**Approved Text**
**11.06.2013**

**IN THE ROYAL COURT OF GUERNSEY**

**(ORDINARY DIVISION)**

**Between:** **EMERALD BAY WORLDWIDE LIMITED**

**Plaintiff**

**-v-**

**BARCLAYS WEALTH DIRECTORS (GUERNSEY) LIMITED (1)**

**-and-**

**BARCLAYS WEALTH CORPORATE OFFICERS (GUERNSEY) LIMITED (2)**

**Defendants**

**Hearing dates: 19th, 20th, 21st, 22nd, 23rd, 26th, 27th, 28th, 29th November 2012**

**Judgment handed down: 11th June 2013**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Counsel for the Plaintiff:** **Advocate G K Bell**

**Counsel for the Defendants:** **Advocate M G A Dunster**

**Cases, legislation and materials referred to:**

The Royal Court (Reform) (Guernsey) Law, 2008
The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011
The BVI Business Companies Act, 2004
*Bebo Investment Limited v The Financial Secretary* (17 January 2008)
*Charles Savarin v John Williams* (1995) 51 W.I.R. 75
*Pinner v Everett* [1969] 3 All ER 257
*Abel v Lee* (1871) L.R. 6 C.P 365
*Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231
*R v City of London Court Judge* [1892] 1 QB 273
*Kammins Ballrooms Co. Ltd v Zenith Investment (Torquay) Ltd* [1970] 2 All ER 871
*Barlette v Mayfair Property Company* [1898] 2 Ch. 28
The Hansard Report of the 22nd Sitting First Session of the 15th Legislative Council of the Virgin Islands
The Royal Court Civil Rules, 2007
The Companies (Jersey) Law 1991
The Companies (Guernsey) Law, 2008
International Business Companies Act, 1984 (BVI)

The Companies Act 2006 (Isle of Man)
The Companies Act 1995 (Antigua and Barbuda)
*Smith v South Wales Switchgear Ltd* [1978] 1 WLR 165
*Farstad Supply A/s v Enviroco Ltd* [2010] 2 Lloyd's Rep. 387
*Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985
The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009
*Molineaux v London, Birmingham and Manchester Insurance Co.* [1902] 2 KB 589
*In re Brazilian Rubber Plantations and Estates, Limited* [1911] 1 Ch 425
*In re City Equitable Fire Insurance Company, Limited* [1925] 1 Ch 407)

Introduction

1. By a Cause tabled on 19 March 2010, the Plaintiff, Emerald Bay Worldwide Limited (hereafter referred to as "EBWL") claims damages against its two former directors, Barclays Wealth Directors (Guernsey) Limited and Barclays Wealth Corporate Officers (Guernsey) Limited, the Defendants. EBWL is a company registered in the British Virgin Islands. Consequently, the claim of breach of directors' duty of care, diligence and skill falls to be resolved in accordance with the law of the British Virgin Islands. The two Defendants are Guernsey registered companies. Their parent company is Barclays Wealth Trustees (Guernsey) Limited (hereafter referred to as "BWTG").

2. The breach of duty is said to have taken place on 23 April 2008 when a board meeting of EBWL was held at which the Defendants, as EBWL's directors, resolved to enter into a Membership Interests Purchase Agreement (hereafter referred to as the "MIPA") with Jetstream Limited, by virtue of which EBWL acquired GE Continental LLC (hereafter referred to as "GEC"). The reason for acquiring that Delaware limited liability company was that GEC had had assigned to it a purchase agreement for a new Hawker 4000 aircraft. By acquiring GEC, EBWL potentially obtained earlier delivery of the Hawker 4000 aircraft than it could have by placing its own order directly with the manufacturers, by that time known as Hawker Beechcraft Corporation (hereafter referred to as "HBC"), and at a price already largely determined. However, by acquiring GEC, EBWL was required to pay what was effectively a purchase price, rather than paying the manufacturer a deposit against an order. It is the non-refundability of an amount so paid that lies at the heart of EBWL's case.

3. The Defendants deny that their decision to enter into the MIPA on the terms contained therein was a breach of their duty as directors. They deny that any of EBWL's alleged loss and damage is attributable to them. However, if the Defendants are found to have committed a breach of their duty as directors causing EBWL the loss alleged, the Defendants claim that, in accordance with what is permitted under the law of the British Virgin Islands, a provision in the Articles of Association of EBWL affords them both an indemnity, thereby defeating EBWL's claim in its entirety.

4. As permitted by section 13 of the Royal Court (Reform) (Guernsey) Law, 2008, following election by the parties, this case was heard by me sitting unaccompanied by Jurats. The Plaintiff was represented by Advocate Bell and the Defendants by Advocate Dunster. I am grateful to them both for the way in which they marshalled the materials and their submissions.

The evidence

5. Much of the history of the matter derives from the contemporaneous documentation, supplemented by oral evidence, helpfully captured in real-time through the preparation of daily transcripts. Because of the abundance of documentation, which at times appears to leave a different impression from what the witnesses have said, and the need to ascertain

exactly what it is that the Defendants say they are entitled to rely on, I will set out in quite considerable detail what transpired.

6. Expert evidence about the law of the British Virgin Islands was given by Philip Jones QC and Robert Levy QC on behalf of the Plaintiff and the Defendants respectively. They filed various written reports and gave oral evidence, all of which has been helpful. Counsel also submitted a short List of Agreed Facts in relation to the law of the British Virgin Islands, dated 15 November 2012. The parties also filed reports from aviation experts, Philip Seymour and Steven Rogers respectively, but, following discussions between Counsel, very little reliance was placed on the contents of them.

7. Witness statements as to fact were provided by Vladimir Chernukhin, Alicia Mulcahy, Olaf Kiener, Sharon Parr, Warner Koller and Stephen Le Ray. All of them, save Ms Mulcahy, also gave oral evidence. In Ms Mulcahy's case, a hearsay notice was served pursuant to rule 1(2) of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011, explaining that she is no longer employed as Mr Chernukhin's personal assistant and now lives in Australia. The Defendants served a credibility counter-notice under rule 5 of the 2011 Rules. I have, therefore, approached the content of her witness statement with appropriate caution. In Mr Chernukhin's case, some of his evidence was given through, or with assistance from, an interpreter, although he generally wished to give his evidence in English. In addition, a number of relevant matters were set out in a List of Agreed Facts.

8. Although various documents emanating from or sent to Dustin Dryden were produced, Mr Dryden did not give evidence. As a result, I have drawn what inferences I can about his role in respect of the matters aired in this case. I have attempted to exercise due care not to attribute to Mr Dryden a particular role in these events because he has not been given the opportunity to speak for himself. However, as with Ms Mulcahy, the documents produced speak for themselves and provide a fairly clear picture of their involvement.

<u>The events that occurred</u>

9. EBWL was only incorporated on 6 February 2008. Until 3 October 2008, its issued share capital was held by two companies as nominees of and for BWTG as trustee of the Galaxy Trust, which had been declared by BWTG on 20 November 2007. EBWL was acquired by BWTG from Equity Trust in early April 2008. Equity Trust (BVI) Limited, EBWL's First Registered Agent, appointed the Defendants as the first directors of EBWL on 8 April 2008. Although the Defendants had only been directors of EBWL for a little over a fortnight when they held the board meeting about which complaint is now made, the involvement of the various people who played a part in this transaction dates back further.

*The origins of the relationship*

10. Mr Chernukhin is a successful businessman of Russian origin. He held various posts with Vnesheconombank from 1996. He served for a time as a Deputy Minister of Finance in the government of the Russian Federation. He was subsequently appointed by presidential decree to be the bank's chairman. He is a high net worth individual. Mr Chernukhin's relationship with the wider Barclays Wealth Group (hereafter referred to as "Barclays Wealth"), which includes BWTG, began around the middle of 2006, following an introduction by the accountants BDO LLP. By the middle of 2007, Ms Parr, the Managing Director responsible for the Guernsey trust and fiduciary operation, led the relationship with Mr Chernukhin on behalf of Barclays Wealth. At that time, Mr Chernukhin was able to make use of a private aircraft held as an asset of the Blue Bay Trust, which had been settled under the law of Jersey. That aircraft was a Hawker 850XP, which was being maintained and operated by Hangar 8 Ltd (hereafter referred to as "Hangar 8") based at Oxford Airport. The key individual involved on behalf of Hangar 8 was Mr Dryden.

