I accept, is that as soon as KRL drew down the loan monies it became hopelessly insolvent. The monies were almost immediately paid out to companies controlled by Mr Fagan and his associates, and dissipated. It would have been clear to Mr Fagan that KRL was insolvent and would have to be placed into liquidation. Mr Fagan had signed the Loan Agreement and knew what KRL's

obligations under it were. He was also the principal or knowing party behind the dissipation of assets. Any reasonable director would have known that KRL was insolvent in those circumstances.

269. In relation to Ratio, the liquidators' position is that this company was also hopelessly insolvent. In January 2018, the position according to Mr Lavarello was that Ratio's liabilities exceeded its assets by £4,453,922. Ratio's assets were valued at £635,201. This was made up of the net proceeds of the M/Y Whatever at £36,190, the net proceeds of the sale of the property at Cannon Lane at £529,135 and cash at bank of £69,876. Mr Lavarello explains at paragraph 898 of his statement that the M/Y Ratio was not then a readily realisable asset (in the event it was later sold for £344,374). Furthermore, although Silex Spain was considered by the liquidators to be Ratio's asset, it had been transferred to Silex UK for no consideration. It had then been mortgaged and there was therefore no prospect of any realisation being made. In terms of liabilities, Ratio owed KRL and ALF the sums of £1,360,873 and £3,728,250 respectively. At paragraph 899 of his statement, Mr Lavarello says:

> *"My analysis of the movement of funds made it clear that substantially all of the monies paid to Ratio were almost immediately dissipated and, other than the property at Cannon Lane and the two yachts (which were wasting assets), Ratio had almost little to no assets of real value and, in fact, other than a subsequent sale of M/Y Ratio for a relatively minimal value, none of Ratio's purported investments have resulted in any returns for the company."*

270. In my judgment, Mr Fagan ought to have been aware, that Ratio was insolvent and that there was no reasonable prospect of Ratio avoiding insolvent liquidation from November 2012?

271. *Issues 24* and *26*: Is Mr Fagan liable pursuant to section 260(2) of the Insolvency Act to contribute to the assets of KRL and Ratio and, if so, in what amount? The loss being claimed is the same as the loss arising from the breaches of fiduciary duty and the fraudulent trading. In my judgment,

Mr Fagan would also be liable to contribute to the assets of KRL and Ratio in like sums under this provision.

Limitation

272. Mr Fagan pleads in his Defence that the liquidators' claims are statute barred. (Limitation is *Issue 28*.) Specifically at paragraph 7A of this pleading, Mr Fagan says:

> "*7A.1 The limitation period for the claims pursuant to ss.258, 259 and s.260 IA 2011 is six years.*
>
> *7A.2 The facts and matters relied upon in support of the Applicants' claims against Mr Fagan occurred more than six years prior to the date of the Particulars of Claim, namely 29 November 2021. Accordingly, the said claims are prima facie time-barred.*
>
> *7 A.3 To the extent that the Applicants qua liquidators rely upon the date of their appointment of KRL on 19 June 2015 and s.32 of the Limitation Act, Mr Fagan will contend that the relevant date at which time stopped running was the 29 November 2021 when the Particulars of Claim were served; alternatively, 16 July 2021 when the Applicants were given permission to serve their application of 18 June 2021 out of the jurisdiction."*

273. The liquidators' response is contained in paragraph 8 of their Reply to the Defence. The first point is that it is accepted by the liquidators that prima facie limitation is six years. However, that is subject to exceptions. Mr Lewis drew a distinction between limitation as it applies to claims brought pursuant to section 258 of the Act on the one hand and claims brought pursuant to sections 259 and 260 on the other. Dealing with the latter, two points were made. The first that limitation is a period of six years beginning on the date that the companies were wound up. This follows the dicta of Sir Andrew Morritt C. in *Re Overnight Ltd (in liquidation)* [2009] Bus. L.R. 1141 where he concluded that "*the cause of action under section 213 of the Insolvency Act 1986 accrued or arose on the day the winding up order was made*". Section 213 of the English Insolvency legislation is the equivalent section to our section 259. What was said in that case applies equally to section 260 because both sections require that proceedings are instituted by "*the liquidator of a relevant company"*. The second point is

that time stops running on the date the applications were filed. It was being said on behalf of Mr Fagan that this was not the case, but counsel for the liquidators were unable to assist the Court with what the possible argument on this may have been. I do not see the argument either.

