IN THE SUPREME COURT OF GIBRALTAR

Claim No 2014-M-81

BETWEEN:

(1) JIM MAGNER
(2) T&T TRUSTEES LTD

Claimants

-and-

ROYAL BANK OF SCOTLAND INTERNATIONAL LTD

Defendant

JUDGMENT

Mr Stephen Moverley Smith QC and Mr Charles Simpson for the Claimants

Mr Nicholas Medcroft and Mr Owen Smith for the Defendant

JACK, J:

1. On 21st January 2010 the *Gibraltar Gazette* gave notification that the Commissioner of Income Tax had issued a winding-up petition against Kristy Secretarial Services Ltd ("Kristy") returnable on 28th January 2010 in this Court. Marrache & Co ("the Firm") owned Kristy. It handled the Firm's payroll. The winding-up petition lead swiftly to the Firm's financial collapse, as confidence in the Firm evaporated.

2. Isaac Marrache founded the Firm in 1985. Shortly afterwards, his brother, Benjamin, went into partnership with him. Another brother, Solomon, was the finance director. Both Isaac and Benjamin were barristers. The Firm became one of the largest in Gibraltar, with offices latterly in Gibraltar, London, Sotogrande and Lisbon.

3. The three brothers stole from the Firm's client accounts. The Firm's total deficit exceeds £28 million. Criminal proceedings were taken against them. On 2nd July 2014 Grigson J (Ag) found all three guilty of conspiracy to defraud: *R v Marrache* 2013-14 Gib LR 540. The judge imposed substantial sentences of imprisonment. Further details are set out in my judgment in *Lavarello v Jyske Bank (Gibraltar) Ltd* (unreported, 17th May 2017) ("*Jyske*") at paras [1] and [2].

4. One of those who lost money in the crash was Mr Jim Magner ("Mr Magner"). By two deeds of 31st January 2002 prepared by the Firm, he established two trusts, the Greene Settlement and the Lamotte Settlement. He and the two trusts claim the Maraches stole over £9.1 million from them between February 2007 and May 2008. In the current action, they allege that the defendant ("RBSI") dishonestly assisted the Marraches in their stealing of client monies, so that they are entitled to judgment against the bank for the full amount. In the alternative they say that RBSI have themselves received sums of his money for which they are liable to account to him. This is put in two ways: firstly as a claim for knowing receipt, and secondly as a proprietary or tracing claim to the money. The sums they seek to recover under these latter causes of action are £220,000 sterling, Canadian $711,155.48, €367,251.60 and United States $562,973.02.

Dishonest assistance

5. As to dishonest assistance, subject to two points, Mr Moverley Smith QC for the claimants and Mr Medcroft for RBSI, accepted my statement of the law in *Jyske*. To establish the cause of action in dishonest assistance, the claimant must prove (a) that there was a trust, (b) that there was a breach of trust by the trustees, (c) that the defendant assisted the breach of trust, and (d) that the defendant assisted the breach of trust dishonestly. In the current case, it is agreed that the first two elements are made out. (a) Monies in Marrache & Co's client accounts at RBSI were undoubtedly trust monies. (b) The Marrache brothers committed a breach of trust when they stole monies from those client accounts.

6. As to (c), Mr Medcroft in his skeleton opening for RBSI submitted (footnotes omitted):

> "90. …[I]t is necessary for the Claimant to show that the relevant assistance played more than a minimal role in the breach being carried out. If the breach has been completed prior to the assistance being provided, it is likely that the court will conclude that there was no assistance as such with the breach. This third element impacts on loss too. Dishonest assistance relates not to any loss or damage which may be suffered but to the breach of trust or fiduciary duty. The relevant enquiry is what loss or damage resulted from the breach of trust which has been dishonestly assisted in.

7. Save that the second sentence may be too favourable to a claimant, I agree with this summary of what needs to be proved as regards (c).

8. The key issue, counsel agreed, was (d): whether RBS were dishonest or not. In *Jyske,* I said:

> "10. …The law on what constitutes dishonesty for the purposes of dishonest assistance is conveniently set out by Rose J in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch):
>
> > '143. The test for dishonesty in this context is that set out by the House of Lords in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164. There Lord Hutton, with whom Lord Slynn of Hadley, Lord Steyn and Lord Hoffmann agreed, described the three possible standards which can be applied to determine whether a person has acted dishonestly. There is a purely subjective standard whereby a person is only regarded as dishonest if he transgresses his own standard of honesty even if that standard is contrary to that of reasonable and honest people; there is the purely objective standard whereby a person acts dishonestly if his conduct is dishonest by ordinary standards of reasonable and honest people, even if he does not realise this, and there is a combined standard:
> >
> > > '…which combines an objective test and a subjective test, and which requires that before there can be a finding of

> dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest.'

144. His Lordship, having considered the test that had been applied by Lord Nicholls of Birkenhead in the earlier case of *Royal Brunei Airlines Snd Bhd v Tan* [1995] 2 AC 378 confirmed that dishonesty is a necessary ingredient of accessory liability and that (at para [36]):

> 'dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.'

145. In *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, Lord Hoffmann considered whether it must be shown that the alleged dishonest assister turned his mind to the ordinary standards of honest behaviour and to whether his conduct fell below those standards. He held that it was not necessary. It was only necessary to show that the defendant's knowledge of the transaction rendered his participation contrary to normally acceptable standards of honest conduct. He did not need to be shown to have had reflections about what those normally acceptable standards were.

146. It is clear that wilful blindness will satisfy the test for dishonesty. An honest person does not 'deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless': *Royal Brunei*, *per* Lord Nicholls at p 389F-G. It is therefore no defence for a defendant to say that he did not realise that he was acting dishonestly: *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [2011] Lloyd's Rep FC 102, at para [32] and

> my judgment in *Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587 at paras [143-145].'
>
> 10. The judge went on to hold that a particular individual, or particular individuals, had to be identified who were dishonest. She noted at para [148]: 'There is an important difference between being incompetent – even grossly incompetent -- and being dishonest.'"

9. As regards this last point, a claimant cannot amalgamate the knowledge of numerous individuals so as to make a claim against a corporate defendant. The Court must examine the knowledge of each individual who it is said dishonestly assisted the breach of trust alleged. Only if at least one individual can be identified will liability attach.

10. There two sorts of relevant dishonesty:
    (a) Actual dishonesty, where the relevant manager at the bank authorised payments knowing that the Marraches were misappropriating money; or
    (b) Blind-eye (or Nelsonian) dishonesty, where the manager had suspicions of the Marraches' misfeasance but made a conscious decision not to make enquiries.

11. In *Stokors SA v IG Markets Ltd* [2013] EWHC 631 (Comm), after going through the authorities cited in *Singularis*, Field J held (footnotes omitted):

> "10. …[T]he test [of dishonesty] has two elements:
> (1) The subjective element -- the Court must consider the defendant's subjective state of mind and what the defendant actually knew and understood;
> (2) The objective element -- the Court must consider whether or not, with that state of mind, knowledge and understanding, the relevant conduct is dishonest, applying an objective standard of dishonesty.

11. The following principles are derived from the authorities:

> 1. It is not necessary for the Court to establish whether or not the defendant considered that he was acting dishonestly. Instead, the defendant's knowledge of the transaction has to be such as to render his participation contrary to normally acceptable standards of honest conduct.
> 2. An honest person does not deliberately close his eyes and ears, or deliberately not ask questions lest he learn something he would rather not know and then proceed regardless where there may be a misapplication of trust assets to the detriment of beneficiaries.
> 3. A dishonest state of mind may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge.
> 4. In a commercial setting dishonesty can be found on the basis of commercially unacceptable conduct.
> 5. Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty.
> 6. Recklessness is a species of dishonest knowledge and is therefore relevant to the Court's consideration of dishonesty in this context. 'Not caring' does not mean 'not taking care', rather it means indifference to the truth. The moral obliquity of this position is in the wilful disregard of the importance of truth.
> 7. Someone can know, and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means."

12. Mr Medcroft put particular emphasis on the observations of Lewison J (as he then was) in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2006] FSR 17 at [1507]:

> "[T]he test of knowledge is subjective. The question is not: what did the assistant suspect; nor what ought he as a reasonable person to have appreciated? Liability will only be established if the assistant actually knew that the property in question was not at the disposal of the fiduciary; or (perhaps) he shut his eyes to that possibility: *Heinl v. Jyske Bank Gibraltar Ltd* [1999] 1 Lloyds Rep. Banking 511, 532 (per Nourse LJ), 532 (per Sedley LJ) and 547 (per Colman J)"

13. I do not regard the reference to "shutting his eyes" as a modification of the test for Nelsonian dishonesty. It is well established that having suspicions but consciously deciding not to investigate is sufficient to give rise to liability. This includes recklessness in the *Derry v Peek* sense of not carrying out investigations because the party accused of dishonesty neither knew nor cared what an investigation might uncover: see *Derry v Peek* (1889) 14 App Cas 337.

Knowing receipt

14. As regards knowing receipt, the parties did not dispute this summary of the law in *Jyske*:

> "15…As set out in *Lewin on Trusts* (19th Ed, 2014) at para 42-023 (footnotes omitted), a claimant must show:
>
> '(1) There is property subject to a trust.
> (2) The property is transferred.
> (3) The transfer is in breach of trust.
> (4) The property (or its traceable proceeds) is received by the defendant.
> (5) The receipt is for the defendant's own benefit.
> (6) The defendant receives the property with knowledge that the property is trust property and has been transferred in breach of trust, or if not a *bona fide* purchaser of a legal estate without notice, retains the property, or deals with it inconsistently with the trust, after acquiring such knowledge.'
>
> 16. As regards this last element, the English Court of Appeal in *Bank of Credit and Commerce (International) Ltd v Akindele* [2001] Ch 437 at 455 held:
>
> 'All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt… [J]ust as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt.'"

Proprietary or tracing claim

15. The proprietary claim is based on monies being transferred from client accounts at RBSI to the overdrawn office account at RBSI. The reason for the claimants pursuing this cause of action is this. The mental state required to show liability in a tracing claim is, Mr Moverley Smith argues, less demanding than that for knowing receipt.

16. In *Papadimitriou v Crédit Agricole Corporation and Investment Bank* [2015] UKPC 13, 2015 Gib LR 159, the Privy Council on appeal from Gibraltar at para [13] approved the formulation of Lord Neuberger MR in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453 at para [109]. The Privy Council held that the question was whether on the facts known to the bank on the relevant dates:

> "a reasonable person with their attributes (ie those of a responsible large bank with the benefit of highly experienced insolvency practitioners as their appointed administrative receivers) should either have appreciated that a proprietary claim probably existed or should have made inquiries or sought advice, which would have revealed the probable existence of such a claim."

17. Whether Mr Moverley Smith's submission is right or not, however, the tracing claim has in my judgment a fatal flaw. Once the money was transferred to the overdrawn office account it ceased to exist: see *Re Goldcorp Exchange Ltd (in Receivership)* [1995] 1 AC 74 at p 105 applying *Re Diplock* [1948] Ch 465.

18. It always used to be thought that "equitable tracing, though devised for the protection of trust moneys misapplied, cannot be pursued through an overdrawn and therefore non-existent fund": *Bishopsgate Investment Ltd v Homan* [1995] Ch 211 at p 220 *per* Dillon LJ. In the light of *Federal Republic of Brazil v Durant International Corp* [2015] UKPC 35, [2016] AC 297 the absolute nature of this block on tracing may need to be reconsidered.

19. In *Otkritie International Investment Ltd v Urumov* (unreported, 9th June 2016, appeal dismissed, unreported, 16th December 2016), I was dealing with beneficial ownership of £5 million held in Jyske Bank (Gibraltar) Ltd and considered whether victims of an earlier fraud might be able to trace their losses to this money. I said:

> "79. …It always used to be thought that in order to trace money it was necessary to show identifiable monies passing from A to B to C to D to E. If, for example, the money was paid by B into an overdrawn account of C, then the money lost its identity. Thus even if C were to pay exactly the same sum out to D the next day, tracing would no longer be possible.
>
> 80. The Privy Council in [*Durant*] held that this is not an invariable rule of law. It held that 'backwards tracing' was potentially legitimate and explained:
>
> > '38. The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry."

> 81. This would imply that the payment from C to D in the above example (assuming it was always intended to represent the monies originally coming from A) could be relied on as part of a tracing claim against E. Further in a money-laundering case it may be arguable that there is a presumption that monies paid in at one end are represented by the monies paid out at the other end. In other words, in the above example, suppose the claimant who was seeking to trace was unable to prove the way in which monies moved from B to C (say, because B converted the money into cash) or did not even know of the existence of C. So long as A could show that B and D had an intention to launder the money, it may be possible for the Court to presume that the money in E's hands represented the money transferred by A to B, without any need to prove C's rôle or even C's existence.
>
> 82. If that is right, then the Russian victims of the earlier frauds might have a claim to the US$5 million."

20. The *Durant* principle cannot, however, help in a case such as the present, where the money has simply disappeared. It can only help where money has gone into an overdrawn account and then "re-emerged" later. In the current case, once the monies went into the overdrawn office account they were lost forever. Accordingly I can deal with the tracing claim summarily by dismissing it.

Burden and standard of proof and motive

21. There was no issue as to my summary of the law in *Jyske* regarding the burden and standard of proof and the relevance of motive.