11. In October 2007, Ms Mulcahy, who was employed at that time by Capital Construction & Development Ltd as an executive assistant, assisting Mr Chernukhin with both personal and business administrative-related matters, was instructed by Mr Chernukhin to organise a meeting to discuss options to upgrade the private aircraft available for his use with Mr Dryden in London. Mr Chernukhin chose to discuss these matters with Mr Dryden because he was satisfied with the service provided by Hangar 8 and so he was keen for Hangar 8 to be involved with any new aircraft once purchased. Mr Chernukhin believed that his wish for Hangar 8 to be involved would offer an incentive to Mr Dryden to assist with Mr Chernukhin's proposal. At that meeting, Mr Dryden provided brochures and specifications for a number of different models of aircraft that might be appropriate, explaining the pros and cons of each. Without committing to anything, Mr Chernukhin expressed an interest in the Hawker 4000 model, which was a brand new aircraft model and apparently more technologically advanced. Mr Dryden indicated he would liaise with his contacts in the aviation market to identify the opportunities available to Mr Chernukhin to purchase a Hawker 4000. He further indicated that he was aware of a potential opportunity to purchase a Hawker 4000 within a relatively short timeframe.

12. On 22 October 2007, Ms Parr attended a meeting in London with Mr Chernukhin, at which Mr Chernukhin's wife, Luba, was also present. This meeting was also organised by Ms Mulcahy. Neither the Chernukhins nor Ms Parr have any notes of what was discussed at that meeting and rely instead on their recollections, which do not entirely match. The differences between their accounts is an important issue for the Court to resolve because so much flows from what was, or was not, said and understood at the time.

13. Ms Parr described the meeting as "*a pitch*", explaining that she was attempting to persuade Mr Chernukhin to engage Barclays Wealth to handle his personal affairs as well as the more business-related matters which Barclays had been handling for the previous year or so. To that extent, this is consistent with Mr Chernukhin's recollection that "*The purpose of this meeting was to explain our requirements and to determine whether Barclays Wealth would be able to assist in facilitating the purchase of the new aircraft*". It was the first occasion on which Mr Chernukhin raised with Ms Parr the acquisition of a replacement aircraft.

14. Mr Chernukhin was adamant that he made it clear to Ms Parr that he explicitly told her he wished the proposed new aircraft to be purchased directly from the manufacturer, emphasising that any monies paid by way of deposit must be refundable in the event that the purchase did not proceed for any reason. At that time, no Hawker 4000 had been delivered by the manufacturer and Mr Chernukhin wanted to have remedies should there be the type of teething problems likely to be experienced with production of a new model of aircraft. He did not have any experience in acquiring an aircraft and so was prepared to pay for professional assistance to achieve his desired outcome. In his statement, Mr Chernukhin indicated that "*Barclays Wealth's expertise and services were required to advise on the commerciality of the agreements relating to the purchase of the aircraft and to put in place an appropriate structure*". He further explained about Mr Dryden's role in relation to the Hawker 850XP and that Mr Dryden "*had identified a potential opportunity to purchase a new aircraft more quickly than would be possible if a new order was placed*".

15. Ms Parr was equally adamant that Mr Chernukhin did not tell her that the only option to take was to purchase directly from the manufacturer. Had something as important to the relationship with Mr Chernukhin as that been said, she would have noted it and acted upon it. Indeed, she recognised that to have wilfully ignored such an instruction would have been unprofessional. Instead, her recollection, which she said was consistent with what then happened, is that Mr Chernukhin informed her that Mr Dryden was "*the guy who would be 'doing the plane', and that everything was to go through him*". Her impression was that the issue of acquiring an aircraft was only raised with her very much at the end of the meeting. She recalled it being a three or four-minute conversation during which a single sheet of paper

was given to her, which she says she annotated with the word "*Dustin*", referring to Mr Dryden.

16. The day after that meeting, Ms Mulcahy sent by e-mail to Ms Parr two documents relating to Hawker 4000 aircraft. Ms Mulcahy confirmed that these documents had been supplied to her by Mr Dryden. One document is headed "OPTIONAL EQUIPMENT DESCRIPTION AND PRICING RC-12 through RC-51 Rev 1" setting out prices in US dollars for various items of equipment by reference to 2006 and 2007 and identifying the 2007 basic aircraft cost as US$20.95 million. Although it is not entirely clear, the file name of this document is more likely than not to be "Spec rc30.xls", because the other file name is "22 10 07 H4000 proposal.doc", which corresponds to the date of the second document. That second document starts with the statement that "*Hawker Beechcraft Corporation (HBC) is pleased to present the following proposal for two Hawker 4000 aircraft, namely Serial Numbers RC-59 and RC-62*". The expected delivery date for those two aircraft was said to be June 2009. The standard equipped aircraft price was also stated to be US$20.95 million. Various items of suggested additional optional equipment were listed. There are some similarities to the optional equipment prices in the other document forwarded but no direct read-across between the two documents. Under the heading "*Payment Terms*", that second document reads:

    "● *Initial deposit of $250,000 to hold the aircraft whilst the Purchase Agreement is finalized*

    ● *Deposit of $4,000,000 due on signature of Purchase Agreement*

    ● *Additional deposit of $3,000,000 due 90 days prior to aircraft delivery*

    ● *Balance due at Delivery*".

17. In or around late October 2007, Mr Chernukhin informed Mr Kiener that the purchase of a new aircraft was to take place and that the transaction would be handled by Barclays Wealth. Mr Chernukhin explained that Mr Kiener "*regularly assists me in relation [to] the management of various financial and business interests*". Mr Kiener is a Swiss lawyer and also a director of Aveva Trust SA (hereafter referred to as "Aveva"), whose clients include Mr Chernukhin and various companies and trusts with which Mr Chernukhin and his family are associated (hereafter referred to as "the Chernukhin Group"). One of the companies in the Chernukhin Group is Navigator Finance Limited (hereafter referred to as "Navigator"), a company incorporated in the British Virgin Islands. Navigator is primarily a funding entity, providing loans within the Chernukhin Group. Mr Kiener explained that, generally speaking, such loans are provided to special purpose vehicles rather than trading companies.

*Payment of initial deposit monies*

18. On 30 October 2007, Mr Dryden sent Ms Mulcahy an e-mail, attached to which were the details of the escrow agent, Insured Aircraft Title Service, Inc. (hereafter referred to as "IATS"). The text of the e-mail was:

> "*Please find attached the details of the escrow agent as discussed in our meeting. In order to continue this transaction we need to transfer a fully refundable deposit of $250,000 to IATS in order to confirm to the Hawker 4000 position owner our interest. He will then send us his contract with Hawker Beechcraft so that the lawyers can inspect it and make sure that everything is correct and that we are happy with the payment schedule and delivery details. If we are happy with the contract we secure the option with the deposit becoming non refundable. We will then negotiate a purchase agreement to assign the HBC contract to an SPV company setup by your contact at Barclays. Once the agreement is firm the balance of the funds will be paid to Escrow and the transaction will complete.*"

As Ms Mulcahy put it in her statement, at that time "*Mr Dryden explained that a $250,000 USD fully refundable payment needed to be paid into an escrow account in order to gain access to the details of the contract to purchase a Hawker 4000 aircraft*". Although it is addressed to her, it is obvious that Ms Mulcahy was not expected to deal with this herself, but must have been expected to relay this information to Mr Chernukhin, which she clearly did.

19. On the instructions of Mr Chernukhin, this message was forwarded by Ms Mulcahy to Ms Parr the next day, with a request that Ms Parr call Ms Mulcahy in relation to it. Ms Parr did not speak to Ms Mulcahy at that time, only realising on 1 December 2007 that she had failed to revert to Ms Mulcahy and e-mailing her to that effect on that date. The message from Mr Dryden was also forwarded to Mr Kiener on 1 November 2007, accompanied by a request that he call Mr Chernukhin. Mr Kiener recalled discussing with Mr Chernukhin on the telephone that the deposit would be paid into an escrow account and would be fully refundable.

20. On 2 November 2007, Aveva prepared a payment order to Credit Suisse on behalf of Navigator for the amount of US$250,000 to be paid to IATS. The payee reference was "*Refundable escrow amount re Hawker 4000/Loan to future entity owner*". Mr Kiener explained in his evidence that this particular wording was unusual, and consequently something that he would not have included without there being some reason for doing so, believing that it indicated to him that he must have spoken to Mr Chernukhin about this. Mr Chernukhin accepted that he had been consulted by Mr Kiener and had confirmed to him that he had nothing against this payment being made. This arrangement was made without reference to Ms Parr or anyone else within Barclays Wealth. During the course of her evidence, Ms Parr commented that she was "*horrified*" when she discovered that the money had been paid without any involvement from Barclays Wealth.