274. In relation to section 258, the position is different. This section is a procedural gateway. An application undersection 258 does not need to be brought by the liquidator of the company. The cause of action therefore ordinarily accrues on the day that the transactions occur. The liquidators however rely on sections 26 and 32 of the Limitation Act.

275. Section 26 is headed "*limitation of actions in respect of trust property*". No limitation period applies to claims brought by beneficiaries of trust properties in the case of fraud. The section provides as follows:

> *"26. (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action–*
>
> > *(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy ; or*
> >
> > *(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use."*

276. This section applies to the duties of directors in their capacity as trustees of the company's property. Mr Lewis relied on *Re JD Group Ltd* [2022] EWHC 202 (Ch). There, Deputy Insolvency and Companies Court Judge Agnello QC was dealing with an application by liquidators under the English equivalents of section 258 and 259 of the Insolvency Act. The director of the defendant company was said to have carried on business with intent to defraud HMRC. At paragraph 90 the judge said:

> *"Mr Pettican appeared to accept that in so far as the Liquidator's case relating to breach of duty was based on fraud, then section 21(1)(a) of the Limitation Act 1980 applied and the action would not be subject to a limitation defence."*

(Section 21 of the English statute is the equivalent to our section 26.)

277. Mr Lewis also referred to *Re Pantone 485 Ltd* [2002] 1 B.C.L.C. 266. One of the issues in that case was that the defendant had caused the company's money to be spent for the benefit of a company that he indirectly controlled. At paragraph 43, Richard Field QC, sitting as a deputy High Court judge, said:

> *"43. In my judgment, as a matter of basic principle, where a fiduciary uses his beneficiary's money to confer a benefit on a company he controls he is denying the beneficiary's title to the money for his own purposes and this amounts to a conversion for his own use. The same is true where a fiduciary causes his beneficiary to incur a liability for the benefit of a company which the fiduciary controls. Since this is what the applicant is in substance alleging under the MOZP claim, I hold that this claim is within s 21(l)(b) of the Limitation Act is therefore not statute barred."*

278. Section 32 of the Limitation Act applies more generally to postpone limitation in cases fraud or mistake. The section reads as follows:

> *"32.(1) Where, in the case of any action for which a period of limitation is prescribed by this Act, either–*
>
> > *(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or*
> >
> > *(b) the right of action is concealed by the fraud of any such person; or*
> >
> > *(c) the action is for relief from the consequences of a mistake,*
>
> *the period of limitation shall not begin to run until the claimant has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it."*

279. Mr Lewis relied on a number of authorities in support of the proposition that where a company has remained under the control of the directors against whom claims are brought in a liquidation based on fraud, the limitation period is postponed pursuant to section 32 until independent liquidators ae appointed to investigate. It suffices to refer to *Haysport Properties Ltd v Ackerman* [2016] EWHC 393 (Ch). There the defendant was sued for breach of duty after causing the claimant company to enter into

certain transactions for no benefit. Peter Smith J held that the former director had been under a duty to disclose the breaches of his fiduciary duty but had failed to do so. This meant that the liquidators could rely on section 32(1)(b). Limitation was postponed because the person against whom the claims could be brought had concealed the right of action by fraud.

280. As I am satisfied that the actions of Mr Fagan were fraudulent, he is not able to rely on limitation as a procedural bar to the liquidators' claims. The exclusion of any limitation period pursuant to section 26 of the Limitation Act applies to the claims under section 258. In the case of the claims brought pursuant to sections 259 and 260 of the Insolvency Act, limitation started to run from the date of the appointment of the liquidators on the 19 June 2015 in the case of KRL and the 17 April 2016 in the case of Ratio. As the applications were filed on the 18 June 2021, they were filed within the ostensible six-year limitation period.

281. In the alternative, limitation extended to a period of six years from the date when the fraud was discovered - which could have been no earlier than the date of the liquidators' appointment.

Relief from liability

282. *Issue 29* is whether Mr Fagan is entitled to relief from liability on the basis that he acted honestly and reasonably. This prospect is based on the fact that the Court has the power to grant relief pursuant to section 477(1) of the Companies Act. This provides as follows:

> "*477(1) If, in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court thinks fit."*

283. Counsel for the liquidators referred to a number of authorities which deal with the considerations for the Court when such an application is made. I would highlight *Barings plc v Coopers & Lybrand (No.7)* [2003] EWHC 1319 (Ch) where Evans-Lombe J held at paragraph 1133 that relief may be granted under this provision if the person had acted in good faith and their "*negligence was technical or minor in character and not 'pervasive and compelling'*".