> "17. The burden of proof lies on the claimant. As regards the standard of proof, I summarised the law in my judgment in *Re Wardour Trading Ltd* (unreported, 15th February 2015), as follows:
>
> > '30. ...The House of Lords in one of its last judgments, *Re B (Children)* [2008] UKHL 35,

[2009] 1 AC 11, clarified the standard of proof to be applied in relation to serious allegations. The allegations in that case were of child abuse, but the same principle applies to allegations of fraud. Lord Hoffman said:

> "13. ...I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not...
>
> 14. Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said [in *Re H* [1996] AC 563 at 586]... that
>
> > 'the court will have in mind as a factor, *to whatever extent is appropriate in the particular case*, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."
>
> 15. I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many

> cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator.'

31. In *Ultraframe (UK) v Fielding*..., Lewison J (as he then was) said at [9] that

> 'the evidence required to show the dishonest scheme alleged must be cogent. As Lord Nicholls said in *Re H* at p 587:
>
> > "The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455:
> >
> > > 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'"'

Motive

18. It is not a legal requirement that the person accused of dishonesty has a motive to behave dishonestly. Indeed in the criminal proceedings against the Marrache brothers, Grigson J (Ag) said at 2013-14 Gib LR 540, para [48], in respect of the Firm's reporting accountants, that he was:

> 'satisfied so as to be sure—

> (i) that [Baker Tilly] did indeed "cook the books"; and
>
> (ii) that they did so for the benefit of M[arrache] & Co. There was no benefit to [Baker Tilly].'

(See *R v Robinson and Wood* 2015 Gib LR 410 at para [11] for the identification of Baker Tilly.)

19. Thus occasionally no benefit from dishonest actions can be identified. Indeed in cases where, for example, the person has been corrupted by bribes paid in cash or by the supply of prostitutes or illicit drugs, it may be impossible for a party to show evidentially that inducements were given.

20. Nonetheless, when making findings of fact, the potential motive of the person alleged to have dishonestly assisted is relevant in determining whether someone was in truth honest or dishonest. As Mann J said in *Mortgage Agency Services Number One Limited v Cripps Harries LLP* [2016] EWHC 2483 (Ch) at para [88]:

> 'By and large dishonest people are dishonest for a reason. They tend not to be dishonest wilfully or just for fun. Establishing a motive for deceit, or conspiracy, is not a legal requirement, but if a motive cannot be detected or plausibly suggested then wrongful intention (to tell a deliberate lie in order to deceive) is less likely. The less likely the motive, the less likely the intention to deceive, or to conspire unlawfully. In many, if not most, fraud cases this would not be a particularly live point. The defendant is often a person who would be a direct beneficiary of the fraud, and a plausible motive is, to that extent, relatively easily propounded. The present case is, however, different.'"

Rowlandson *and section 85 of the Solicitors Act 1974 (UK)*

22. In *Jyske* I held:

> "21. ...The *general* duties of a banker in relation to trust accounts are... accurately stated in a passage in

Paget on the Law of Banking (14th Ed, 2014) at para 6-19, which was approved in *Rowlandson v National Westminster Bank Ltd* [1978] 1 WLR 798 at p 805:

> 'If a bank has notice, however, received, that an account is affected with a trust, express or implied... it must regard the account strictly in that light... When a bank is fixed with the fiduciary nature of an account, it has to bear in mind two somewhat conflicting factors. It has to consider the interests of the person beneficially entitled, and it has to recognise the right of its customer to draw cheques on the account and have them honoured. The bank obviously must not be a party or privy to any fraud, any misapplication of the trust fund. It could not, on the mere instruction of the customer, transfer trust monies to [a] private account, to wipe out or reduce an overdraft."

22. There is a degree of flexibility in this summary of a bank's duties. Thus, some fiduciaries will be more high risk than others. In *Rowlandson* itself, the trustee was an amateur, an uncle of the beneficiaries. Unusual transactions in such cases will be more suspicious than in the case of professional trustees and solicitors, who are likely to be low risk. There is a strong presumption that solicitors are honest.

23. Despite this presumption, aspects of these duties would be potentially unworkable in relation to solicitors' client accounts, where funds must often be moved at short notice and where the identities of the clients of the solicitor may be subject to duties of confidentiality owed by the solicitor to the client. Accordingly, in England there is a specific provision which applies to banks who provide client accounts for solicitors."

23. This provision is section 85 of the Solicitors Act 1974 (UK), which reads:

> "Where a solicitor keeps an account with a bank or a building society in pursuance of rules under section 32—
>
> (a) the bank or society shall not incur any liability, or be under any obligation to make any inquiry, or be deemed to have any knowledge

> of any right of any person to any money paid or credited to the account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it; and
> (b) the bank or society shall not have any recourse or right against money standing to the credit of the account, in respect of any liability of the solicitor to the bank, other than a liability in connection with the account."

24. I held that this provision applied in Gibraltar by virtue of section 33 of the Supreme Court Act 1960 (Gib), which reads:

> "(1) Subject to the provisions of this Act and of any rules of court for the time being in force the law in England for the time being in force relating to barristers and solicitors shall extend to Gibraltar, and shall apply to all persons practicing as barristers or solicitors in Gibraltar.
> (2) The rules prescribed from time to time by the Bar Council and the Law Society in England in regard to the professional conduct of barristers and solicitors shall with such modifications as the Chief Justice may deem fit to allow be respectively observed by barristers and solicitors in Gibraltar."

25. By virtue of section 3 of the English Law (Application) Act 1962 I held section 85 could be applied to Gibraltar with suitable modifications, so that, for example, the reference to the English Solicitors' Accounts Rules could be taken as a reference to the Gibraltarian Solicitors' Accounts Rules 1973.

26. In the current case, Mr Moverley Smith QC submitted that I erred in *Jyske* in relation to section 85. Section 33(1) of the 1960 Act, he said, identifies the *extent* to which English law applies and also *to whom* it applies. The only persons to whom it applies are solicitors, not third parties like banks. This submission is very similar to that made by Mr Alexander

QC on behalf of the claimants in *Jyske*, which I rejected at para [30] of my judgment. The problem with Mr Moverley Smith's submission in my judgment is this. Section 33(1) has two halves to it. The first half is a general provision that "the law in England... relating to barristers and solicitors shall extend to Gibraltar". Only the second half is addressed to "persons practising as barristers or solicitors in Gibraltar." There is in my judgment no difficulty with the first half having application to third parties, such as bankers. Accordingly I hold to my view that section 85 extends to Gibraltar.

27. Section 85 does not release a bank from its liability for dishonest assistance, whether as a result of actual knowledge or Nelsonian blind-eye knowledge, but it creates a strong presumption, on which bankers can rely, that solicitors' client accounts are being conducted in a proper manner. A banker's duty to investigate transactions must be considered against the background of that statutory assumption.

RBSI and the Firm's accounts

28. The Royal Bank of Scotland plc ("RBS") was incorporated by an Act of the (original) Scottish Parliament in 1724. The National Westminster Bank plc ("NatWest") was a more recent creation, only dating from 1968, although parts of the business were much older. RBS and NatWest merged as a matter of law in 2000, but it took a long time for the merger to take full effect in terms of facts on the ground. In particular, what had been the two banks continued to use their separate legacy computer systems. RBS's system was called Kapiti. NatWest had two systems, IBBA and Caustic. In addition there was a shared system called the Relationship Manager Platform ("RMP"). The RMP was used by relationship

managers to communicate with the credit management team in Jersey.

29. Before the merger, both RBS and NatWest had subsidiaries in Gibraltar. The RBS subsidiary was a free-standing Gibraltarian operation with exclusively Gibraltar-based staff. Around the time of the merger, the corporate vehicle for RBS's operations in Gibraltar became RBSI: Royal Bank of Scotland (Gibraltar) (Transfer of Undertaking) Act 2009. RBSI was incorporated in Jersey. As well as Gibraltar, RBSI was the corporate vehicle for RBS's operations in Jersey and Guernsey and elsewhere outside the United Kingdom. Instead of the bank having a free-standing operation in Gibraltar, significant functions were carried out elsewhere. In particular, credit management was done in Jersey.

30. The Gibraltar operations of the NatWest were transferred to RBSI by the NatWest Offshore (Transfer of Gibraltar Undertaking) Act 2001.

31. In Gibraltar itself, RBSI had a number of different departments. Payment functions were carried out by the payment processing team. This was almost purely an administrative function. It dealt with the mechanics of all payments in and payments out. So long as the payments appeared to be validly authorised by a customer and were within the credit limits given to the customer, the payment department would make the payment. The payment department had only limited referral duties. In particular staff in that department were not expected to, nor did they, query the purpose of payments and transfers. There were other departments like treasury, account opening and account administration, but they do not feature in the current case.

32. The credit managers were, as I have said, based in Jersey. Those who feature in this case are Kenny Maclean, sometimes spelt MacLean ("Mr Maclean"), Kelvin Heward ("Mr Heward"), Bryan Simpson ("Mr Simpson"), Ian Nash ("Mr Nash") and Tony Quayle ("Mr Quayle"). The chief executive of RBSI was Graeme Smith ("Mr Smith"). He was also based in Jersey.

33. RBSI had money-laundering officers ("MLOs"), to whom suspicious transaction reports ("STRs") could be made. This was initially Patricia Risso, but for most of the relevant time, the MLO in Gibraltar was Amanda Eccleston ("Ms Eccleston").

34. Each customer had a relationship manager based in Gibraltar. The Firm's relationship managers were all in the corporate and financial intermediaries division. It is between January 2004 and May 2008 that employees of RBSI are said to have dishonestly assisted the Firm's defalcations. During this period, the Firm's relationship managers were successively Bianca Lester, née Key ("Mrs Lester"), Howard Shaw ("Mr Shaw") and Jordan Ramagge ("Mr Ramagge").

    (a) Mrs Lester is a native Gibraltarian. She joined RBS in Gibraltar in 1997. By 2000 she was an advances assistant. Subsequently she was promoted to team leader in the Spanish mortgage business. In January 2004 she became the Firm's relationship manager. In January 2005, she became a support manager in the same division, but she still appears on correspondence as the Firm's relationship manager up until June 2005, when she went on maternity leave.

    (b) Mr Shaw is English. He started working in financial services in England in 1976. In 2000 he moved from RBS in England to work for RBSI in Guernsey. On the

completion of his five year overseas contract, Mr Smith suggested he apply for a contract extension to work for RBSI in Gibraltar from April 2005. His application was successful. He took over the Firm's connection in June 2005. Latterly Mr Ramagge was his support in his capacity as an assistant relationship manager. Mr Shaw left RBSI in 2009.

(c) Mr Ramagge is also a native Gibraltarian. He joined RBSI after university in 2002. In July 2003 he became electronic banking services manager. In June 2006 he was promoted to assistant relationship manager and assigned to support Mr Shaw. In July 2007, he was promoted again to relationship manager and took over the Marrache connection from Mr Shaw.

35. In addition the individual Marrache brothers had their own relationship manager in the "premium" (retail banking) department, Ms Joanne Balban née Morello, but this manager does not have any material rôle in the matters in issue in the current case.

36. The head of corporate and financial institutions during this period was Marvin Cartwright ("Mr Cartwright"). He worked in Gibraltar. Mrs Lester, Mr Shaw and Mr Ramagge reported to him. The overall head of the bank in Gibraltar was Kerry Blight ("Mr Blight"), the regional manager.

37. A substantial part of the bank's business in Gibraltar was lending money for the purchase of Spanish properties (known as the "real property" business). At the relevant time, the head of this department was Lino Brydges ("Mr Brydges"). He knew the Marraches well. Firstly, he had until about 2002 been their relationship manager. Secondly, the Firm, through its Sotogrande office, was RBSI's solicitor for the Spanish

mortgage business. He had many dealings with them in this capacity and he valued their services for the bank in this key function. By 2007 Mr Brydges had become head of premium retail banking, although he may have kept his responsibility for real property lending.

38. Prior to the RBS/NatWest merger the Firm had office and client accounts with both subsidiaries. After the merger, what had been the NatWest accounts of the Firm were closed, although the precise date is not in evidence. During the period 2004-08 the Firm had the following active accounts:

057400293: Sterling office account ("293 account")
057400294: Sterling client account ("294 account")
057400149: US$ client account ("149 account")
057400201: Canadian $ client account ("201 account")
057400135: Euro client account ("135 account")
057400155: US$ client account
057400151: Sterling client account
057400153: Euro client account
057400221: Sterling client account

These last four client accounts were little used and do not feature in the current case.

39. In February 2008 RBSI opened a new office account for the Firm as well as three client accounts under the NatWest brand. This was part of a move to an improved computer system. The RBS Kapiti system was not being updated, whereas the NatWest systems were being. The idea was to migrate RBS accounts to the NatWest side of the business, so that the better computer systems there could be used. These new NatWest accounts do not feature in the issues in the current case. The RBSI accounts continued to be used up until the collapse in 2010.

The Marraches' relationship with RBSI

40. The evidence of the bank as to its knowledge of the Marraches was not substantially disputed. The Marraches were a long-established and wealthy family in Gibraltar with excellent connections in the Gibraltarian community. Until its collapse, the Firm had a good reputation. As I have noted, RBSI used it for its Spanish mortgage business. In addition, Coutts & Co, RBS's private banking arm in London, recommended the Firm to its customers for Gibraltar-related work. The three Marrache brothers presented themselves as having great personal wealth.

41. As well as the Firm itself, the brothers had a trust and company administration business, Gibland Secretarial Services Ltd ("Gibland"), and a corporate trust firm, Cabor Trustees Ltd ("Cabor"). In addition, they had an estate agency, which they ran as a partnership, Canon Real Estate, and a tobacco wholesaler, AS Marrache & Son Ltd. These last two businesses are not relevant to the issues in this action.