*Exchanges that autumn/winter*

21. On 6 November 2007, Ms Mulcahy re-sent the information she had forwarded to Ms Parr on 23 October 2007, asking whether it had been received and whether Ms Parr had contacted Mr Chernukhin "*directly to confirm it was all OK*". Ms Mulcahy also informed Ms Parr that "*The deposit has been paid*". The information was forwarded to Mr Le Ray, who believes he undertook a Google search at that point in relation to Hangar 8 so as to check that it was reputable and had relevant experience in finding aircraft, brokering deals to acquire aircraft and managing aircraft. He discovered that it did. He also checked to see whether the RC-30 aircraft was listed for sale and found it was not. He informed Ms Parr of the outcome of his researches.

22. A meeting was held in Zurich on 14 November 2007. It involved Mr Kiener, Ms Parr, Mr Le Ray, Mr Chernukhin and two others. (Mr Kiener had first met Ms Parr on 9 October 2007 when she had called on him whilst she was in Zurich in relation to other, unrelated matters, although he had previously dealt with Barclays Wealth personnel on the telephone and in correspondence.) That meeting focused on the practicalities of setting up various trust structures for Mr Chernukhin and was not specifically about the aircraft acquisition. Knowing that Mr Chernukhin was cautious about disclosing his affairs, Ms Parr asked him to whom she might turn for tax advice. Mr Chernukhin suggested consulting Joel Adler of Mischcon de Reya. This meeting was the only occasion on which Mr Le Ray met Mr Chernukhin. Mr Le Ray formed the impression that Mr Kiener would not move any monies on behalf of the Chernukhin Group without first speaking to Mr Chernukhin.

23. On 20 November 2007, Walbrook Trustees (Guernsey) Limited, as BWTG was then named, made a Declaration of Trust in respect of The Galaxy Trust. The proper law of that Trust is Jersey law. The Beneficiaries are Mr and Mrs Chernukhin (although references are to Mrs Chernukhin's maiden name) and the issue and remoter issue, whenever born, of each of them. The Declaration of Trust made provision for a Family Council, to be initially appointed by Mr

Chernukhin, and for the first Protector to be the Family Council. Ms Parr explained that it was her understanding that the Family Council was not appointed during the time that BWTG continue to deal with The Galaxy Trust.

24. Ms Parr contacted Ms Mulcahy on 3 December 2007, asking to be able to meet with Mr and Mrs Chernukhin the following week, only to be informed by Ms Mulcahy that they were on holiday and so unavailable. Ms Mulcahy asked Ms Parr if she had looked at "*the new deal*" she had forwarded, at Mr Chernukhin's direction, in early November. At the end of that exchange, Ms Mulcahy indicated, on 5 December 2007, that the aircraft deal "*needs to keep moving*". As a result, Ms Parr e-mailed Mr Kiener to give him "*a heads up that we are likely to need $250k as the initial deposit shortly although we have still not finalised the structure*". She also forwarded to him details of the escrow agent. In doing this, she initially overlooked that Ms Mulcahy had told her on 6 November 2007 that a deposit had been paid. Accordingly, when first contacting Mr Kiener, it is unclear whether Ms Parr had in mind needing the deposit to pay to HBC for an aircraft with either serial number RC-59 or RC-62, which relates to the document forwarded to her by Ms Mulcahy on 23 October 2007 or the e-mail message from Mr Dryden, forwarded on 31 October 2007, although use of the word "*initial*" points more towards the former, which lists three distinct deposits, whereas Mr Dryden's message refers only to one amount. Ms Parr contacted Mr Kiener approximately one hour later, correcting herself about the deposit: "*Alicia has just informed me that the deposit has been paid already*". Ms Mulcahy's position that day is demonstrated by what she sent to Mr Dryden: "*You really need to start giving me updates on where the new contract is at and start to keep in touch with Sharon Parr and myself regarding the next steps*".

25. Ms Parr had e-mailed Mr Adler on 30 November 2007 and received his response on 5 December 2007. This exchange related to the structure in which an aircraft should be held and made no reference to the transaction through which the aircraft would be purchased. Ms Parr then forwarded this response to Ms Mulcahy on 14 December 2007, saying she needed to discuss the proposed structure with Mr Chernukhin to determine how to proceed. She also added "*Should we need something urgently, following the outcome of the meeting with Hangar 8 on Wednesday, then this will be possible but may not be optimum*".

26. On 8 January 2008, Ms Mulcahy e-mailed Mr Dryden commenting that she "*was still yet to receive the new aircraft contract that you were going to send me by email instead of making the trip to London for our meeting*". The implication is that the meeting with Hangar 8 to which Ms Parr had referred, scheduled to take place on or about 19 December 2007, had not happened. Ms Mulcahy's message continued: "*Vladimir's money was transferred to the escrow account quite a while ago now and we need to move forward with this new deal as soon as possible*". Having received no reply for a week, Ms Mulcahy chased Mr Dryden on 15 January 2008, eliciting the following response:

> "*As per our previous discussions everything is in place for the purchase of this aircraft except a firm delivery. I have attached the full specification and preliminary contract but cannot advise you to go ahead with the purchase until we receive a firm delivery slot from the manufacturer who is in turn waiting for some approvals from the FAA. I will contact you later to fill you in more detail.*"

When Ms Mulcahy enquired within minutes whether the funds will always be refundable in full to Mr Chernukhin, Mr Dryden replied "*The funds are fully refundable until Vladimir signs contract*". This exchange apparently took place without the knowledge of, or input from, Ms Parr or anyone else at Barclays Wealth.

27. Ms Parr asked Ms Mulcahy on 21 January 2008 to set out the use to which it was proposed the aircraft would be put. This was because the usage envisaged may have an impact on the optimum legal/tax structure. Ms Mulcahy referred that request to Mr Kiener, who replied the following day, although his response to Ms Mulcahy began with the caveat that "*my*

*comments are limited as you may have better knowledge of how the present aircraft is used*". Ms Mulcahy forwarded Mr Kiener's comments to Ms Parr straightaway, because Ms Parr was due to meet with Mr and Mrs Chernukhin on 23 January 2008. Ms Mulcahy further explained: "*I am hoping to have a delivery date from Beechcraft tomorrow*". Ms Parr informed Mr Adler on 24 January 2008 that they had been given a delivery date.

28. Ms Parr had a discussion with Mr Chernukhin about the proposed aircraft on 23 January 2008, during which it was clarified that the aircraft was intended to be for private use only. In the middle of Ms Parr's handwritten notes about that conversation, she refers to "*specification price*" and explained that she suspects this was a reference to the fact that the plane fit-out had not then been finalised and that this would affect the price. Ms Parr had a further telephone discussion with Mr Chernukhin on 25 January 2008 about the most appropriate tax structure, during which he told her he wished to replicate the arrangements already in place for the Hawker 850XP because he felt they were suitable to his needs. As a result, Ms Parr caused enquiries to be made later that day of the Jersey-based trustees.

29. On 24 January 2008, Ms Parr contacted the Jersey Advocates' office of Ogier seeking advice on setting up a private trust company structure in which to hold an aircraft. That advice was forthcoming very swiftly and a fee quotation of the preparation of documentation provided and Ms Parr duly gave instructions for Ogier to proceed on the basis identified.

*The Offer Letter*

30. On 31 January 2008, Mr Dryden e-mailed to Ms Mulcahy a document that Ms Mulcahy forwarded to Ms Parr later the same afternoon, noting that Mr Chernukhin "*asked me to send you this*". Ms Mulcahy also added: "*We now need to move very quickly on the research regarding this deal as we have 25 days from today's date before our deposit will become non-refundable*".

31. The document in question was dated 8 January 2008 and sent by e-mail from Richard Laggan of GEC to Mr Dryden. It refers to Hawker 4000 Serial Number RC-30. It constitutes an offer to sell 100% of the membership interests of GEC for US$23 million less any amounts that become payable by GEC pursuant to the terms of an Aircraft Purchase Agreement (hereafter referred to as the "APA"), the benefit of which was assigned to GEC by an Assignment dated 30 October 2007. It refers to a refundable deposit of US$250,000 that had been made to IATS, which will be credited against the purchase price for the membership interests. It refers to a delivery date in August 2008 "*as per Amendment Number Four*" to the APA dated 23 February 2000 and that the serial number had been changed by Amendment Number Three. The document represented and warranted that the APA was still regarded as enforceable as between GEC and HBC and that amounts payable by the purchaser of the Hawker 4000 RC-30 by the date of the offer had been paid. There is an internal inconsistency in the document relating to the timeframe during which the parties would negotiate in good faith with a view to completing the sale of the membership interests under an LLC Membership Interests Purchase Agreement, because it refers to a completion date of no later than 21 December 2007.