284. It really is unnecessary to consider the principles any further. On the facts of this case, I am most certainly not of the view that Mr Fagan acted honestly and reasonably.

Provision of an account

285. The liquidators say that Mr Fagan should provide an account of all sums received by him or paid to other companies of which he is a shareholder, beneficial owner or director. These are *Issues 16(c)* and *18(b)*.

286. According to Mr Lavarello's financial analysis, the total paid for his personal benefit from KRL was £30,328,377.44 and from Ratio was £3,878,193.46.

287. Mr Fagan has offered to provide accounts but has failed to do so, citing the unavailability of books and records and inadequate disclosure by the liquidators for this. I have already reached my conclusions on the question of the books and records. I have no reason to doubt that the liquidators have provided all such disclosure as was required.

288. Although I have very little expectation that Mr Fagan will comply, I shall formally make the order that he provide an account as sought by the liquidators.

Interest

289. *Issues 16(d), 18(c)* and *27* all deal with whether Mr Fagan is liable to pay interest on any sums found to be due by him. The liquidators' case is

that he should pay at the 'wilful default rate' which the Court should set at 8% per annum (this being the judgment rate of interest).

290. In *Wallersteiner v Moir (No 2*) [1975] Q.B. 373 Lord denning MR said that following at page 388:

> *"… in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or a trustee or anyone else in a fiduciary position - who has misapplied the money and made use of it himself for his own benefit…. The reason is because a person in a fiduciary position is not allowed to make a profit out of his trust: and, if he does, he is liable to account for that profit or interest in lieu thereof."*

291. Mr Lewis referred to a section in the White Book entitled '*Notes on Awards of Interest'* (included at the end of Part 16 of the Civil Procedure Rules). Paragraph 16AI.2 of the Notes, deals with the different rates of interest. Sub-paragraph (e) is entitled "*The 'Wilful default' rate*". It provides as follows:

> "*In its equitable jurisdiction the court may award a high rate to ensure that no profit is made from a breach of a fiduciary duty*."

292. It seems to me to be just that Mr Fagan is ordered to pay interest at a high rate to account for the profit that he made by his fraudulent activities. I shall order that interest at the rate of 8% per annum be paid on the sums due by Mr Fagan. Interest should be calculated from the date that payments out were made by KRL and/or Ratio.

Orders Sought by the liquidators

293. Mr Lewis submitted that it was appropriate to make declarations of the Court's findings with regards to Mr Fagan's misfeasance, fraudulent acts and insolvent trading before ordering the restitution.

294. The first declaration sought was a declaration pursuant to section 258 of the Act that Mr Fagan was misfeasant and acted in fraudulent breach of his fiduciary duties to KRL and Ratio. I have found that Mr Fagan was

misfeasant and in fraudulent breach of his fiduciary duties and so it follows that such a declaration should be made.

295. The second is a declaration pursuant to section 259 of the Act that Mr Fagan was knowingly party to the carrying on of the business of KRL and Ratio with intent to defraud creditors and for a fraudulent purpose. Again, following my findings, it would be appropriate to make such a declaration.

296. The third is a declaration pursuant to section 260 of the Act that Mr Fagan at all material times during his directorship knew or ought to have concluded that there was no reasonable prospect that KRL and Ratio would avoid going into insolvent liquidation. I shall make this declaration.

297. Mr Lewis then sought orders that Mr Fagan be required to contribute the total sum of £56,201,905.10 to the assets of KRL and the total sum of £5,785,368.32 to the assets of Ratio. Subject to my being satisfied that there would be no double counting, I will make these orders.

298. I shall also make the orders requiring Mr Fagan to provide an account and to pay interest on the sums for which he has been found liable at the wilful default rate of 8%.

299. Finally, the liquidators seek an order that their costs be paid on an indemnity basis. Costs will follow the event, but I will invite submissions as to whether this should be on an indemnity basis.

Conclusion

300. In his opening submissions, Mr Cruz said that this was not a case of bad business. That it was a case of fraud. In light of the evidence which has been presented by the liquidators, I can only but conclude that he was correct.

Liam Yeats
Puisne Judge
Date: 12 February 2025