42. There was a darker side to the relationship with RBSI. The brothers were arrogant and bullying. They claimed to be the second biggest law firm in Gibraltar, whilst in truth only being in the top five. Benjamin Marrache was particularly prone to *braggadocio*, boasting of his connections with footballers such as David Beckham and Formula One racing teams. He claimed the Firm was instructed to act in the enormous Eastside development project in Gibraltar (which in fact proved abortive).

43. This also led to something of a culture clash. Historically, banks in Gibraltar found it difficult to obtain timeous financial information from Gibraltarian businesses. As a result lending

was often done on the basis of a customer's reputation, rather than on conventional credit analysis. When the credit function moved to Jersey, RBSI started to insist on financial information. The Marraches were reluctant to cooperate. It was only with great difficulty that the Marraches could be prevailed upon to provide the accounts for the Firm, Gibland and Cabor. This led, as will be seen, to repeated show-downs. RBSI would refuse to extend facilities unless the Firm managed its credit relationship better. These threats typically produced at least a temporary improvement in the Marraches' financial management.

44. The brothers presented to the bank as being particularly chaotic. A long-running theme, again as will be seen, is that they persistently exceeded their overdraft on the 293 office account. The brothers, especially Solomon, explained this as being the result of billing clients but failing to transfer the monies from the client accounts to the office account. In cross-examination, Mrs Lester was taken first to an internal comment form of 16th July 2004 where she said:

> 'The customers are slowly bringing down the office account by processing fee income through this account. We haven't had to chase them for funds lately. They are paying in almost on a daily basis."

She was then asked (transcript, day 7, page 52 line 13 to page 53 line 11):

> "Q. ...So that appears to suggest that they are now processing fee income through this account, ie invoicing the client and then transferring money on that basis to the office account. Is that what you are --
> A. Yes, that was -- that was our frustration, and that's what we wanted for them to see, that they were invoicing there and then.
> Q. Did you have discussions about that?
> A. With regard -- we kept on, and I mean, I distinctly I remember having the conversation of: why

> don't you just do this exercise of, financially with your brothers, look at what fees are there and transfer all of it to the office account? Do it now. Why does it have to be when we chase you?
> Q. And presumably the reason they just didn't do it straight away is because they hadn't got round to sorting out the paperwork and sorting out the invoices, presumably?
> A. They were too busy to do it, was basically – and that's what was so frustrating."

45. Whether the Marraches were in fact as chaotic as they presented themselves to the bank is unclear. Solomon Marrache was able to keep what was ostensibly an accurate record of the Firm's running account of client monies held for Mr Magner and his two trusts. For example, the Firm was able to produce a running account to Mr Magner and his accountant, Mr Pauric Caldwell ("Mr Caldwell"), on 11th May 2006, when the Firm wanted some monies to cover outgoings. Similarly accounts were produced on 13th December 2007, 16th April 2008, 7th May 2008, 17th September 2008, 6th October 2008 and 4th February 2009 (this last is misdated 4th January 2009). In an email of 19th June 2008, Mrs Penny Garcia at Cabor was able to tell Mr Magner that the Firm held 5.246 million US dollars, 5.438 million Canadian dollars and 3.835 million Euros for Mr Magner's two trusts. (These monies purportedly held by the Firm had all been stolen by May 2008. However, I should make it clear that Mrs Garcia was a completely innocent employee of Cabor who had no suspicion the Marraches had stolen client monies.) The ability to keep two sets of books is not, to my mind, consistent with chaotic cash management. However, nothing turns on this. I am satisfied RBSI thought the Marraches were chaotic.

46. Both Mrs Lester and Mr Ramagge were newly promoted relationship managers when they had that function with the Firm. Mrs Lester explained (first witness statement para [37]):

> "I mainly corresponded with Solomon, usually by telephone or email. I cannot recall either meeting or corresponding with Isaac directly but I do recall that he would only speak to either Marvin Cartwright or Kerry Blight… Whilst I did meet Benjamin on occasion, I was a relatively new RM at the time and he would also prefer dealing with either Marvin or Kerry. In fact I recall that he would often go over my head and liaise with either Marvin or Kerry directly which made the connection even more difficult to manage."

47. Mr Ramagge had similar problems, commenting ruefully in an email of 19th July 2007: "Nice way to start my career as an RM – due to the reshuffle of portfolios I'm inheriting the Marrache connection."

48. Mr Shaw was in a different position. He was an outsider with decades of experience. He took a tougher line. On 13th September 2015, shortly after taking over the connection and accompanied by Mr Cartwright, he had a meeting with Solomon, and possibly Benjamin, Marrache. Mr Shaw explained to the Marraches forcibly the bank's requirements for financial information. In his first witness statement (para [59]) he said:

> "I have a clear recollection that Solly was not happy at the meeting… either with my approach or with my explanation of the Bank's concerns. I remember Marvin Cartwright commenting to me as we left the meeting that it was lucky he had been there, otherwise I would have 'left horizontally through the window.'"

The relationship manager's rôle

49. Within RBSI, relationship managers had an important, but somewhat circumscribed rôle. They had no general duty to monitor customers' accounts. Instead:
    (a) They would act as a point of liaison with the customer.
    (b) They would prepare credit applications to be considered by the Jersey credit management team.
    (c) In addition, every day they would receive two types of report on which they needed to act.

50. The first of these reports was an "excess report". Every time customers went over their overdraft limit, that fact would be reported on that day's excess report. The relationship manager had to read the excess report as a priority and decide what should be done about the excess. This could include, for example, bouncing cheques. There were some exceptions (such as where a shadow overdraft, which the customer was not told about, was placed on an account), but in principle all excesses had to be referred to the credit team in Jersey via the RMP for approval.

Selective today's postings

51. The second report was generated to assuage any money-laundering concerns which might exist about bigger transfers. Although these reports had a number of different names, the ones in evidence are called "selective today's postings" ("STPs", not to be confused with STRs, suspicious transaction reports). All transfers above the relevant limit were the subject of an STP, which would be generated daily. This report would initially go to an assistant relationship manager who would initial it and (assuming they approved the transfer) stamp or write on it: "Satisfied this transaction is in line with normal

business activity". A relationship manager would then countersign it. It was not a requirement that the relationship manager with conduct of the connection sign the STP (he or she might, for example, be absent), but that was the general rule: Shaw, transcript, day 4, page 3, lines 17 to 20.

52. There were different limits for different types of transaction. Thus cheques over £10,000 were the subject of an STP. Likewise transactions from or to high risk countries, like Nigeria, or from or to politically exposed persons, had lower limits. None of these different limits are relevant for the current case.

53. Only a limited number of STPs have survived. (Some further ones were disclosed in the course of the trial.) All date from 2007. The first (F2/1/1) is dated 8th February 2007. So far as relevant, this concerned a transfer of US$128,591.50 that day from the Firm's 149 US dollar client account to the 293 office account. The "normal business" stamp was affixed by Mr Ramag ge and the STP was countersigned by Mr Haywood, another relationship manager. The technical rubric on this STP shows that the system at that time generated an STP on all transfers of more than US$25,000. STPs for sterling were set at £25,000 at this time. This changed. By October 2007, only transfers of more than £100,000 were the subject of STPs.

54. The oral evidence was more confused as to what the limits were before the change. Mr Ramagge originally said the limit was always £100,000 (transcript, day 5, page 132 lines 15 to 16), but he slightly qualified that the next day (transcript, day 6, page 14 line 23 to page 15 line 4) by saying:

> "If the computer system issued a paper... with a limit of 25,000, we were only instructed to look at the payments of 100,000 or over. If we signed or stamped it, I don't think I would have given much attention to it."

55. Mr Cartwright's evidence was similar: transcript, day 8, page 44 lines 1 to 4. Mrs Lester thought the limit had always been £100,000, although she said it was £25,000 for personal accounts: transcript, day 6, page 115 lines 2 to 12. This was also Ms Eccleston's unchallenged evidence in respect of the NatWest system: witness statement para 16. Mr Shaw was asked about an STP for a transfer of US$66,000 from the 149 client account to the 293 office account on 27th February 2007. He said (transcript, day 3 page 130 lines 1 to 6):

> "I would have just signed it without further enquiry, particularly bearing in mind that it is below the 100,000 which was the threshold that I said I'd work to, and in all probability if it had been 150,000, 250,000, for a respectable practice of lawyers in Gibraltar, I would have just signed it."

This tied in with the evidence in his first witness statement (para [31]) that the limit had been £25,000 until it was increased in 2007, but that *de facto* he had always treated the limit as £100,000.

56. There is no documentary evidence of changes in the STP limits apart from the few STPs disclosed themselves. Doing the best I can with this oral evidence, my conclusions are these. Until the change in 2007, the STPs generated by the Kapiti system were for sums in excess of £25,000 (and probably 25,000 of other currencies). Relationship managers and assistant relationship managers, however, paid only cursory attention to sums of less than £100,000.

57. One other feature of the STPs which should be noted is that they give little detail of the transaction which is being reported. Thus the relevant line of the 8th February 2007 STP reads (to fit on the page I have had to split the lines of the report in the STP):

> "777-057400-149 Marrache & Co
> USD FX 128,591.50 08FEB07 SFX070108
> Tnf to 293-ac GIBR @@FX 00196"

It would not immediately spring to the eye of the relationship and assistant relationship managers that this was a transfer to an office account (293) from a client account (the US dollar 149 account).

Chronology: pre-2004

58. I turn then to the chronology relevant to the case against the bank. The earliest credit application in evidence is one dated 19th January 2000, seeking authorisation for a £75,000 overdraft. It was prepared by Mrs Lester. At this time she was an advances assistant assisting Mr Brydges, who was still the Firm's relationship manager. Mrs Lester commented:

> "The Marrache & Co account has been utilised for non firm expenditure although now this practice is ceasing as they pay more attention to strict control. This is further evidence[d] in their improvements in collection of monies owed to them, an area which we have always felt lacked particular attention. We feel the customers have now orientated their financial matters in the right direction."

The requested overdraft was authorised.

59. On 23rd May 2001, Mr Brydges made a further application to renew the overdraft and increase it to £100,000. This application noted:

> "The only issue that we have always had, has been that the accounts have not been run in the manner that one would wish to see, however, we strongly believe that with the consolidation of their account to RBS (Gib) we shall be in a better position to control and help them run with their accounts in a more professional manner."

This application too was approved. At the same time, an overdraft of £140,000 was given to Gibland.

60. The facility letter is dated 17th September 2001 and countersigned by the Marraches on 28th September 2001. It granted an overdraft of £100,000 for "assisting with working capital" for the period to 17th September 2002. Interest was charged at 2 per cent over base.

61. On 8th November 2001 Barclays Bank returned a cheque drawn on it by the Firm for £6,000 to RBS. The letter has a hand-written note which says: "Looks like 'cross firing' back in 2001." It is unclear who made this note on it. Mr Shaw suggested it might have been a Mrs Barber: transcript, day 3 page 135, line 9. There is no evidence that Mr Shaw or any of the other relationship managers ever saw the note.

62. On 23rd November 2001 Mr Maclean, in what appears to be the first formal involvement of the Jersey credit team, told Mr Brydges that an annual review was due in January 2002. He noted that the credit team did not want to see the overdraft "facility fully utilised from day one, creating a hard core which remains in place until the next review... [I]t must fluctuate fully... I have no appetite for further lending to this connection given we effectively remain in a pawnbroker situation against the brothers' asset base and reputation." Mr Maclean's proposed pre-drawdown conditions included the provision of the Firm's 1999 and 2000 accounts.

63. Matters dragged on. On 5th August 2002 there is an exasperated file note from the credit team:

> "Ongoing issues remain for this connection as a whole, notably the volume of excesses on both the personal and partnership accounts, hardcore nature of overdrafts, lack of financial info, outstanding review etc – a pretty unimpressive list when considering the nature of the business and its / the partners' profiles on the Rock. We would therefore be fully justified in declining the application in front of us until such time as the review has been undertaken and some of these issues addressed. This would no doubt cause a breakdown in the relationship which we would perhaps not have any qualms about were it not for the number of referrals they make to the branch. The facility itself looks affordable from the limited information to hand and I can accordingly recommend sanction"

The note then points to the late production of accounts for 1999 and 2000, which were still only in draft form.

64. In a further note of the same day, Mr Maclean said: "I am rapidly losing patience with these people. We need the review done ASAP."

65. Notwithstanding that position adopted by the credit managers in August 2002, matters still dragged on. On 2nd December 2003, Mr Maclean commented that "the operation of the Marraches' practice a/c is unacceptable and the lax handling of excesses by the branch over the past year or so contradicts an explicit 'no excesses' instruction from credit."

66. On 1st December 2003 Mr Maclean emailed his colleague in credit, Mr Nash, as follows:

> "Excesses are unacceptable in any form. They must sort this out immediately or we will bounce.

> Hardcore is also unacceptable. Law firms are especially at risk from poor debtor control and sizeable bad debts. They need to fully satisfy us as to the financial strength of the firm or we will enforce limit reductions or term out facilities.
>
> Frankly Nasher, I've had more than enough of the Marraches. We've only put up with them in the past because of the strongest possible branch representations. This won't wash for much longer and I'll enforce a tougher line whether or not these strong representations continue.
>
> Cheers."

The email string was copied to Mr Cartwright, who replied that he would take "a firm stance".

67. On 30th December 2003 Mr Cartwright wrote to Solomon Marrache asking for up-to-date financial information. Although he pointed out that the Firm was using its overdraft as hardcore borrowing, the letter does not in my judgment on a fair reading take anything approaching "a firm stance".