32. Ms Parr also held a meeting with Mr Chernukhin during the early evening of 31 January 2008. She does not recall discussing anything specific about the aircraft transaction and her handwritten note of the various topics mentioned and action points does not make reference to the document that had been forwarded by Ms Mulcahy from Mr Dryden. The main purpose of the meeting was to discuss further the proposed super-yachts being acquired by the Chernukhins, where two orders would be placed with a view to retaining one and selling on the second to another person wishing to acquire such a vessel.

33. On 1 February 2008, Mr Dryden forwarded to Ms Mulcahy details about the running costs of the Hawker 850XP, which Ms Mulcahy forwarded to Ms Parr. Ms Mulcahy then forwarded

to Ms Parr a copy of the existing management agreement with Hangar 8 in respect of the Hawker 850XP on 6 February 2008.

34. On 14 February 2008, Mr Dryden sent Ms Mulcahy an e-mail in the following terms:

> "*Hawker Beechcraft have confirmed that this aircraft has been specified with the same interior and exterior as your hawker 850. If you are happy to go ahead with the purchase of this aircraft I can go through the contract details with Sharon Par.*"

He attached two documents. The first was "RC-30 spec.pdf". This was on Hangar 8 headed paper and refers to a delivery date of October 2008. The document sets out the aircraft's performance and dimensions and has a number of photographs on it as well as a list of optional items with the prices for each. The costs involved were stated to be:

| | |
|---|---|
| "*Deposit Due Now* | *$7,100,000.00* |
| *May* | *$1,000,000.00* |
| *Delivery* | *$14,900,000.00* |
| *Extras* | *$723,765.00* |
| *Total* | *$23,723,765.00*". |

The second document attached by Mr Dryden was a draft Aircraft Management and Charter Agreement between the prospective owner of the Hawker 4000 and Hangar 8.

35. Also on 14 February 2008, Mr Dryden and Ms Parr spoke on the telephone. Whether that was before or after Mr Dryden sent his e-mail to Ms Mulcahy is unclear. The way Ms Parr described part of her conversation with Mr Dryden is recorded in her contemporaneous handwritten note, namely "*that Mr Chernukhin had an "option on an early delivery slot" for the new plane*".

36. During February 2008, Ms Parr sought advice from BDO on the tax implications of what was being proposed as a structure for holding the aircraft. One question relating to the assets of the finance company within the Chernukhin Group was relayed to Mr Kiener and he replied with details about the source of its assets on 19 February 2008. A structure chart was considered which, in relation to the proposed aircraft, was comparatively simple, involving a Jersey trust owning a company registered in the British Virgin Islands, which in turn owned the aircraft, albeit that the aircraft would be run by an unrelated management company. The extent of Ms Parr's understanding of what was envisaged was shown in her e-mail to BDO on 20 February 2008: "*I don't know where it is being purchased from but I believe the supplier has it in a Delaware vehicle Hangar 8 who will be the mangager [sic] will be providing the crew*".

37. There was a flurry of activity on the afternoon of 22 February 2008. Under the subject heading "New plane", Ms Parr e-mailed Mr Kiener indicating "*It is likely that we will need to sign the docs on this in the next week or so (I am playing phone tag with the man at hangar 8)*". Mr Kiener was grateful for the update and offered some words of comfort about the possibility of incorporating a Liechtenstein foundation into the proposed structure. Within a short time, Ms Parr reverted to Mr Kiener telling him: "*For info Hangar 8 have just advised that we need to execute a preliminary agreement this afternoon. This can be transferred to the correct structure when finalised*", so she proposed to use a shelf company registered in the British Virgin Islands, Rastelo Limited (hereafter referred to as "Rastelo"), which BWTG had acquired for use in relation to one of the super-yachts under consideration by the Chernukhins. When Mr Kiener confirmed that "*Rastelo Ltd seems to be fine for the preliminary agreement*", Ms Parr supplied the details about Rastelo to Mr Dryden, adding "*I*

*need to see a draft of the agreement ASAP and I left you a voicemail as we are also still waiting for an amended RC30?*".

38. Within a matter of minutes, at approximately 5.10 pm, Mr Dryden then forwarded two documents to Ms Parr, copied to Ms Mulcahy. The first was an offer to purchase Hawker 4000 RC-30. This document was sent to "*Company name Rastelo Ltd*" and addressed "*Dear Sharon*". By leaving in the words "*Company name*", the clear inference I draw is that Mr Dryden (or someone acting on his instructions) failed to remove them from the template being used. This letter was sent by Jetstream Aviation Limited. The body of the letter was in very similar form to the text of the document dated 8 January 2008, which Mr Dryden had forwarded to Ms Mulcahy on 31 January 2008, save for a couple of matters. The purchase price for the membership interests of GEC was stated to be US$23,723,765 less any amounts that became payable by GEC pursuant to the terms of the agreement to buy the aircraft from the manufacturer. Consequently, the schedule of four payments had been modified to reflect that the deposit of US$250,000 had already been paid, and that a second payment of US$6.85 million was due on execution of the LLC Membership Interests Purchase Agreement, with the balance due on "*Final Delivery subject to specification*" increasing to US$15,623,765, which incorporates the extras set out on the second document attached by Mr Dryden, which had the same file name, "RC-30 spec.pdf", to which reference has already been made. The timescale for completing the negotiation of a formal LLC Membership Interests Purchase Agreement was stated to be 30 days from signature and provision had been included permitting the agreement to "*be assigned in order to complete a full share purchase agreement*".

39. Ms Parr was concerned that the period of 30 days in which to complete a formal purchase agreement gave insufficient time for Barclays Wealth to finalise the tax structure. She therefore spoke to Mr Dryden requesting an increase in the period to 45 days. Ms Parr recalls that Mr Dryden indicated he would need to check but believed that change would be fine. No information was given as to with whom Mr Dryden needed to check to check this or on whose behalf he was purporting to act. There was no indication whether Mr Dryden confirmed that the change was fine but the document signed on behalf of Rastelo later that day (hereafter referred to as "the Offer Letter") had been changed to refer to "*45 business days from signature*".

40. Less than 10 minutes after Mr Dryden sent the documents, Ms Mulcahy sent the following message to Ms Parr, copied to Mr Dryden:

> "*Please be advised that the RC-30 is the document that I was waiting for and I can confirm that the change has been made as requested.*
>
> *Would you kindly please confirm what time you are leaving the office today and where you are at with signing the contract.*"

Because both documents referred to "RC-30" it is unclear to which of them Ms Mulcahy is referring or what change she was talking about. In her witness statement, she commented that she "*did not however review the Offer Letter. As Mr Chernukhin's Executive Assistant there was no basis for me to consider the terms*".

41. Ms Parr wanted to speak with Mr Chernukhin to get confirmation that he was comfortable with the timetable. She telephoned Ms Mulcahy. Mr Chernukhin was clear that Ms Parr had not spoken with him about this. In her evidence, Ms Parr thought that it was unlikely that she had actually spoken to Mr Chernukhin (despite having so stated in her witness statement). She reached that belief because, if she had spoken to him, she felt she would have addressed other points in addition to the extra time needed to formalise the purchase agreement. She had a second telephone conversation with Ms Mulcahy and said that the latter had told her that Mr Chernukhin was happy with the terms. Ms Parr accepted that she did not take Mr Chernukhin through the terms of the Offer Letter clause by clause.

42. At 6.05 pm the same day, representing the respective corporate directors of Rastelo, Ms Parr and Mr Le Ray held a telephone Board meeting, at which they noted the details of the Offer Letter received from Jetstream Aviation Limited and referred to the need to extend the deadline for completion of the formal purchase agreement. After due care and consideration, the directors resolved to accept the terms of the Offer Letter and authorised themselves to sign on behalf of the respective corporate directors. A scanned version of the signed Offer Letter was then sent back to Mr Dryden by one of their colleagues at approximately 6.19 pm with the original following by conventional mail on 26 February 2008.