Chronology: 2004

68. The letter was followed by a visit to the Firm on 15th January 2004. Mr Cartwright and Mrs Lester, who by this time was in post, thought they had made progress. Notwithstanding that, by 18th March 2004, nothing material had happened. Mr Cartwright was pressing Mrs Lester to sort matters out, not least because the Firm's overdraft had hit £180,000.

69. Only on 20th April 2004 did Mrs Lester send an email to Solomon Marrache seeking a meeting "to discuss the facilities and the way forward."

70. On 17th May 2004 Benjamin Marrache was pushing his premium banking relationship manager to approve a loan for a property purchase. This set off a string of emails in which Mr Maclean reiterated that he wanted up-to-date accounts before lending anything. Mr Cartwright agreed and again pressed Mrs Lester to drive the matter forward. She in turn said she had been liaising with Solomon Marrache who was blaming his elder brothers for the delays.

71. On 20th May 2004, Mrs Lester made an excess referral. The Firm's office account was £132,727 in the red. She was asking whether to permit further withdrawals of £5,360.37 or refuse them. On the basis that the Firm's 2003 accounts were nearly ready and that fees to cover the excess were expected shortly, Mr Maclean authorised the excess.

72. On 7th July 2004 Mrs Lester wrote the Marraches a letter "further to [their] meeting on 8th June 2004". This confirmed the need for the 2003 accounts, information from Baker Tilly on working capital requirements and a fresh valuation on the Marraches' property assets. She noted: "In real terms, I feel little progress has actually been made despite goodwill on both sides." Benjamin Marrache replied on 15th July 2004 saying that Baker Tilly would have the accounts shortly and disputing the need for a formal property valuation.

73. On 16th July 2004 credit management extended the Firm's £100,000 overdraft to the end of August that year in the expectation that the promised financial information would be forthcoming. The excess of £27,000 on the Firm's overdraft was to be reduced. On 29th July 2004 Mr Cartwright (who was managing the connection whilst Mrs Lester was on holiday) confirmed to credit that he was taking a tough line with the Marraches.

74. On 29th July 2004 Benjamin Marrache wrote to Mr Cartwright regarding a €5 million deposit, purportedly from the sale of a stake in an hotel in Dublin by a high net worth individual living in Gibraltar. He said:

> "As I informed you our fees in this transaction are substantial and therefore I would be grateful if on receipt of the funds you would kindly place the office account in credit and pay off the personal loan accounts."

Mr Cartwright passed the letter to Mrs Lester.

75. Mr Cartwright emailed Benjamin Marrache the following day to say that that bank would give them a breathing space until receipt of £400,000 early the following week, but that the overdraft should not exceed £140,000.

76. By 6th August 2004 no monies had been received. Mr Cartwright emailed Mrs Lester to say:

> "As of Monday [9th August 2004] this account must now operate within £100k. Credit will not operate any excesses from hereon. You will need to chase Benjy/Solly to see where these magical funds that are repaying the facility will be coming from as well as taking forward the wider proposals for the restructure of this connection."

77. On 10th August 2004 the 293 office account was brought just within its £100,000 limit. On 13th August 2004 Mrs Lester sent an email saying €4 million had been received into the 135 Euro client account. In fact it was a sum of €4,743,239.73 which was credited to that account on 16th August 2004. However, the following day the Marraches instructed that the monies be returned to the sender. Mrs Lester sent an email saying:

> "The €4.7m payment came in yesterday and is leaving the account today, because the Marraches should have been paid in Sterling and therefore are returning the funds to the customer so they do not suffer exchange rate fluctuations, therefore we will receive the payment in sterling. The facility is currently working within the £100k."

Mr Maclean replied to say he could live with that for a further week.

78. On 27th September 2004, there was a transfer from Jyske Bank to the 293 office account of £279,500. Solomon Marrache represented that this money represented fees received in connection with the Eastside project. The office account went substantially into credit. Mrs Lester made a file note that Baker Tilly were reviewing what the best tax position would be for the Marraches.

79. Within weeks, the Firm was back to exceeding its overdraft and on 15th October 2004 Mrs Lester had to make another excess report in order to obtain permission to pay four cheques totalling just over £11,000. Much the same occurred a week later.

80. On 29th October 2004. Mrs Lester authorised the cashiers to pay out £13,854.64 in cash from the 294 sterling client account. The reason given was "salaries". On that date the 293 office account was in credit of more than £30,000. Mrs Lester sought no explanation for why the payment was from the client account.

81. On 1st November 2004 Mr Cartwright emailed Benjamin Marrache to say "some progress has been achieved with the repayment of the office Account [but] we appear no closer to

formalizing your requirements which expired well over a year ago."

Chronology: 2005

82. By January 2005 the Firm was back to having excesses. Mrs Lester was chasing for payments in and for financial information.

83. On 11th February 2005 Mr Cartwright emailed Mrs Lester regarding AS Marrache & Son Ltd to say:

> "I note this account has now been continually overdrawn for at least the last 2 weeks. I also note that this position has not been reported on RMP. If this is the case, you have not adhered to our Credit Policy and I am seriously concerned about this.
>
> In your new role it is even more important that this does not occur particularly as the whole team is now relying on you to maintain the tightest controls of Credit Stewardship."

84. She replied to say that Joe Beriro (who operated AS Marrache & Son Ltd under a joint venture with the Marraches) was transferring monies, so she had a discretion to approve the excess.

85. On 23rd February 2005, Wendy Robba from client services emailed Mrs Lester to ask why she had authorised a cash collection of €200,000 for collection the next day and with no commission charged. Mrs Lester replied that "[i]t was client monies for a completion and would therefore have a shortfall should the commission be charged."

86. On 25th May 2005 Mrs Lester told Solomon Marrache that she was liaising with credit to finalise a £100,000 facility for the

Firm. On 22nd June 2005 Solomon Marrache said that the Firm would like to arrange an overdraft facility of £250,000. Nothing was finalised before Mrs Lester finally relinquished her rôle as relationship manager completely.

87. By 29th July 2005 Mr Shaw was in place as the relationship manager and made an excess report. He noted that the last formal overdraft facility granted had been removed in September 2004, but that the Firm had continued to borrow as if it had a facility. The balance on the day of the excess report was £121,540.30, but Mr Shaw reported that funds were in transit to reduce it below £100,000. He also noted that draft account to June 2004 had been received and spread on the RMP.

88. On 26th August 2005, Mr Shaw made a further excess report. The overdraft was going to hit £117,000, but he reported that funds were expected from another bank. Mr Shaw made the following comment:

> "As mentioned, I am also investigating a number of transfers between client and office both with RBSI and the 'other' bank in Gibraltar as I need to understand how they manage their/clients' cash. I need to ensure they are not cross firing/misusing client's funds."

89. Around this time, Mr Shaw analysed transfers from the 294 sterling client account to the 293 office account from January 2005 to August 2005. I shall return to the question whether it was Mr Shaw or one of his colleagues who prepared the analysis. The first transfer was noted as one of £15,000 on 15th February 2005. (In fact, this was an error: this transfer was of £25,000, but little turns on this.) On 21st February 2005 there was a transfer of £25,000 and on 30th March 2005 £20,000. After a transfer of interest earnt on the 294 account,

there were transfers of £27,555 on 7th April 2005, £30,575 on 13th April 2005, and of £20,000, £10,000 and £20,000 on 5th, 10th and 13th May 2005. Following these large round-sum transfers, there were additional round-sum transfers of £10,000 on 5th July 2005 and £30,000 and £20,000 on 10th and 17th August 2005. There were some eighteen other transfers for smaller sums, most of which were not round numbers. The largest of these was for £10,909.65 on 12th July 2005.

90. Mr Shaw says that he did not examine the other client accounts, but that this may have been an "oversight": transcript, day 3 page 145 line 21. Nor did he make any physical or electronic note of the many transfers from the 294 account to Kirsty, starting with £15,000 on 7th January 2005. I shall return later to the significance of these payments and what I conclude as to Mr Shaw's approach to reviewing the accounts.

91. On 7th or 8th September 2005 Mr Shaw made an excess report. The overdraft went to £119,000 on 6th September, but £85,000 was received in uncleared effects on 7th September. Mr Shaw noted:

> "Meeting booked with Marrache brothers Tuesday 13/9 to assess future needs/agree parameters for future operation of account. My stance on striving to maintain a maximum balance of #100k has met with serious unrest from clients and they require a 'clear the air' meeting. I am not certain whether this is progress or not!!!"

92. On 22nd September 2005, Adam Moon, who was a premium banking manager's assistant, warned Mr Shaw that Benjamin Marrache "didn't seem very happy that this had to go through you."

93. An email string on 5th and 6th October 2005 shows a consultation between Mr Cartwright, Mr Smith and Mr Shaw about the continuing difficulties with managing the Marrache connection, including ongoing excesses, the hardcore nature of the borrowing and the failure to formalise facilities. Mr Smith concluded that "we will never get this client to be 'perfect' in Credit's eyes and at best it will be evolution rather than revolution."

94. On 27th October 2005 Mr Shaw submitted a credit proposal for the Marrache connection. It noted that Kristy was a "Gibraltar registered Co. supplying staff to Marrache & Co. This Co effectively employs the staff of the legal practice."

95. A review of around the same time said:

> "Whilst the partners are considered proficient in the supply of legal services, the manner in which they manage the bank accounts of the various entities, and their personal accounts, has always been a cause for concern for the bank. See [later in the review] for further commentary in relation to the failure to adhere to pre agreed limits and repayment terms. It should also be recorded that the business historically banked with NatWest – prior to merger, and account management issues were also seen. At the time of the merger RBS was appointed main bankers and facilities were consolidated under the one brand. It would also appear that on occasions client and office funds are not segregated but segregation is not a requirement under current Gibraltar legislation and Marrache do not follow UK best practice adopted by some local competitor practices."

(Note that the passage "on occasions client and office funds are not segregated" is in the present tense.)

96. Later the review said:

> "Local legislation governing the operation of solicitors' client accounts does not require segregation of client's funds. It is however good practice to follow UK practice and whilst Marrache generally follows such practice this is not always the case. Legislation will be introduced next year to provide for segregation."

97. It is unclear where this notion came from that segregation was not a legal requirement. It certainly was under the Solicitors' Accounts Rules 1973. RBSI had in-house lawyers who could have been consulted. For example, on 23rd May 2008 Mr Ramagge was able to discuss a technical issue about what constituted a "commercial benefit" for the purposes of Know-Your-Customer requirements with Lisa Harvey, in-house counsel in Jersey. Why Mr Shaw did not raise the segregation issue in a similar way is a mystery.

98. Mr Maclean responded on 16th November 2005 on a sanction summary sheet. The document records the "sanction" (in other words the conditions of approval of the grant of a facility) and the reason for it. He began by saying that this was an "extremely challenging request based on the poor behaviour of this connection over a considerable period," but it had to be balanced against good relationship in connection with the Spanish mortgage business. He noted:

> "The lack of segregation between client / office funds is worrying but remains legal until next year. Hopefully the A/R [Annual Review] can confirm separation of funds (it will need to). Employing a qualified accountant will also hopefully assist with financial control…"

Chronology: 2006

99. On 3rd January 2006 Mr Shaw made an excess report. He said that he had been unable to contact the Firm, because it was

shut over Christmas, but that monies were expected. Mr Simpson approved the excess. On 11th January 2006 Mr Shaw reported to Mr Maclean that he was due to see the Marraches on 17th January 2006. On 2nd February 2006 Mr Shaw reported that progress was being made. The following day Mr Quayle agreed a further extension pending formalisation of the Firm's facilities. Meanwhile, Mr Shaw lodged a fresh credit application, which included the familiar details about absence of segregation.

100. By letter of 14th February 2006 Mr Shaw offered the Marraches facilities. This included an overdraft for the Firm raised from £100,000 to £250,000 and a continuation of the Gibland overdraft of £140,000.

101. On 2nd April 2006 Mr Shaw advised credit that "[n]egotiations were nearing completion but unfortunately Isaac Marrache has now entered the negotiation and the formerly debated structure is off." Mr Heward on 7th April 2006 agreed a further deferment, but said: "I am not willing to agree further deferments without a full update on latest financials..."

102. On 25th May 2006 Mr Shaw requested a further deferment to 20th June. He noted: "We have client acknowledgement that moving forward facilities will be secured against tangible assets." On 27th June 2006 Mr Shaw reported that there had been no progress. On 11th August 2006 Mr Shaw told Mr Heward that there had been progress in that the brothers would give security of two Queensway Quay properties valued at £1.2 million to cover facilities totalling £590,000 split between the Firm (£250,000), the brothers (£200,000) and Gibland (£140,000).

103. On 3rd August 2006 there is an exchange of emails between Mr Shaw and Solomon Marrache regarding the security which it was proposed should be given for the facility. Once again no progress was made.

104. On 18th September 2006 Mrs Lester authorised the withdrawal of £20,000 in cash from the 294 sterling client account. No commission was to be levied. The reason for the collection was described as "normal business transactions".

105. On 26th September 2006, the Firm transferred US$96,929.46 from the 149 US dollar client account to the 293 office account. This completely emptied that client account. This transfer would have appeared on an STP. I discuss this further below.

106. On 1st October 2006 Mr Shaw carried out his annual review. The wording of previous credit applications as regards segregation were repeated, but the report added:

> "On 1 January 2006, new Gibraltar legislation was introduced making it a requirement to segregate client and office funds and hopefully future accounts will confirm that appropriate practices are now being followed. Our recent experience has seen an improvement in the management of client funds."

107. Mr Shaw made a credit application in similar terms on 11th October 2006. The sanction summary sheet was prepared by Mr Heward. On 18th October 2006 he agreed to extend facilities of £250,000 to the Firm on the basis of full security but noted:

> "This is a difficult position to manage. We are asked for mainly fully secured facilities for prominent local customers, with good means clear and where we also have full personal recourse. On the other we have

> opaque financial accounts, a history of not altogether satisfactory account conduct, an unwillingness to share information with RBSI (albeit this has improved recently – thanks for your efforts in this respect) and some doubts about the extent to which clients' funds are properly segregated.
> ...
> I know that the client account issues are a sensitive subject but I agree with the need to ensure that customers are compliant with current legislation. Given the potential reputational issues surrounding this, please ensure Graeme Smith is aware and supportive of these facilities."

108. On 26th October 2006 Mr Shaw was able to issue a facilities letter to the Firm. The letter provided for an overdraft of £250,000 against security to be given by way of an assignment of two life insurance policies and a charge over the sub-lease of 292A Main Street, Gibraltar.

109. The same day Mr Shaw sent an email to Ms Eccleston, the MLO, which he copied to Mr Cartwright. Mr Shaw wrote:

> "I have been asked by Gibland to open an account for a Gib Co in the name of [redacted], ultimate 'beneficial owner' [redacted], [d]irectors [redacted], account signatories Gibland. Upon further investigation, it transpires that the shares are actually in the name of a Swiss Trust and request was therefore made to Gibland, to be provided with the principles [*sic*] of the trust – via extract of trust deed. Gibland advise that [redacted] is not prepared to authorise the divulgence of such information to the Bank and the request to open the account is withdrawn.
> Position is therefore suspicious and my request is do you want a STR or is this e-mail sufficient.
> My main concern is the fact that this is the 3rd occasion in the last 6 months where Marrache/Gibland had withdrawn a new account request following our standard request for disclosure of information."

Ms Eccleston confirmed that an STR was required. Mr Cartwright said:

> "Howard, if this is indeed the third time surely we should be picking up with the senior people at Marrache's.
> I imagine each time there is an application this takes up your time and we owe it to ourselves to ensure that partners are aware of our position and understand why there is resistance."

In her witness statement Ms Eccleston says this was the sole STR made prior to the crash in connection with the Firm.

110. On 29th December 2006 Mr Ramagge acting as (at least temporary) relationship manager submitted an excess report. He noted that the security for the £250,000 overdraft had not been provided, but that the Firm had kept within the old £100,000 limit, except on this occasion where the overdraft had crept up to £109,000. There were monies in other accounts, but the Firm had closed for Christmas. The excess report was repeated on 2nd March 2007.

Chronology: 2007

111. On 16th January 2007 Mr Shaw sent out another copy of the facilities letter originally sent on 26th October 2006. Isaac and Benjamin Marrache signed it on 18th January 2007, but the security was still not provided, so the facility did not come into effect.

112. On 8th February 2007 Mrs Lester authorised a cash withdrawal of £10,745.81 from the 293 office account. The reason given was "normal business transaction".

113. On 3rd May 2007 Mr Shaw made a further credit application. In an update of 28th June 2007, he commented on the mortgage of the lease on 292A Main Street not having been provided, so

that the facility remained at £100,000. He noted that the Marraches had finally signed facility letters. He said he intended to migrate all accounts to the NatWest system. On the conditions he wrote:

> "4) Financial information – accounts to 6/2005 for Gibland and draft accounts for the practice are promised by the 10 May. Accountant's confirmation will be received that within 6/2006 accounts, to the best of their knowledge (there is no audit requirement) office and clients' funds are now being separated – best."

His conclusion was:

> "In summary, we are no worse off than we have been for some time and account conduct has improved following the appointment of an internal finance officer but the file has not been put to bed. I guess end June deadline will get stretched but I will continue to press and now have internal management support that if I need to threaten the relationship then so be it."

114. On 29th May 2007 Mrs Lester authorised the withdrawal of £12,000 in cash from the 294 sterling client account. No commission was charged. The reason for the withdrawal was again given as "normal business transaction". Mr Shaw queried this with Mrs Lester. She said that because the cash was in sterling, no commission was payable. She added that at the end of the month it was normal for the Firm to pay salaries in this way, so was a "normal business transaction".

115. Over 27th and 28th June 2007 there were emails within the bank discussing the Marraches' failure to provide the security due under the 16th January 2007 facilities letter. One chain of emails was limited to staff in Gibraltar. This chain began with Mr Shaw drafting an email to be sent to the Firm threatening to

withdraw all facilities for the Firm and Gibland unless the promised security was forthcoming.

116. Mr Cartwright responded after referring to Mr Shaw's "very strong" text:

> "Howard has managed to play the politics so far [with Credit and real property] but is running out of time and credibility internally. [He then discusses increasing the interest rate in the meantime to base plus 5 per cent.] Ultimately the partners may still take affront to this given their general attitude so my request to you is: can Lino pick up the phone to Solly and read him the riot act in an arm over shoulder way??... Bottom line is that we have worked very hard to strike a deal... but despite effort after effort we don't get [the] same professional response. I am also conscious of the fact that exiting the relationship on this basis may have implications for the Real Mortgage business we do with them so comments appreciated."

117. Mr Brydges replied that he had been able to speak to Solomon Marrache, who had promised to sort matters out by 6th July. Mr Shaw finished the exchange by noting that Mr Ramagge would be taking over as relationship manager a week on Monday and commented:

> "Care – clients do not know about the proposed change of relationship [manager] although I guess they will be delighted to get rid of me."

118. Whilst that email string was proceeding, there was another email string. In this Credit were complaining about the Marrache connection, Mr Cartwright was explaining that they were trying to sort things out with the approach by Mr Brydges, and Mr Smith decided to leave matters in Gibraltar's hands for the time being.

119. At the same time on 27th June 2007, Mr Shaw queried how it was that the Firm had paid cash sums into the bank using Scottish bank notes totalling £6,800 and £4,900. He said this was part of the bank's "know your customer" requirements. Solomon Marrache gave an explanation that a Swatch shop they operated was moving premises and that the shop had always accepted Scottish banknotes. The issue does not seem to have been taken further.

120. On 9th July 2007 Mr Shaw submitted what was to be his last credit application for the Firm. It reproduces verbatim much of the previous credit reports (including "Legislation will be introduced next year to provide for segregation", despite 1st January 2006 being long in the past). It notes that the accounts for the Firm and for Gibland were now available ("a major achievement").

121. On 19th July 2007, Mr Ramagge, who had become the relationship manager for the Firm, said that the Firm no longer needed an overdraft of £250,000 and was content with £100,000.

122. On 8th August 2007 Mr Ramagge, prepared a sanction summary sheet for the proposed £250,000 overdraft facility to be given to the Firm. It required June 2005 and 2006 accounts by the end of 2007 and June 2007 accounts by the end of 2008. It also required "confirmation that client and office monies are segregated." The sanction summary was followed by an updated credit application dated 13th August 2007.

123. On 9th August 2007 Mr Ramagge told Mr Shaw by email that the Marraches were now proposing to make a deposit of £100,000 into the bank in Jersey as security against the Firm's overdraft in that amount.

124. On 19th September 2007 Mr Simpson responded to Mr Ramagge's proposed sanction summary thanking him for his efforts. He said:

> "Moving on to the issue of the segregation of client funds and the transfer of the banking relationship over the NatWest brand please provide an interim update by the 31st December confirming that this has been completed."

125. The bank in Jersey dragged its heels organising the documentation for the security deposit. On 24th December 2007 Mr Ramagge reported that there had been delays in opening an account to receive the proposed £240,000 cash security in Jersey. He was hopeful the security for the overdraft facilities of £100,000 to the Firm and £140,000 to Gibland would be in place by 18th January 2008.

126. On 27th December 2007 Mr Ramagge raised a query with Ms Eccleston. The bank was missing the Firm's practising certificate, which Jersey required to open the account there which was to hold the security deposit. Ms Eccleston said they could waive that requirement since they knew that the Firm was a practising firm of solicitors.

Chronology: 2008

127. On 14th January 2008 Mr Ramagge emailed Solomon Marrache referring to their conversation of the previous Friday. He said that the bank required a letter from the Firm in the following terms:

> "In pursuance of section 31 of the Financial Services (Accounting and Financial) Regulations 1991, we are required to notify your bank as follows.

> All monies standing to credit of the above named account are deemed to be 'clients' monies' as described by section 31 and all monies in the Client Account are held by us under trust and our bank is not entitled to combine the monies from this account with any other monies from our other accounts or to exercise any right to set off or counterclaim against monies in the Clients' Account in respect of any debt owed to your bank by Marrache & Co/Gibland Secretarial Services Ltd."

128. Solomon Marrache wrote a letter to the bank in those terms on 18th January 2008. The same day Mr Ramagge emailed Mr Simpson to tell him that he had received the 2006 draft accounts for the Firm and a "letter confirming segregation of funds".

129. On 6th March 2008 Mr Ramagge issued a facilities letter to the firm to continue the £100,000 overdraft, secured by a cash deposit in Jersey. The letter was countersigned on 28th March 2008.

The witnesses

130. On the claimants' side, I heard live evidence solely from Mr Magner. Although originally Mr Caldwell was to give live evidence, in the course of the trial it was agreed that his witness statement could be read. Mr Louis Lombard, a director of T & T Trustees Ltd, gave formal evidence by witness statement that by a deed of retirement and appointment made on 9th February 2010 T & T Trustees Ltd were appointed as trustee of the Lamotte Settlement and of the Greene Settlement in place of Cabor.

131. On RBSI's behalf I heard live evidence from six witnesses: Mr Shaw, Mr Heward, Mr Ramagge, Mrs Lester, Mr Cartwright

and Mr Maclean. In addition the witness statements of four witnesses were taken as read without the witnesses being required to be cross-examined. These witnesses were Ms Eccleston, Mr David Bruce, Ms Gill Knox and Mr Justin Lloyd-Jones.

132. Ms Eccleston's evidence was that no concerns had been flagged about the Marraches or the Firm on the bank's internal monitoring system and that only one STR had been made, that of 26th October 2006. Mr Bruce joined RBSI in 2008, but only moved to Gibraltar in 2013. He gave generic evidence about a relationship manager's duties. Ms Knox and Mr Lloyd-Jones gave formal evidence about the physical and electronic disclosure exercise carried out in this current action.

The expert evidence

133. Permission had been given for each side to have experts on banking practice. The claimants instructed Mr Robin Bryant and RBSI Mr Richard Palette. Both experts are well-qualified. In the event they were able to reach agreement on almost all matters. Very properly they said many of the issues were ones for me to determine on the facts. In the event, the experts were not called to give live evidence. Instead I was given an updated joint statement of agreements and disagreements.

134. Both experts agreed:

(a) Bankers were not expected to have knowledge of the relevant Solicitors' Account Rules.

(b) Competent bankers, like relationship managers, can be expected to be aware of the need for separation of client and own monies by solicitors.

(c) Until 2007, banks were under no obligation actively to monitor customers' accounts. From 2007 they did

come under an obligation, but a bank was entitled to adopt a risk-based approach. Only if suspicions were aroused would there be more of a need to monitor a solicitor's accounts.

135. The experts agreed that a "reasonably competent banker would not be expected to police the separation of client and office monies." Mr Palette added that "if a banker had a suspicion that client monies were being misappropriated, he would be expected to make enquiries." Mr Bryant said, "Clearly the Bank was policing Marrache & Co in this regard as it had suspicions for some time that it was not, or might not be, applying Separation." Both agreed: "Whether or not the relevant bank staff (a) held a suspicion and (b) were policing the separation of client and office monies are questions of fact to be determined by the Court on the evidence."

136. As regards a bank's duties of investigation, the experts were agreed as to principles which are well-established in the case law. A banker is not expected to be a detective. However, if a banker becomes aware of matters which raise a suspicion that a customer is misusing client funds, he is obliged to investigate that suspicion.

Mr Magner and limitation

137. Mr Magner is an internet entrepreneur of Irish origin. In 1997 he set up Sports Interaction. In 1999 the Kahnawake Gaming Commission in Kahnawake, Québec, granted Sports Interaction an online sports betting and casino business licence. Subsequently the company expanded into online poker.

138. In late 2001 he was introduced to Isaac Marrache in London, who advised him to set up the trusts which became the Lamotte and Greene Settlements. A Gibraltar company, SIA Ltd, was also established to hold the Kahnawake gaming licence. The trusts and company were managed by Cabor and Gibland respectively.

139. On Mr Magner's instructions, SIA Ltd, transferred monies to the Firm's client account. The transfers which are the subject of this action are identified in his witness statement as these:

Date of transfer	Currency	Firm's client account
6.2.2007	US$3,000,000	149 US dollar
9.2.2007	CA$2,000,000	201 Canadian dollar
3.5.2007	CA$1,000,000	201 Canadian dollar
5.2.2008	CA$2,250,000	201 Canadian dollar
5.2.2008	US$2,000,000	149 US dollar
8.2.2008	€2,000,000	135 Euro

140. These monies should have been invested in term deposits by the Firm, but in fact were stolen shortly after they arrived in the various client accounts. Mr Caldwell has reconciled the various statements produced by the Firm with the transfers made. He calculates that as at 12th February 2010 the Firm owed the claimants €10,383,198.44 (including the interest which should have accrued). I am not asked to make any determination as to whether that figure is correct. It was agreed by counsel that that would be a matter for an account in the event of liability being established.

141. The main thrust of the cross-examination of Mr Magner was to show that he knew that something was wrong at the Firm before 17th September 2008. The significance of that date is that it is six years before 17th September 2014, when the claim form in the current action was issued. RBSI in its defence relies on the six year limitation period in section 26(2) of the

Limitation Act 1960. The claimants deny that section 26(2) is applicable and say that section 26(1) (under which there is no limitation period) is applicable. Alternatively they rely on the extension of time given by section 32(1)(a) and (b).