*Further steps in the transaction*

43. During March 2008, Ms Parr and Barclays Wealth continued to work towards finalising the most appropriate structure in which to hold the aircraft (and other assets), taking advice from *inter alia* BDO. On 11 March 2008, BDO e-mailed to Ms Parr several documents, one of which was headed "*Indirect Tax Issues on purchase of aeroplane*", which explained in its opening sentence "*We understand that VC or alternatively a structure that VC has an interest in, (so hereafter referred to as 'the client') is purchasing a Hawker 4000, this will be achieved by the purchase of the US company that already has a contract to purchase such a plane*". Later the same day, Ms Parr forwarded that document as one of a batch to Mr and Mrs Chernukhin by e-mail.

44. On 14 March 2008, Ms Parr sent a message to the e-mail addresses of Mr and Mrs Chernukhin she regularly used setting out some queries raised by BDO, adding her comments about them. In relation to the proposed aeroplane purchase, BDO asked "*Our understanding is that the US company have contracted to purchase the aeroplane, is it possible to novate the contract such that any new entity that is established can effect the final purchase?*", to which Ms Parr added her own direct question to both Mr and Mrs Chernukhin: "*Having been involved in the negotiations would you know if this may be possible?*".

45. These questions were further explored at a meeting Ms Parr held with Mr and Mrs Chernukhin in London on 18 March 2008. Although the meeting was designed to range over a lot of different topics, one of them was the new plane structure, with a view to reviewing the preliminary advice received on a suitable structure, understanding how it would operate and be financed, and finalising these arrangements. Ms Parr's contemporaneous note matches her recollection that Mr Chernukhin informed her that she was to ask Mr Dryden about the structure and question him about whether the aircraft should be registered. Mr Chernukhin's evidence about this meeting was different. Whilst he accepted that it was quite possible that he said she should speak to Mr Dryden because the latter could explain what needed to be achieved in relation to the aircraft for him to be comfortable about its use, he indicated that any documentation used at that meeting was not something for him to consider because he was paying other people to review these documents and advise him what to do. In particular, he was dismissive of the documents produced by BDO, which he had not asked for and did not intend to pay for.

46. On 1 April 2008, Ms Mulcahy sought an update from Ms Parr and Mr Dryden "*as to where we are at regarding the new contract*". Although no subject was mentioned, because the enquiry was made of Mr Dryden as well, the only matter in which both he and Ms Parr were involved was the acquisition of the new aircraft. On 2 April 2008, Ms Parr forwarded to Mr and Mrs Chernukhin by e-mail further documentation received from BDO. Again, the document relating to the acquisition of the aircraft recorded that "*The US company has already contracted to buy the aircraft*".

47. On 2 April 2008, Ms Parr made a formal request, internal to Barclays Wealth, for dispensation for BWTG "*to own a private jet in an SPV/discretionary trust structure*", which was in the course of construction. She further explained that she appreciated that Barclays Wealth "*only did planes for their most significant clients*". The reason for seeking such a

dispensation was because of the amount of revenues from the Chernukhin Group's business received by Barclays Wealth in the previous calendar year and the likelihood of even more being generated that year. For those reasons, the dispensation sought by was granted by her more senior colleagues on 3 April 2008.

48. Ms Parr provided an update to Ms Mulcahy early on 3 April 2008:

> "*On the plane I am in the final throws [sic] of sorting out the structure as we had tax advice at the beginning of the week. I'm on holiday from today but I've asked Steve Le Ray here to follow it through on the structuring side. I know you're not permitted by V to speak with Steve but hopefully he can finalise the tax advice structure with BDO in the meantime.*
>
> *I'll liaise with Dustin on this before I leave today to make sure we are on the same page*".

The immediate response from Ms Mulcahy was to enquire whether Mr Le Ray would be organising the payment for the plane, to which Ms Parr replied that she would need to liaise with Mr Kiener before she went away on holiday.

49. In the middle of that day, Ms Parr contacted Mr Dryden commenting that she had not yet received the draft contract that he and his lawyers were happy with, requesting that it be forwarded to her. Mr Parr also contacted Mr Kiener to alert him to her belief that "*we are going to need to make a payment for the new plane very shortly as we will need to execute the acquisition contract and Dustin has informed me that the current contract holder will not order the interior we want without us having committed to the purchase*". Mr Kiener was grateful for being forewarned and indicated that, if notification of the amount required were provided at least three banking days beforehand, that would avoid additional cost and that he was happy to deal with Mr Le Ray about these matters. In response, Ms Parr sent to Mr Kiener a copy of the Offer Letter, showing the terms accepted by Rastelo, including that the next payment required would be in the amount of US$6.85 million due on the signing of the contract to purchase the membership interests of GEC. Ms Parr further explained that Mr Dryden was "*pushing us to be able to do this ASAP*" and that she was trying to speak to Mr Chernukhin about it.

50. Ms Parr managed to speak to Mr Chernukhin later that day and, in an e-mail, briefed Mr Le Ray about their conversation. Mr Chernukhin indicated that he wanted the structure that "*fits best*" but was content to accept what was being proposed in the short-term, namely a company registered in the British Virgin Islands within a discretionary trust structure. Ms Parr told Mr Chernukhin that Barclays Wealth "*would want him to be comfortable with the full contract in due course*". Ms Parr also briefed Mr Le Ray that day, leading him, as he explained in his statement, to be "*aware that we needed to act quickly on this and it was extremely likely that we would need to complete on the transaction whilst Ms Parr was absent*".

51. During that afternoon, arrangements were made to reserve a suitable company for the purpose of acquiring the proposed aircraft. The upshot was that EBWL was reserved with the Jersey office of Equity Trust on behalf of BWTG. The following day, an employee of BWTG confirmed to Equity Trust BWTG's intention to purchase EBWL, as a matter of urgency, and indicated that the corporate directors would be the two Defendants.

52. Mr Le Ray informed Mr Dryden of the name of the company to be used to purchase the membership interests in GEC towards the end of the afternoon on 3 April 2008. Mr Dryden later sent two documents to Ms Parr and Ms Mulcahy by e-mail. The first was the same attached file named "RC-30 spec.pdf" to which reference has already been made and the second was listed as "*ATS' initial draft of Membership Int Purch Agmt 4-02-08 jetstream iom.DOC*". This was the first occasion on which the draft MIPA, albeit without containing

details about the purchaser, had been seen by anyone within Barclays Wealth. The Seller of the membership interests was shown to be Jetstream Limited and that company was shown as having an office at an address in Guernsey, in the parish of St Saviour. Indeed, Mr Dryden mis-typed one of the e-mail addresses he used for Ms Parr and Ms Mulcahy then forwarded the message and attachments to the correct address some minutes later.

53. During the morning of 4 April 2008, Ms Parr forwarded the documents received from Mr Dryden to Mr Le Ray, suggesting that they be "*reviewed from a legal perspective*". Ms Parr also suggested to Mr Le Ray that he let Mr Dryden know how long the legal review would take and alert Mr Kiener because of the desirability of giving the latter the requested notice before the payment needed to be made. Very shortly thereafter, Mr Le Ray forwarded the documentation to Mr Adler at Mishcon de Reya, describing it as the "*contract to acquire a plane*" and explaining that "*we are being pressed by both the agent and the principals to execute*". Mr Le Ray also attempted to speak with Mr Dryden, but without success, so posed a number of questions by an e-mail sent towards the end of that morning. Having earlier noted the name of the company to be used to make the purchase, Mr Dryden replied to Mr Le Ray's enquiries during the evening of 4 April 2008. Without explaining why, Mr Dryden indicated his hope that the contract would be signed the following Monday, 7 April 2008, at which time the funds to make the payment would be required. Mr Dryden supplied other answers relating to the proposed structure, which Mr Le Ray forwarded to BDO on 6 April 2008 and he then relayed more information to BDO later in the day, apparently gleaned from a conversation with Mr Dryden, including that the aircraft would be built in August/September.

54. A file note prepared on 4 April 2008 by Rachel Bougourd recorded details of the proposed structure for holding the aircraft, including that "*A US Delaware company has already contracted to buy the aircraft and the [letter of intent] signed was in respect of the purchase of the company. The final purchase of the aircraft will not be through the US company.*" Other internal documentation generated within Barclays Wealth on 7 April 2008 and signed by Mr Koller confirmed the structure envisaged for the acquisition and holding of the aircraft.