142. Sections 26 and 32 of the 1960 Act, so far as material provide:

> "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.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.
>
> 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:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which–

> (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
> (ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made."

143. In *Jyske*, I discussed the application of these provisions as follows:

> "252. Mr Leech [QC for Jyske] relied on the English High Court decision in *Cattley v Pollard* [2006] EWHC 3130 (Ch), [2007] Ch 353 for the proposition that the English equivalent of section 26(2) applied to actions for dishonest assistance. Whether *Cattley* applies as a matter of Gibraltarian law is a difficult question. The judge in *Cattley* declined to follow dicta of the English Court of Appeal in *Soar v Ashwell* [1893] 2 QB 390 at 394-395 *per* Lord Esher MR, and 396 *per* Bowen LJ, which hold that someone who dishonesty assists a breach of trust is liable as a constructive trustee and that therefore no limitation period runs. It is arguable that the Gibraltar legislator when making the 1960 law was acting against that judicial background: see *Lowsley v Forbes* [1999] 1 AC 329 at 342. If that is right, then *Soar* would remain good law in Gibraltar.
>
> 253. Jyske's position may in any event be distinguishable from that of the defendant in *Cattley*. Jyske was the institution which was actually holding the trust monies on behalf of the Firm. It may thus be a trustee itself without any need to resort to the creation of a constructive trust.
>
> 254. Even if section 26(2) does apply, then there is an issue as to whether an extension under section 32(1)(a) or (b) might arise. It is of course ironic that Jyske should as part of its limitation defence be saying that the beneficiaries should have identified the Firm's frauds earlier, since Jyske's case throughout has been that it always thought Marrache & Co were highly

> respectable solicitors and never had an inkling that the Firm was a fraudulent conspiracy."

144. In the event, I do not need to decide these points of law, because RBSI, even on the interpretation of the law most favourable to them, lose on the facts relevant to limitation.

145. In cross-examination, Mr Medcroft elucidated from Mr Magner that the transfers to the Firm were intended only to be there on a temporary basis. Mr Magner intended to transfer them out from the Firm into a long term investment he proposed to make with Gibraltar Asset Management Ltd. The transcript (day 2, page 114, line 12 to page 115, line 23) reads:

> "Q. So the fixed deposits with Marraches were always intended to be a fairly temporary arrangement?
> A. Yes, it was always intended that they would be invested into something that would earn more and would be more of a long-term investment.
> Q. Would it be fair to say that by June it was pretty clear that the Marraches were giving you the runaround because they didn't want you to invest in Gibraltar Asset Management?
> A. Sorry, I presume we are talking about June 2008, yes?
> Q. Yes, sorry, I am. The payments were made originally in February 2008. Certainly by June, on my reading of the emails, you are having difficulties, let's put it like that, in getting Marrache to move the funds from the client accounts to the Gibraltar Asset Management fund?
> A. Yes, and at the time my thinking on it was, and I think Pauric probably felt this way too, but at the time you may be aware the Marraches were very close to setting up the Close Marraches bank, and Benjy had been looking for me to invest the funds with their bank. To my mind, the reason for the delays and the reason for the language used to try and put us off GAM was that it was basically self-interest: he wanted the money to go into his own bank. In hindsight, also I realised that he probably thought that the bank was going to be his get-out-of-jail card: that it would give him an even bigger client account to wash more money through.

Q. I am looking at June 2008. If you can't answer this, then please say so. I will understand.
A. Yes.
Q. Is it your understanding that by June 2008, now, with the benefit of hindsight, all of the monies that you had transferred to the defendant bank had been dissipated?
A. In June 2008? No.
Q. Right.
A. No, I certainly didn't believe that."

146. Later Mr Magner was asked about his meeting with Benjamin Marrache on 18th September 2008 (transcript, day 2, page 120, line 19, to page 122, line 2):

"Q. Between June and 18 September, so just over two and a half months, things appear to have deteriorated because, as I understand it, on 18 September you had a meeting with Benjamin Marrache to discuss the delay in the investments in the Gibraltar Asset Management company?
A. Yes.
Q. Is that fair to say?
A. Yes.
Q. At the time of the meeting, whose initiative was it to have the meeting?
A. Mine. I actually flew in especially for it.
Q. What were you hoping to achieve?
A. To get some -- a confirmation that the funds would be invested as we'd asked, as we'd requested.
Q. At that point in time, did you still think that they were holding back because they wanted to use your money in the Marrache Close fund?
A. Yes. It's not really correct to say that I thought they wanted to use our money in Close Marrache, but that I thought that they wanted the investments to go into the bank, into Close Marrache.
Q. At that meeting on the 18th, as I understand it, he produced a piece of paper with two plot numbers on and said that actually your money had been used to invest or some of it had been used to buy properties in Sotogrande; is that right?
A. Yes, yes.
Q. That was a bolt from the blue, was it?
A. Yes, absolutely, yes.

> Q. That was the first indication you had had that monies that you had invested on a fixed deposit were being used by the Marraches for some other purpose?
> A. Yes.

147. I accept that evidence. I found Mr Magner an honest and credible witness with a good eye for detail. His account of these events is cogent and believable. It was only following that meeting that Mr Magner was on notice that his monies might have gone missing. For completeness I should note that, even if he had realised earlier that the Marraches had been stealing his money, that would not have put him on notice that he might have a claim against RBSI. Discovering the facts relevant to a claim against RBSI would have taken a lot longer. Thus even if June 2008 was the date he discovered he had a potential claim against the Firm, I would still have found that time for limitation purposes would not have begun to run against the claimants in favour of the bank before 17th September 2008. Indeed it would probably only have begun to run once Mr Adrian Hyde, the liquidator of the Firm, had been able to investigate matters following his appointment in 2010.

148. In the event, although he did not formally abandon reliance on limitation, Mr Medcroft did not address me on it in his final speech. I reject RBSI's limitation defence.

The Firm's 2004 accounts

149. Mrs Lester's witness statement exhibits the Firm's draft accounts for the year ending 30th June 2004. She says they were received on 4th December 2004. As is usual these accounts also give the figures for the year ending 30th June 2003. These are the only accounts of the Firm in evidence at trial. (Approved accounts for the years ending 30th June 2004,

2003 and 2002, but not later years, were disclosed by RBSI: A/24/185-186; but none were put in evidence. Mr Ramagge's email of 8th January 2008 shows that the bank had at least draft accounts for 2006, but these have not been disclosed by RBSI.)

150. Beyond her mentioning the existence of these draft accounts, she says nothing about the accounts or their contents. No other witnesses in their witness statements mention having seen these accounts. This is surprising. One of the extraordinary features of the accounts is that "cash at bank and in hand" is identified in the notes to the accounts as being:

	2004	2003
	£	£
Office accounts	1,792	165
Client accounts	33,613	417,776
	35,405	417,941

Creditors appeared in the notes as including "client money held" in the sums of £33,613 and £417,776 respectively.

151. The amount held in the 294 sterling client account on 30th June 2004 was £96,963.72. Thus, the £33,613 figure for "client money held" cannot relate to the monies actually in client accounts. This is without considering the other client accounts held at RBSI, still less client accounts held with other banks.

152. This could potentially be highly significant. Indeed I wondered whether it was these accounts which caused Mr Shaw to suspect some irregularity in the Firm's treatment of client monies. However, Mr Shaw's evidence was that he could not remember why he decided to start investigating. It was never put to him that it was these accounts which put him

on enquiry. Indeed, neither he nor any other witness was asked any questions about these accounts at all.

153. There would clearly have been a lot of questions which could have been asked about these figures. For example, what did Mrs Lester think these client monies appearing in the accounts represented? Did Mr Shaw obtain reassurance from the reduction in the client monies owed reducing from £417,000 odd to £33,000 odd? Such questions could be material to the state of mind of the relationship managers. In the absence of these questions being posed, in my judgment all I can do is ignore these entries in the accounts. Were I to do otherwise, I would be speculating. For completeness, I should say that, even if I am wrong in disregarding what was shown in these accounts, it would in fact not affect my determinations in relation to Mr Shaw.

The case against Mrs Lester

154. I turn first to the case against Mrs Lester. Here the claimants had a major problem. The way the case was originally pleaded was that relationship managers had a detailed knowledge of monies coming and going out of their customers' accounts. This was the way accounts were managed at Jyske Bank (Gibraltar) Ltd, as I explained in my judgment in *Jyske*. However, as I have set out above, relationship managers at RBSI had a much more limited (albeit still important) function. Mr Moverley Smith QC in opening acknowledged that the claimants' initial understanding of a relationship manager's rôle was wrong.

155. Quite a lot of the case against Mrs Lester fell away, because many suspicious transactions simply would not have been brought to her attention. For example, on 7th July 2004 the

Firm transferred €20,901.79 from the 135 euro client account to American Express Europe Ltd and €6,284.16 to American Express SVS Europe Ltd, in both cases to pay Isaac Marrache's AmEx card. Neither of these transfers would have appeared on an STP, so she would not have known about them.

156. Some payments would have appeared on an STP, but because the payments were below £100,000, they would not, on the evidence which I have accepted, have attracted any attention. This is the answer to Mr Moverley Smith's point in closing that there were various payments to Kristy from the 294 sterling client account: £31,000 on 7th January, £18,500 on 15th January, £51,650 on 27th January, £37,500 on 20th February and £29,000 on 27th February 2004. None of these transfers would have been subject to anything other than the most cursory inspection by the assistant relationship managers and relationship managers.

157. As the trial proceeded, it became less and less easy to see what case was being made against Mrs Lester. Indeed Mr Medcroft justifiably complained in his closing speech that it was unclear from Mr Moverley Smith's closing, whether any case in dishonesty was in fact still being pursued against Mrs Lester.

158. The strongest part of the case against Mrs Lester was her willingness to approve cash withdrawals from the client accounts. On 29th October 2004 the Firm sought to withdraw £13,854.64 from the 294 sterling client account for "salaries". Her cross-examination went as follows (transcript, day 7, page 66 line 13 to page 67 line 12):

> "Q. So on what basis were you authorising this cash collection?

A. Typically, I would get the call that Marrache & Co want to take what the amount was for salaries. I can only suspect at the time either I thought it was from the office account or, if it was the 294, I would have queried it, for sure.
Q. You would have queried it, for sure. Why would you have queried it, for sure?
A. Because again, although there are transfers, there are -- and to make sure that it is fees and that it is the -- I mean, salaries from a client's account is an unorthodox transaction so I would have queried it.
Q. So why don't we see any comment by you recording how you are satisfied about this particular aspect?
A. Because this was the only cash collection. I would have satisfied myself with the client at the time on the phone.
MR JUSTICE JACK: But why would Marrache & Co be needing cash for salaries? I mean, presumably all their staff would be paid by cheque or bank transfer, wouldn't they?
A. Well, sorry, they had at the time a few Spanish employees in the little offices that preferred to be paid in cash rather than ...
MR JUSTICE JACK: I see."

159. I accept that evidence. I found Mrs Lester a convincing witness. She believed that the Marraches were chaotic in their cash flow management. She believed throughout her time as their relationship manager that there were fees owed to the Firm which had not been moved from the client account to the office account. That would justify a payment out of a client account for salaries, even a cash payment for salaries. I accept her evidence that she would check such payments with the Firm to satisfy herself that the payment was legitimate. I bear in mind that Mrs Lester was still a fairly junior manager. In the light of her reasonably limited experience, I do not consider she was dishonest. She was entitled to rely on the Firm's reputation and the assurances given her. (There was a similar withdrawal of £12,000 in cash for salaries on 27th May 2007 from the 294 account, which Mrs Lester authorised, but it

is possible in addition she did not by that time remember that the 294 account contained client monies.)

160. There were other, sometimes much larger, cash withdrawals in euros from the 135 euro client account. Mrs Lester said that some notaries in Spain refused to accept banker's drafts written by banks in Gibraltar, so that there was a legitimate reason for such withdrawals. The claimants adduced no evidence to show that these withdrawals were not for this sort of legitimate purpose. Allowing these cash withdrawals shows no evidence of dishonesty in my judgment.

161. The case against Mrs Lester fails.

The case against Mr Ramagge

162. The claimants' case against Mr Ramagge faced similar difficulties. He moreover was entitled to assume that Mr Shaw had sorted out the difficulties with the Firm over segregation of client monies.

163. He was even less experienced than Mrs Lester. This lack of experience is shown in his draft sanction summary of 8th August 2007. He completely failed to understand Credit's condition. To sanction the facility to the Firm, Credit required there to be confirmation of segregation of client and office monies. He took this to be the requirement of section 31 of the Financial Services (Accounting and Financial) Regulations 1991 for a solicitor to confirm that a bank had no right of set-off against monies in a client account. In fact of course what was required was confirmation from Baker Tilly that the Firm segregated client monies. In my judgment this is inexperience rather than any evidence of dishonesty.

164. Mr Moverley Smith in closing argued that all through 2008 there were still ongoing issues about segregation. I do not accept that. It is true that Credit still wanted confirmation that client funds were segregated, but that is not an indication that they suspected that they were not. It just became a standard requirement once the issue had been raised back in 2005.

165. Apart from that argument, very little was said against Mr Ramagge in Mr Moverley Smith's closing. I reject the case in dishonesty against Mr Ramagge.

The case against Mr Maclean, Mr Heward and Mr Simpson

166. The case against the individuals in Credit is equally bad. The Further Information provided by the claimants name Mr Maclean and Mr Heward as the persons in Credit with actual or constructive knowledge of the Marraches' breach of trust: see answers 2 and 3. Later in answer 11, they add Mr Simpson. There is a short answer to the claims against these three men. The credit applications and excess referrals make it clear that issues of segregation were being dealt with. It was entirely reasonable for the credit managers to rely on those assurances from the relationship manager. As the documentation in the chronology shows, Credit were thoroughly fed up with the Marraches and would have had no hesitation in severing the connection if they had sufficient grounds to do so.

167. Indeed Mr Moverley Smith in closing said that Mr Maclean was "the only straightforward witness of the bank". Mr Maclean thought that Gibraltar would sort matters out and in due course had sorted them out. In my judgment Mr Heward and Mr Simpson would have thought the same. I do not find any dishonesty on the part of these men.

Mr Shaw's investigations

168. At the heart of the case is the view I take of the investigation which Mr Shaw carried out into the concern raised in his excess referral of 26th August 2005. It will be recalled that he wrote (correcting various typographical errors):

> "I am also investigating a number of transfers between client and office account both with RBSI and the 'other' Bank in Gibraltar as I need to understand how they manage their/clients' cash. I need to ensure they are not cross firing/misusing clients' funds."

169. The actual steps he carried out, he says comprised:

(a) talking to Mr Bautista at the suggestion of Mr Cartwright about an earlier investigation;

(b) examining transfers from the 294 sterling client account to the 293 office account in the period January to August 2005; and

(c) meeting Baker Tilly who gave him reassurance.

The bank's case is that this was adequate investigation. Even if it was not adequate, they submit that Mr Shaw believed it was adequate. Either of those scenarios would acquit Mr Shaw of dishonesty.

170. On the claimants' behalf it is said that the investigation was obviously inadequate. So inadequate was it that the Court should draw the inference that Mr Shaw had realised something was seriously wrong or deliberately decided not to make any further investigations because he feared that he might discover something seriously wrong.

Mr Shaw and segregation of client monies

171. As can be seen in the chronology, the 26th August 2005 excess report is the only use of the expression "misusing clients' funds". Thereafter, the expression used is "non-segregation". Mr Shaw was asked about his understanding of what this involved. Near the start of his evidence (transcript, day 3, page 45 lines 13 to 17) he said:

> "I think the principle is that if there is a lack of available of funds in the office account, I am absolutely clear that a legal practice cannot just take money out of the client account as it feels, unless it is due those funds."

172. The next day, he explained that he could not remember from whom he learnt that Gibraltarian legislation did not require segregation. He was taken to his credit application of 27th October 2005 where he wrote "on occasions client and office funds *are* not segregated" and "whilst Marrache generally [segregates] this *is* not always the case" (emphasis added). He explained (transcript, day 4 page 43, line 25 to page 44, line 20):

> "A. ...But I'm saying that the understanding was there that it's not a requirement [of the legislation]. Irrespective of all of that, my person (*sic*) requirement is, whether Gibraltar law requires it or not, the bank required it, and my understanding was that the FSC requirements required it. So, you know, I would -- if I saw non-segregation myself I would have reported it.
> Q. And that's what you are reporting here, aren't you, that there has been non-segregation and there is at least a possibility that it's going to carry on? Is that not what you are saying?
> A. Not at the time when I was responsible for managing the account.
> Q. So you are saying this is an historical non-segregation?
> A. I am talking in generic terms, and, you know, the exact choice of words there, I can't remember why

> I used those exact choice of words. What I can remember is that there is not one point in time where I remember: that is the Marraches using client funds for their own purposes. I really cannot. Because if I had seen that or believed that I would have absolutely reported it immediately."

173. Later he was asked why he did not make an STR. The examination went (transcript, day 4, page 47 line 24 to page 49 line 3):

> "A. My investigation conclusion was that I was not concerned that they were misusing client funds. That was the result of my investigation, because I did not submit a suspicious transaction report.
> Q. So that means, therefore, that you didn't consider it improper, unlawful, dishonest, to dip into client funds?
> A. No, I did consider it, as I have already said, dishonest and against the law to dip into client funds.
> Q. Yet you are recording here that that's what the Marraches did from time to time, aren't you?
> A. I am saying here that this is a general comment, and I've said I can't remember why I made those particular comments. It may well have been because I was asked by colleagues to look into the issue. But I looked into it at the time when I was reporting on my experiences.
> Q. And you came back reporting the fact that, yes, it's right, they are dipping into client funds. That's what you are saying, isn't it?
> A. As I said, maybe the choice of words are not good. But I am not saying here -- what I don't say here is the Marraches are misusing client funds.
> Q. But you would agree with me, wouldn't you, that non-segregation of client funds is a misuse of client money, isn't it?
> A. Um, does non-segregation mean that they are then going to misuse the funds? If we had one account with £100 in it, and there was £50 of client funds and £50 of office funds does that in itself mean they are misusing** client funds because they have not segregated them? I am not sure it does, does it?"

(**I have corrected an obvious mistake in the transcript.)

174. Thus it can be seen that the question whether Gibraltarian legislation required segregation or not is something of a red herring. Mr Shaw always knew that dipping into the client account was dishonest.

The Bautista investigation

175. The first element of Mr Shaw's inquiries was a discussion with Mr Bautista. There is a serious issue whether this discussion in fact ever took place. Much of the cross-examination of Mr Cartwright on this was intended to show that the discussion did happen and that Mr Cartwright was therefore on notice of possible misfeasance by the Firm. However, if I reject the attack on Mr Cartwright's veracity, then I have of necessity to consider whether Mr Shaw's account of what occurred is true.

176. What RBSI say happened is this. Following the merger of RBS and NatWest, it had become possible to see how Marrache & Co had been using its client accounts with both RBS and NatWest. Mr Shaw gave the following account of RBSI's investigation (transcript, day 3, page 134, lines 5 to 21, elaborating on his witness statement para [101]):

> "When I spoke about the cross-firing issue, going back to the time when we saw the accounts of both NatWest and RBS that you [Jack J] alluded to earlier, there had been an internal investigation and Marvin Cartwright was able to say to me that an investigation had taken place and no cross-firing had been proved.
> MR JUSTICE JACK: Had Mr Cartwright carried out that investigation or was he merely reporting to you --
> A. He reported to me the results and it's in my statement as well that a gentleman by the name of Joe Bautista, who used to work for NatWest, had undertaken the -- I think he was the relationship manager for the Marraches when they were at NatWest before it was all moved to RBS. Joe Bautista undertook that assessment, and Marvin called Joe up and, in my presence, Joe confirmed that nothing was

> proved. So it was quite easy to eliminate the concern around potential cross-firing."

177. Mr Cartwright's evidence (witness statement para [56]) was different:

> "I do not have any recollection of there being a concern about the Marraches failing to separate client and office funds. Indeed my recollection is that they did separate client and office funds into client and office account which they operated at all material times. Failure to separate client and office funds would potentially be a serious matter. It is the sort of issue that is serious enough to bring to my attention as HCFI [head of corporate and financial intermediaries]. The fact that I cannot recall the matter being brought to my attention suggests that either (i) it was not brought to my attention, or, that (ii) it was brought to my attention but the matter was satisfactorily resolved at the time. If it was satisfactorily resolved at the time, and any concerns, allayed, then that would explain why I do not recall this issue today."

178. Mr Cartwright was cross-examined on this (transcript, day 8, page 82 line 15 to page 83 line 25). Counsel took him to Mr Shaw's excess referral of 26th August 2005 made to Mr Heward in Jersey. In it Mr Shaw wrote: "I need to ensure they are not cross-firing/misusing clients' funds." Mr Moverley Smith QC then asked:

> "Q. So Mr Shaw was carrying out an investigation in relation to client and office funds and how they were being used. Now, he is not going to have done that off his own bat, is he? He's going to have done that by reference to discussion with you?
> A. I have no recollection of a discussion with me in that regard.
> Q. Well, this is a firm of solicitors?
> A. Yes.
> Q. And I think Mr Shaw's evidence was he had never been involved with investigating a firm of solicitors for misuse of client funds before. So it was something highly unusual, wasn't it?

A. It would be highly unusual, yes.
Q. And are you saying that Mr Shaw suddenly one sunny morning decided he would start investigating solicitors for misuse of client funds?
A. No, I think that Howard would have been familiarising himself with the file and may have seen some payments, I don't know, and decided to look into them to just satisfy himself. Now, it would appear, given that this has not been escalated, from my recollection, that that satisfaction was sought and found.
Q. I am asking about what you knew about it at the time. You said you had no recollection at all --
A. No.
Q. -- about any suspicion or concern about misusing client funds. And that is clearly, I suggest to you, not the case. You must have a recollection of Mr Howard Shaw raising that issue?
A. I have no recollection, my Lord, of that being raised with me as an issue, none whatsoever.
Q. If it had been raised as an issue with you, would you consider it to be a serious matter?
A. Absolutely.

179. No written record of Mr Bautisa's investigations was produced at trial. Nor is there any indirect record of any such investigation having taken place. There is no evidence that the note regarding cross-firing on the letter of 8th November 2001 has any connection with an investigation by Mr Bautista. (Indeed, the note says: "Looks like 'cross firing'." This is not consistent with what the Bautista investigation is said to have concluded.) The review of 28th January 2005 does not mention such an investigation. Indeed the reference in the review to non-segregation is arguably inconsistent with the alleged conclusion of the Bautista investigation.

180. I shall have to consider whether the accounts given by Mr Shaw and Mr Cartwright are capable of reconciliation, and if not, whose account I prefer, when I come to my holistic appraisal of the evidence.

The investigation into the client accounts

181. The only documentary evidence of Mr Shaw's investigations into the Firm's use of the client accounts is one spreadsheet, showing the transfers from the 294 sterling client account to the 293 sterling client account. The spreadsheet says it reflects the period January to August 2005, but Mr Shaw in cross-examination asserted that it was the period 15th February to 22nd August (transcript, day 3, page 139, line 10). I consider it improbable that Mr Shaw did choose this arbitrary period for his investigation. The contemporary heading, in Mr Shaw's own handwriting (*ibid* line 14), is more likely to be accurate.

182. I have set out the results of that exercise above in paras 92 and 93. Choosing the first eight months of 2005 to investigate was in my judgment sensible. If there was misuse of client monies, it would have manifested itself in that period. Investigating a longer period would be more labour-intensive and probably not much more productive.

183. However, just investigating one client account is in my judgment obviously inadequate. All active client accounts should have been looked at. The amount of work would not have been great. The entries for the 135 euro client account for the period cover a mere four pages in the trial bundle. On a computer, it may have been a few more screenshots, but still not an excessive number.

184. Further, the investigation of the 294 client account did throw up matters which were potentially suspicious. The transfer of a round sum from the client account could reflect the fact that the Firm had quoted a fixed price for, say, some conveyancing work. The occasional round sum is thus not suspicious. However, there were nine round sum transfers, including

transfers of £20,000, £10,000 and £20,000 on 5th, 10th and 13th May 2005 and £30,000 and £20,000 on 10th and 17th August 2005. Such sums are large for single conveyances. The bunching of them into short time-frames calls for investigation. (The two banking experts agreed that transfers of round sums were not suspicious, but do not address the bunching point.)

185. Moreover, the investigation of the 294 client account itself is grossly defective. No analysis is made of payments to Kristy. Mr Shaw was aware that Kristy was the Firm's payroll company. The transfers from 294 to Kristy are easily identifiable from the transaction history. Indeed they tend to jump out from the page. This is because most entries are meaningless one line references like "ACQ 817281", whereas Kristy entries are over two (or sometimes three) lines and read: "DR TRF TO KRISTY SECRETARIAL" or similar.

186. The transfers to Kristy from the 294 sterling client account start with a transfer of £15,000 on 7th January 2005, then continue with £3,900 on 31st January, £10,000 on 16th March and £1,100 on 13th May 2005. (There were also transfers of £30,000 and £20,000 to Marrache Frères on 22nd June and 29th June respectively, but Mr Shaw was not asked about these, so I shall ignore them.)

187. If Mr Shaw had looked at the 135 euro client account, even a cursory examination would have thrown up concerns. On 26th January 2005 €67,888.30 was transferred to Kristy. On 1st February €139,855.77 (= £95,000) was transferred to the 293 office account, followed by another transfer to 293 of €44,097.66 (= £30,000) the next day. On 3rd February €10,315.39 was transferred to Penzance Holdings Ltd ("Penzance"), which Mr Shaw knew as a Marrache-owned

property holding company: transcript, day 3, page 58 line 18. On 11th February €44,431.20 (= £30,000) was transferred to 293. On 15th February €33,531.68 was transferred to Kristy, but the transfer was reversed with a substituted transfer of €34,900.32 the next day. On 24th February there were transfers of €64,039.22 and €69,729.14 to Penzance and Kristy respectively and a transfer via local clearing (thus presumably to another bank) of €88,329.96 to Marrache & Co.

188. Thus in less than four weeks €563,587.00 (c. £383,400) had been transferred from the euro client account to Marrache-related entities. Mr Shaw knew that the Firm had a turnover over between £1.3 and £1.8 million: transcript, day 3, page 137 line 20 to page 138 line 2. This equates to £110,000 to £150,000 turnover a month, so the £384,400 represented double or treble the normal monthly turnover. Further it will be recalled that there were transfers of £25,000 on each of 15th and 21st February from the 294 client account to the 293 office account as well, so the total transfers in this four week window were potentially nearly quadruple the normal monthly turnover. There are four aspects of these transfers from 135 which in my judgment would have put any banker on notice of potential malfeasance: (a) the absolute level of transfers (b) in such a short period (c) from the *euro* account (d) to entities including Kristy and Penzance which would have had no entitlement to client monies, still less from a euro account.