*Mr Le Ray assumes lead responsibility*

55. Mr Le Ray contacted Mr Kiener on 6 April 2008 requesting him to make arrangements for the funding required for the next payment to be available during the coming week. Mr Kiener responded the following morning saying he would have to discuss this with Mr Chernukhin but was confident he could act within three days. On 8 April 2008, Mr Kiener e-mailed Mr Le Ray asking for "*a chart showing the maturity dates for the various payments in respect of the new aircraft*", which had been requested by their mutual client, Mr Chernukhin. Mr Le Ray responded approximately one hour later, attaching the same "RC-30 spec.pdf" file to which reference has previously been made, explaining that "*$7,100,000 is required now with $1,000,000 due in May and $14,900,000 due on delivery*", adding "*I will check with the plane agent when the funds in May are due*". His reference to "*the plane agent*" can only be a reference to Mr Dryden.

56. On 8 April 2008, Mr Le Ray received comments on the draft MIPA from one of Mr Adler's partners. The first comment was that the advice of a person qualified to opine on the law of Delaware, the governing law of the draft MIPA, would be required. He requested sight of the various documents to which reference was made within the MIPA and comfort as to the reliability of the escrow agent. He commented that "*The fact that the deposits are non-refundable is unattractive*". Mr Le Ray considered this to be "*an odd comment from a lawyer as I would not expect them to comment on the commercial deal*". The lawyer also gave a "*strong recommendation that inquiries are raised of Hawker Beechcraft Corporation (the manufacturer) both as to the technical specification …, together with the manufacturer's confirmation that it recognises the seller as being the sole party entitled to complete the original contract*". Approximately half an hour later, Mr Le Ray replied confirming that they

would "*take up these points with our agent*" and he duly sent an e-mail to Mr Dryden raising the points made by Mishcon de Reya.

57. My Dryden reverted to Mr Le Ray rather quicker than some of his other dealings with Barclays Wealth and Ms Mulcahy. He attached scanned copies of the documents requested and commented that the escrow agent, IATS was "*generally considered to be the best in the industry*". Mr Dryden did not deal with Mr Le Ray's other questions but undertook to investigate to progress them. The documents Mr Dryden attached were the Aircraft Purchase Agreement, including copies of a couple of the amendments to it (hereafter referred to as the "APA"), the assignment of the benefit of that APA to GEC, and a copy of the details of IATS, which was identical to what had originally been forwarded by him to Ms Mulcahy on 30 October 2007. The inference from this exchange between Mr Le Ray and Mr Dryden is that this was the first occasion on which the APA and the assignment agreement had been provided to anyone at Barclays Wealth. If the documents were already on file, Mr Le Ray would not have needed to ask for them from Mr Dryden.

*The APA and its assignment to GEC*

58. The APA is dated 23 February 2000 and was made between Raytheon Aircraft Company, referred to as "the Seller", and Hanns Pielenz, referred to as "the Buyer". Since that time, Raytheon Aircraft Company had changed its become HBC. The APA refers to the aircraft with the serial number RC-31. The 1999 Base Price of US$15.49 million was used, leaving open the cost of any optional equipment to be chosen and also the way in which the economic price adjustment would be made pursuant to Addendum I, linked to the annual Consumer Price Index, Urban Wage Earners and Clerical Workers. A deposit of US$250,000 was required on executing the APA. A further deposit of US$750,000 was due within 30 days of completion of the first flight or 24 months prior to estimated delivery, whichever was later. An additional deposit of US$1 million was to become due 12 months prior to the scheduled delivery date. The balance due on delivery was still to be determined because of the unknown amounts for extras and the economic price adjustment. At the time of executing the APA, the estimated delivery date was October 2002. By no later than 12 months before the estimated delivery date, the Seller had to notify the buyer of the scheduled delivery date and the Buyer similarly had to confirm the specification requirements within the same timeframe.

59. There are 13 clauses on the reverse of the APA, which were expressly incorporated as terms and conditions. These show a number of things. The agreement was expressly governed by the law of Kansas. Amendments to it were permissible, but only in writing signed by both parties. The APA was not assignable or transferable except with prior written consent of the Seller. Clause 6 deals with the position if the Buyer of the aircraft did not accept delivery and so informed the Seller or if there were to be a breach of any terms of the APA. In such a case, the Seller could terminate the APA and retain all deposits previously paid as liquidated damages. Clause 7 covered the position if the Seller failed to deliver the aircraft within 180 days of the scheduled delivery date, giving the Buyer the choice to terminate the APA by notifying the Seller in writing and requiring the Seller within 30 days of the termination date to return the deposits previously paid with interest running between the date of receipt of each deposit by the Seller and its return.

60. The scanned document also included Amendment Number Three and Amendment Number Four. By Amendment Number Three, apparently signed by Mr Pielenz on 16 February 2005 and on behalf of Raytheon Aircraft Company on 28 February 2005, the aircraft covered by the APA was changed to serial number RC-30 and the scheduled delivery date was established as December 2007. Amendment Number Three also established the Base Price at US$16,899,690, with no economic price adjustment to be included thereafter and recorded that the first deposit of US$250,000 had been made and that the next deposit of US$750,000 was due on 15 December 2005, with the final deposit due one year later on 15 December 2006. The additional costs of extras remained open.

61. Amendment Number Four was apparently signed by Mr Pielenz in mid-September 2007 and on behalf of HBC on 24 September 2007. It formally records the change of name of the Seller, modified the established scheduled delivery date to August 2008 and recorded that the second deposit of US$750,000 had been received on 7 September 2007. The consequence of the changes to the delivery date and the payment of the second deposit was that the next deposit of US$1 million was agreed to become due on 15 May 2008. All the other terms remained unchanged.

62. The version of the APA supplied appears to be incomplete in that at least one line in the middle of clause 7 is missing. No one seems to have asked Mr Dryden to provide a better copy. No copy of Amendment Number One or Amendment Number Two was supplied. Indeed, the assignment agreement of 30 October 2007 refers to "*Side Letter #1 and Amendments #2, #3 and #4*", implying that whatever was first in time may not have been in the same form as the last two Amendments. Again, no one seems to have asked Mr Dryden whether he had copies of those documents or worried about what they might say. Given the crystallised terms that can be distilled from Amendment Number Four, and the fact that Amendment Number Three referred to Amendment Number Two changing the serial number of the aircraft to RC-12 before then changing it to RC-30, it is just possible that there were not any gaps in any contract reviewer's knowledge as a result of those two earlier amendments not being seen. The version of the APA supplied by Mr Dryden also appears to have been received by someone by fax as an eight-page document on 25 October 2007, although there is no indication of who sent it and who received it. The only identifying feature is a reference in the header to "jetbroker.com", but no explanation was offered as to the relevance of this.

63. The assignment agreement attached by Mr Dryden was made on 30 October 2007 between Mr Pielenz, GEC and HBC (hereafter referred to as "the Assignment Agreement"). The document was not signed by Mr Pielenz, but on his behalf. The document does not record that any money was paid by GEC to Mr Pielenz. The effect of the agreement appears to be that GEC simply substituted thereafter for Mr Pielenz in relation to the benefits and obligations of the APA. From the footer of the document, where there are references to "*New long assignment*" and "*HBC*", there is an inference that this was a standard-form document prepared by HBC and used by any of its clients wishing to assign the benefit of their aircraft purchase agreements with HBC.

*First activities of EBWL*

64. Another event that took place on 8 April 2008 was that Mr Le Ray and Mr Koller held a board meeting of BWTG, as trustee of The Galaxy Trust, and resolved to purchase two shares in EBWL, all in accordance with the provisions of the Declaration of Trust, and that one share each would be held by two nominee companies provided by Barclays Wealth. The method of funding the share purchase was for BWTG to accept a loan of US$2 from EBWL.

65. The first meeting of the corporate directors of EBWL was held on 9 April 2008. Mr Koller represented the First Defendant and Mr Le Ray represented the Second Defendant. The minutes of that meeting show that the board conducted all the business one might expect to see occurring for the company to become operative thereafter. The directors noted that "*the Company had been set up as an investment holding company*" and resolved to make a loan of $2.00 to "*the Shareholder(s)*".

66. A second meeting of the board was also held on 9 April 2008. The interchangeability of the humans involved is shown because Mr Le Ray represented the First Defendant and Mr Koller represented the Second Defendant. They resolved to approve and sign account opening documentation on behalf of EBWL with Barclays Private Clients International Limited.