189. Investigation of the 149 US dollar client account would also have raised concerns. The printouts show payments to American Express of $1,395.75 on 6th April, $200.00 on 19th May, $1,765.79 on 7th June, $25,861.39 on 15th July and $1,391.84 on 12th August 2005. Such payments would be unusual from a client account. An investigating banker such as Mr Shaw could have easily obtained the customer's

instructions to make these transfers. These would have shown that all these payments were for Isaac Marrache's AmEx card. Payments of an individual solicitor's credit card from a client account are highly suspicious.

The meeting with Baker Tilly

190. Mr Shaw's evidence about his discussions with Baker Tilly is vague. In his first witness statement (para 100) he says:

> "I attended at the offices of Baker Tilly at Regal House... [T]his would have been shortly after 13 September 2005 when Solly requested Ian Wood of Baker Tilly to provide me with certain information... I saw Ian Wood, who explained to me that they dealt with the preparation of the Marrache accounts. I also understand that he had undertaken the audit of the client account which allowed them to certify that it was correctly operated and audited. My meeting with Ian Wood assisted me in concluding that Marrache & Co were segregating client and office funds."

191. In cross-examination, he was significantly vaguer. He repeatedly said that his visit to Baker Tilly had given him "comfort", that he "came away comfortable": transcript, day 4 page 27 lines 18 and 20 and page 28 lines 15 and 16. He claimed that he made "a file note... post the Baker Tilly visit": transcript, day 4, page 68, lines 14 to 15. However, no such file note has been disclosed. In re-examination he said that his "discussions with Baker Tilly around the segregation piece was a one-off discussion in 2005": transcript, day 4, page 150 lines 20 to 22.

192. There is no corroboration of Mr Shaw's account of what was said at the meeting with Mr Wood. The Solicitors' (Practising Certificate) Rules 2005 came into force on 1st May 2005: see rule 1(2). Rule 4 provided:

> "(1) Every solicitor shall produce to the Registrar not later than 31 December in every year a certificate signed by an auditor which satisfies the Registrar that such solicitor has complied with the Solicitors' Accounts Rules for the preceding year.
> (2) For the purposes of sub-rule (1) 'the preceding year' means from the 1 July of the year preceding the date of the certificate to 30 June next following."

193. Thus Baker Tilly had until 31st December 2005 to produce a certificate of compliance. Mr Shaw's assertion that Mr Wood said he had "undertaken the audit of the client account" so soon after 30th June, is possible but unlikely. Firstly, 13th September was just after National Day and the end of the holiday season. Secondly, the Marraches repeatedly show themselves leaving the preparation of accounts and such like to the last moment. Thirdly, the Rules do not actually require an audit; they merely require certification. Mr Shaw knew that. In his credit application of 28th June 2007 he said there would be forthcoming "Accountant's confirmation... to the best of their knowledge (there is no audit requirement) office and clients' funds are now being separated." Fourthly, the Firm's own partnership accounts were never audited. It is possible that an accountant would put weight on the reputation of a solicitors' firm and certify without insisting on conducting a detailed (and expensive) formal audit.

Conclusions as to Mr Shaw

194. Putting all these matters together in order to reach my conclusions on liability for Mr Shaw, I shall start with the Bautista investigation. There is a clash of evidence between Mr Shaw on the one hand and Mr Cartwright on the other. Mr Shaw says Mr Cartwright "called Joe [Bautista] up and, in my

presence, Joe confirmed that nothing was proved." Mr Cartwright had no recollection of that.

195. Now, it is theoretically possible that Mr Cartwright had simply forgotten about calling up Mr Bautista in these circumstances. However, in my judgment it is very unlikely. It is worth emphasising how strikingly unusual it is for a bank to have concerns about the treatment of client monies by an outwardly respectable firm of solicitors. It is a once-in-a-professional-lifetime experience. I do not accept that Mr Cartwright would have forgotten about a call made as part of an investigation into something so completely unusual.

196. I found Mr Cartwright a straightforward witness. By contrast I regard Mr Shaw as an unsatisfactory witness. He showed signs of tailoring his evidence. In the passage I have cited from the transcript, day 4, page 47 line 241 to page 49 line 3, in para 173 above, the reference to "general comment" seemed to be an attempt to dodge the implications which counsel was legitimately seeking to draw from Mr Shaw's statement of 27th October 2005 that "on occasions client and office funds *are* [present tense] not segregated". Similarly later in the passage cited, he talks about mixing £50 of client money with £50 of office monies. I found this an unconvincing attempt to suggest that any references by him to non-segregation might be innocent.

197. Likewise on his first day in the witness box Mr Shaw in cross-examination accepted it was he who prepared the key analysis of January to August 2005 transfers from the 294 sterling client account to the 293 office account: transcript day 3, page 141, lines 10 to 11. The next day he tried to retract that and said it could have been a colleague who made the analysis: transcript, day 4, page 12 line 24 to page 14 line 1. I do not

find his explanation for the change that "he thought about this last night" convincing: transcript day 4, page 13 line 21.

198. On balance of probabilities I reject Mr Shaw's account of his having had a conversation with Mr Bautista. There is really no scope for me to find that he made a mistake about this: either he was telling the truth or he was lying. I conclude that he was lying.

199. In relation to this finding, I need to give myself a *Lucas* direction (see *R v Lucas* [1981] QB 720). These are usually given in criminal trials in the instructions to jurors, but (subject to the different burden of proof) apply equally to civil trials. I direct myself as follows. Before I can use a lie to prove the contrary, I must be satisfied on balance of probability of the following. Firstly, the lie must be proved or admitted. Secondly, the lie must be deliberate and must not have arisen through confusion or mistake. Thirdly, it must not be told for a reason unconnected with the witness's liability (for example, through fear the truth would not be believed, to protect another, or for some reason advanced on behalf of the witness). If I am satisfied all three elements are made out, then I *may* use the lie as some support for the other side's case. A warning often given to juries is that witnesses sometimes seek to bolster a truthful case by telling stupid lies. I give myself the same warning.

200. In my judgment, the three elements of *Lucas* are made out. He made a deliberate lie and there was no unconnected reason for him to make the lie. When I consider the evidence against him holistically, I shall consider whether it is appropriate to use his lie as some support for the claimants' case.

201. It is convenient next to turn to the meeting with Baker Tilly. There is no corroboration whatsoever for Mr Shaw's account of his conversation with Mr Wood. The file note, which Mr Shaw says he made, has not been disclosed. No reason for the failure to disclose it has been proffered. I can properly infer that there was no post-meeting note and that Mr Shaw was lying about that too. Though possible, it is unlikely that Baker Tilly had conducted an audit of the client accounts by 13th September 2005. I shall consider as part of a holistic assessment of Mr Shaw's evidence whether I accept his account of the meeting.

202. Lastly, I turn to the investigation of the accounts. On any view, limiting his inquiries solely to the 294 sterling client account was woefully inadequate. He was an experienced man. I do not believe that he can have thought an investigation solely of the 294 sterling client account would be sufficient to dispel any worries about misuse of client funds. Nor is this likely to have been an "oversight", as he suggested: transcript, day 3 page 145 line 21. Further the significant number of round-sum transfers in short time-frames from the 294 account, whilst not of themselves proof of misuse, would spur an experienced banker to continue with his investigations.

203. Of the other client accounts, the 201 Canadian dollar was little used. In the first eight months of 2005 there are only four lines of entry, so that would have taken no time to investigate. Whether or not Mr Shaw turned to the 149 US dollar account or the 135 euro account, as set out above, he would very soon have discovered transactions which were not compatible with the proper use of a solicitor's client account.

204. Before putting all these points together, I should ask the question: Why would Mr Shaw behave dishonestly? What

incentive was there for Mr Shaw to disregard the evidence of the client accounts? It is clear that the Marraches disliked Mr Shaw. He in turn saw them as a professional challenge, which he was disappointed not "to have put it all to bed really before I moved on, but wasn't to be": transcript, day 4, page 119 lines 4 to 5. The relationship between Mr Shaw and the brothers was not such as to induce him to suppress the evidence of misuse of client monies.

205. Any question as to a man's state of mind is always difficult to answer. Here a good starting point is the striking fact that Mr Shaw never made a STR in respect of his suspicions of the Firm. As soon as he identified the issue of misuse of client funds, he was justified (and indeed probably obliged as a matter of strict law) to make one. Mr Shaw was well aware of the enormous sensitivities surrounding the Marraches. Mr Heward's sanction summary sheet of 18th October 2006 post-dates Mr Shaw's investigation, but Mr Shaw would have been aware from the start that "client account issues are a sensitive subject" with "potential reputational issues", which, if raised, would go to Mr Smith at the top of the bank. An STR would open a can of worms. Although RBSI would no doubt have reacted to an STR in a proper professional manner, it would have been a courageous thing for Mr Shaw to have done. It is a sad fact of life that whistleblowers are not always thanked.

206. The downside of not reporting the results of his investigation into the client accounts was likely to have appeared to him to be fairly small. Back in 2005, the Marraches presented as extremely wealthy men with a large -- but in the nature of things illiquid -- property portfolio. The misuse of client funds looked to be in the hundreds of thousands, not in the millions, still less the tens of millions. Mr Shaw would have been able to see it as "dipping". In other words, he would have seen the

Marraches taking monies for immediate liquidity purposes rather than stealing the monies with no prospect of ever making repayment. The fact that the 2005 review said that segregation was not a requirement of Gibraltarian law would have given him some protection against personal consequences. (He knew that in England some professions like travel agents and insurance brokers were not required to segregate client funds: transcript, day 5 page 52 lines 9 to 18.)

207. Mr Shaw could realistically have hoped that, if he persuaded the Firm to run its accounts properly, the monies borrowed for liquidity purposes would in due course come back and matters could be put on an even keel. If that was his state of mind, then he would have been disabused of it. For example, on 26th September 2006 the Firm cleared the US dollar 149 client account of all the money in it, some $96,929.46. That transfer to the 293 office account would have generated an STP. It was highly suspicious. Notwithstanding the general rule that transfers under £100,000 were ignored for STP purposes, Mr Shaw would, as I have found, have been on notice of issues of misuse of funds by the Firm. Thus, he would have kept an eye out for suspicious transfers, even if they were under £100,000. However, once Mr Shaw had brushed the issue of non-segregation under the carpet in August 2005, it would have been difficult for him to revive the issue.

208. Further at the time of his investigation, the prospect of the Firm's malfeasance coming to light in the near future must have been low. Events bore this out. It was another four and half years before the Firm collapsed. By then Mr Shaw had left RBSI. Indeed the Marrache brothers probably consider themselves unlucky not to have been able to delay for a few more months the advertising of the Kristy winding-up petition on 10th January 2010. If they had been able to do so, they

might have succeeded in getting the Chase Marrache Bank up and running, which, as Mr Magner astutely put it, would have given them "an even bigger client account to wash more money through."

209. Putting all these points together show the following in my judgment:

(a) Mr Shaw would have known, when Mr Magner started these proceedings, that the paper trail for the investigation he carried in August 2005 would be simply the one page spreadsheet of transfers from one client account.

(b) If that stood on its own, it would show that he had carried out a grossly inadequate investigation. So inadequate would the investigation have been that the Court might well disbelieve that that was all he did by way of an investigation and make findings of dishonesty against him.

(c) He therefore knew he needed to bolster his case, so as to show that it was reasonable to stop his investigation after analysing the transfers only from the 294 sterling client account to the 293 sterling client account.

(d) Accordingly he invented the Bautista investigation. If issues of misuse of client accounts had already been investigated after the RBS/NatWest merger and no misconduct found, that would excuse him from having to carry out a more detailed investigation. I consider it appropriate to draw a *Lucas* inference against him on this.

(e) I do not accept that there was a meeting with Baker Tilly around 13th September 2005 which "gave him comfort". It is, for the reasons I have given, improbable that Baker Tilly would have assured him that they had already carried out an audit of the Firm's

client accounts. There is no contemporaneous record of the meeting.

210. I remind myself of what I said about the burden and standard of proof in para 21 above. In my judgment, on balance of probabilities Mr Shaw did look at the other client accounts. The likelihood is, and I find on balance of probabilities as a fact, that he did an analysis of the other client accounts for the period January to August 2005. He discovered the evidence that the Firm was misusing client monies. In my judgment he did have actual knowledge of the Firm's misuse of client monies. Thereafter he assisted the Firm to continue to misuse client funds. That in my judgment is dishonesty on his part.

211. Even if I am wrong on that and he did not carry out a full analysis of the other client accounts, nonetheless I find on balance of probabilities that he would have started some further investigations into other client accounts. After starting them he would have realised very soon that there was evidence raising a suspicion that the Firm was misappropriating client monies. Stopping his investigation at that point would in my judgment be a classic example of Nelsonian blind-eye knowledge. That too would be dishonest.

212. I find the case against Mr Shaw of dishonestly assisting the Marrache defalcations proved. There is sufficient causation of loss to satisfy the test formulated by Mr Medcroft, which I have set out in para 6 above.

The case against Mr Cartwright

213. It follows from my findings above that Mr Cartwright was unaware of the misuse of client funds and was therefore not dishonest. The case made in respect of him fails.

Conclusion

214. Accordingly I hold that RBSI are liable for Mr Shaw's dishonest assistance of the Marraches' misuse of client monies. In addition, Mr Shaw's state of mind means that they are liable for knowing receipt as well. However, since the claim for dishonest assistance include the sums claimed under this latter head, this is of academic interest only.

Adrian Jack
Puisne Judge

10th August 2017