*Pressure to conclude the deal and lawyers' advice*

67. In the early evening of 9 April 2008, Mr Le Ray forwarded the documentation that had been provided the day before by Mr Dryden to the lawyers at Mishcon de Reya. He also e-mailed Mr Dryden seeking confirmation from him about the proposed registration of the aircraft and the VAT consequences of importation into the Isle of Man, requesting a letter to enable them to "*ensure that the company is VAT registered before we acquire the plane*".

68. The next morning, after speaking with Mr Kiener on the telephone, Mr Le Ray e-mailed him attaching the details of IATS, the escrow agent, adding "*The plane agent has confirmed that either the funds or the signed contract will be required by close of business tomorrow. As discussed the contract is with the lawyers who are reviewing now and I am pressing to revert before we commit any funds*". He then re-sent the documentation received from Mr Dryden to the lawyers at Mishcon de Reya, noting that "*unfortunately we are being pressed on the attached*" and asking them to review it and let him know if any further information was required. The reply received several hours later confirmed that the documents supplied were those referred to in the draft MIPA and advised that the lawyer qualified to advise on Delaware law should raise a number of matters with HBC.

69. Mr Le Ray spoke to Mr Dryden about the matters raised in this legal advice. Mr Dryden explained about the name change of the manufacturer and promised to speak with HBC and Jetstream Limited and revert if there were any problems. Thereafter, because Mr Dryden did not revert, Mr Le Ray proceeded on the basis that everything was OK. Mr Le Ray also recorded that, during a telephone conversation that day with Mr Dryden (and it is unclear whether this was the same conversation or a different one), Mr Dryden was "*pressing for the monies to be deposited with the escrow agent to secure the deal and that he could only hold the deal for so long*". In his statement, Mr Le Ray also explained that he was told by Mr Dryden that "*Mr Chernukhin wanted this plane, this was a normal transaction and that the funds were fully refundable if the transaction didn't go forward, and that [Barclays Wealth] seeking legal advice was holding everything up*". On the same day, Mr Le Ray promptly sought assistance from Mr Adler about identifying such a Delaware-qualified lawyer. He also forwarded the message from Mishcon de Reya to Mrs Chernukhin and Mr Kiener "*By way of an update on the plane*" and confirmed that they were "*seeking confirmation from Delaware lawyers on the contract*".

70. On the morning of 11 April 2008, Mr Kiener enquired whether Mr Le Ray could let him know about releasing the funds that day because otherwise payment might have to wait until the following Tuesday owing to a forthcoming Swiss holiday weekend. A little later, Mr Kiener forwarded to Mr Le Ray a draft payment order, asking him to check it, to which Mr Le Ray responded that he was chasing lawyers and would revert. Less than an hour later, Mr Le Ray forwarded to Mr Kiener the comments received from Mishcon de Reya, indicating further that he would be unable to get any comments on the draft MIPA from Delaware lawyers within the timescale mentioned by Mr Kiener. In his view, "*none of the comments at this stage appear to be deal breakers*". He explained his understanding that the funds were "*being sent to an escrow account and as such are refundable to us as the depositor*" and concluded "*Given the timelines and the assumption that the principal has been consulted on this matter I am comfortable with these funds being sent*". The payee reference on the payment order to Credit Suisse on behalf of Navigator was "*Hawker 4000 RC-30; Loan to future entity owner*". Unlike for the initial payment of US$250,000, there was no mention of any "*Refundable escrow amount*" that time. Mr Le Ray held a number of telephone conversations with Mr Kiener that day. He understood from Mr Kiener that Mr Chernukhin had been consulted. He confirmed with Mr Kiener that the payment details were correct and understood that the payment would therefore be sent.

71. During the afternoon of 11 April 2008, Mr Dryden forwarded to Mr Le Ray by e-mail a revised draft MIPA, which he described as "*the final version*". The revision he highlighted

was that an additional warranty on behalf of Jetstream Limited, apparently taken from the advice given by Mishcon de Reya, had been included confirming that the aircraft and the Aircraft Purchase Agreement Assignment of 30 October 2007 had not been charged or pledged and that no third party had any legal or equitable interest in them. The Purchaser of the membership interests of GEC was now shown as Rastelo. In response, Mr Le Ray informed Mr Dryden that he would pass the draft past the US lawyers and confirmed that US$6.85 million had been transferred to the escrow account earlier that day. By return, Mr Dryden requested a copy of the transfer so that he could "*stop HBC calling every 5 mins*". However, Mr Le Ray could not assist because he did not "*have a copy of this transfer, it was not sent by ourselves*".

72. On 12 April 2008, a Saturday, Mr Le Ray sent Ms Parr an e-mail summarising developments during her absence on holiday, explaining that "*essentially most things are with others*" and that Ms Bougourd had been updated. This step was taken because Mr Le Ray was taking the following week as holiday and he needed to carry out some form of handover back to Ms Parr, who was due to return from her own holiday the following week. However, Ms Parr had fallen ill whilst on her holiday and did not attend the office during that following week.

73. On 15 April 2008, Ms Mulcahy sent Ms Parr an e-mail seeking "*an update on the new plane contract*". Ms Parr's secretary forwarded the enquiry to Ms Bougourd, who replied to Ms Mulcahy the following morning, explaining that Ms Parr was unwell but that the contract had been reviewed by UK lawyers and that she was "*in the process of liaising with a US lawyer as the contract is written under Delaware law and therefore needs to be reviewed on this basis also*". She further explained that Mr Dryden was aware of what had happened.

74. Ms Bougourd then contacted the New York office of Clifford Chance explaining that she was "*dealing with a company which is purchasing a Delaware LLP and through which an aircraft is being purchased*" asking whether that firm could assist, which it said it could. After Ms Bougourd and Christopher Roman from Clifford Chance spoke, Ms Bougourd forwarded to Mr Roman copies of the APA, the Assignment Agreement and the draft version of the MIPA that had been supplied by Mr Dryden on 11 April 2008. Mr Roman asked Ms Bougourd whether she had "*any organizational documents for the Company*" and enquired whether Hanns Pielenz owned Jetstream Limited, as they wished to understand the assignment transaction and how GEC came to be owned by Jetstream Limited. Ms Bougourd replied that Barclays Wealth did not yet have any organisational documents for GEC, further explaining that "*Hanns Pielenz was the original owner of the aircraft which has since been assigned. The ownership is now in the LLC and the transfer is way of the transfer of shares*". Ms Bougourd suggested to Mr Roman that if he required any further information about the prior ownership of the aircraft and on the structure in general he should contact Mr Dryden. Ms Bougourd then forwarded her exchange with Mr Roman to Mr Dryden for his information.

75. Within a matter of minutes, Mr Dryden sent the following e-mail, which he copied to Ms Mulcahy, to Mr Le Ray and Ms Parr (neither of whom were in their office at that time), and also included Ms Bougourd, but mis-typed her e-mail address:

> "*I am getting huge pressure from Hawker Beechcraft to conclude the purchase of the Hawker 4000. They needed to finalise the specification last Friday in order to meet delivery date and after that period they are entitled to charge for any changes. Please also be aware that HBC can still sell this aircraft to anyone else as even though you have sent the money to Escrow it is still held to your order and there is no contract in place. Please can you endeavour to expedite this transaction as the next available aircraft is late 2010 and I do not want to have to tell my client that his aircraft has been sold elsewhere?*"

By the following afternoon, Ms Mulcahy sent a chaser to all those in receipt of Mr Dryden's e-mail, asking for an urgent update because she had not seen "*a response to this urgent e-*

*mail*". By using the mis-typed e-mail address for Ms Bougourd, Ms Mulcahy discovered that her message was not being received by Ms Bougourd, prompting her quickly to ask Mr Le Ray and Ms Parr to check if there was a problem. This exchange was spotted by Ms Parr's secretary, who duly forwarded Ms Mulcahy's request to Ms Bougourd, who shortly thereafter informed Ms Mulcahy that the contract was being reviewed by the US lawyer and that she had spoken to Mr Dryden so he was aware of the situation.

76. Within a few hours, Ms Mulcahy sent the following e-mail to Ms Parr, copied to Ms Bougourd:

> "*I am very concerned about the new Hawker contract and the fact that it can be sold from under us at any time.*
>
> *I am already aware that the contract is being reviewed by a US lawyer. Rachel's answer below is the same answer I was given last time I asked.*
>
> *No-one from Barclays has kept me updated on progress on a regular basis, given me timeframes of the next steps, or informs me of what the next steps are.*
>
> *No-one from Barclays has acknowledged or actioned the fact that this contract has not been secured and can be sold by Beechcraft at any time.*
>
> *Sharon I need to know why each process takes so long.*
>
> *Hangar 8 sought legal advice from 3 law firms in different countries in one day before we sent the contract to you.*
>
> *The contract was sent to you on the 3rd of April and the only things I'm aware of that have been done in two weeks are a UK lawyer looking over the contract, and now a US lawyer.*
>
> *I would appreciate a full update on the situation.*"

Although despatched by Ms Mulcahy, the tenor of this message is such that this was not written by her on her own initiative, but was dictated to her, most probably by Mr Chernukhin.

77. On the morning of 18 April 2008, Ms Bougourd asked Mr Roman to indicate how long his advice would take, and was told that it would be forthcoming later that day. Ms Parr's secretary contacted Ms Mulcahy to explain further about Ms Parr's sickness absence and immediately got a response from Ms Mulcahy saying this was urgent and could not wait for Ms Parr's return, so could Mr Le Ray help. Ms Bougourd's response to Ms Mulcahy explained that Mr Le Ray was away on holiday but assured her that "*the matter is being dealt with in their absence and we are aware of the need to have the contract signed as soon as possible*". Ms Mulcahy enquired of Ms Bougourd how the aircraft sale with HBC had been secured so that it would not be sold and was told by Ms Bougourd that she had "*just spoken*" to Mr Dryden to update him and that "*He is continuing to liaise with Hawker Beechcraft to ensure that they are aware that the contract is going to be signed as soon as the final legal advice is received*". By the end of that day, which was a Friday, Ms Bougourd sent an e-mail to Mr Dryden explaining that the US lawyers would advise on the contract later that day and that she should "*be in a position to get the contract signed on Monday subject to the comments received*".

78. The comments from Mr Roman were received by Ms Bougourd, Ms Parr and Mr Le Ray by e-mail during the evening of 18 April 2008. Some suggested changes were handwritten on to a copy of the draft MIPA, together with a document containing notes and riders as also cross-referenced in manuscript on the draft MIPA. The first general point raised by Clifford

Chance was whether the parties should seek the Seller's consent to this transaction. The first note was made in relation to clause 3.2 of the draft MIPA, which provided:

> "*Simultaneously with its execution hereof, the Purchaser shall wire-transfer to the Escrow Agent, an additional deposit (the "Second Deposit") in the amount of Six Million Three Hundred Fifty Thousand and No/100 (US$6,350,000) United States Dollars which, upon the Escrow Agent's receipt thereof, shall, together with the Initial Deposit, be deemed to be non-refundable for all purposes hereunder, subject only to the Seller's timely compliance with its obligations hereunder.*"

Clifford Chance's note asked "*Is this the commercial deal? The Second Deposit in fact represents the balance of the net Purchase Price.*" The final manuscript note at the end of the draft MIPA was "*IATS should countersign as Escrow Agent*".

79. In relation to clause 4 of the draft MIPA, dealing with Closing, the date inserted there, namely Friday, April 4, 2008, was struck through, no doubt because it had already passed. The inference is that Mr Roman clearly felt that a future date would need to be inserted before the final agreement was executed, probably following further liaison on behalf of the parties. Mr Roman suggested inserting a further six representations and warranties on the part of Jetstream Limited into Clause 5 and suggested an additional condition precedent to be inserted into clause 7 ("*The Manufacturer shall have provided its written consent to the transaction contemplated by this Agreement*"). Mr Roman suggested modifying clause 9, dealing with Default, so that only the Initial Deposit of US$750,000 would be forfeit if the Purchaser failed to close rather than "*all of the Deposits received by the Escrow Agent prior thereto*" and, because he was recommending that IATS also be a signatory, making the return of the Deposits a direct responsibility of IATS rather than it being something to be caused by Jetstream Limited. His final comments related to the Applicable Law and jurisdiction provisions in clause 13, adding a note about the desirability of them aligning and being a jurisdiction, like New York, whose laws would uphold these choices by the parties (further noting that the parties were based in Guernsey and the British Virgin Islands), "*whose transaction otherwise has no significant connection with such jurisdiction*".

80. In the middle of the morning on 21 April 2008, Mr Le Ray forwarded the two documents supplied by Mr Roman to Mr Dryden, adding "*Once we have these back we should be in position to sign – today if possible!*". Mr Le Ray and Mr Dryden then spoke on the telephone with Mr Le Ray impressing on Mr Dryden that the comments made by Clifford Chance needed to be taken into account. Apparently, neither of them wanted to have to tell Mr Chernukhin that the planned aircraft acquisition had run into difficulties. At the end of that working day, Mr Le Ray e-mailed Mr Dryden commenting that he was "*keen to ensure that we do manage to secure the plane although I would like the legal issues addressed*". He also wrote that he did not want to have a conversation with Mr Chernukhin "*should things not go according to plan*".

81. During the morning on 22 April 2008, Ms Mulcahy e-mailed Mr Dryden saying that "*I have been told yet again from Barclays that all is in hand with our new Hawker contract*", asking "*Does this mean that you have an extension in place with Beechcraft so that they will not sell the aircraft to anyone else? Please confirm the new deadline that we have to have the contract signed by.*" Mr Dryden simply responded "*The amendments to the purchase contract requested by Barclays Capital where [sic] sent to the seller yesterday and we hope to finalise and sign today*". Then, by the early evening, Mr Le Ray e-mailed Mr Dryden suggesting that Mr Dryden forward any comments to him and Ms Parr at their private e-mail addresses that evening to enable them "*if appropriate to hold a board meeting to approve its execution*". Mr Dryden then sent a further revision to the draft MIPA approximately a quarter of an hour later. Mr Le Ray then contacted Ms Parr indicating that he would review the amended version the next day because "*on first glance not all our suggested changes have been incorporated and I therefore need sometime to digest and review*".

*Events on 23 April 2008*

82. During the morning of 23 April 2008, Mr Le Ray went through the latest version of the draft MIPA he had received from Mr Dryden. A copy of the document, which contained tracked changes, also bearing his handwriting, shows that he highlighted the provisions that remained unchanged despite his request to Mr Dryden that they be incorporated. He then asked Ms Bougourd to "*arrange for minutes to be drafted approving*" the MIPA, commenting that he was checking with Mr Roman whether the seller's decision not to incorporate the changes in respect of the governing law were "*deal breakers*". He also sent an e-mail to Mr Roman explaining developments and asking whether the fact that the seller had not accepted the proposed "*changes in the applicable law (your Note B)*" represented "*a significant risk*". Mr Roman replied that he would arrange to speak with Mr Le Ray, which he then did, enabling Mr Le Ray to inform Ms Bougourd during the early afternoon that Mr Roman's view was "*that there is no significant risk with accepting the use of Delaware law with possible litigation in Florida*", with the consequence that "*On that basis we should proceed to sign the plane contract*".

83. Ms Bougourd then e-mailed Mr Dryden to let him know that the company entering into the contract would be EBWL, and not Rastelo. Mr Dryden replied about half an hour later to Mr Le Ray, merely saying "*They seem happy with that please see amended contract for signature*", attaching what became the final version of the MIPA, marked as being "clean.doc" and showing EBWL in place of Rastelo from the draft he had forwarded late the previous day.

84. Mr Le Ray and Mr Koller then participated in two board meetings. Ms Parr indicated that she would have participated on that day had she been available. The first was a meeting of the board of Rastelo. Mr Le Ray represented the First Defendant and Mr Koller represented the Second Defendant. The business of that meeting was to assign the benefits and obligations arising under the Offer Letter executed by the company to acquire the membership interests of a Delaware Company through which an aircraft was being purchased. Although the company concerned is not identified on the face of the board minute, it must have been GEC. The second meeting was of the board of EBWL when, once again, Mr Le Ray represented the First Defendant and Mr Koller the Second Defendant. This was the meeting at which EBWL resolved to authorise the execution of the MIPA and is, therefore, the act about which the Plaintiff complains. Mr Le Ray's explanation about the board meeting pack used was that:

> "*we draft effectively an aide-memoire about what we are going to discuss in the board meeting beforehand and the decisions we are going to reach in the board meeting, and then we – so those are always drafted before, and they're then presented with the pack. … There's the draft board minute at the top and then there's documentation which relates to that board minute underneath*".

85. Mr Le Ray acknowledges in his witness statement that Mr Koller had had minimal involvement with the proposed transaction. As a result, he said Mr Koller was especially "*meticulous with detail*". Mr Le Ray explained that the beneficiaries' office had been intimately involved, there was considerable pressure to finalise the transaction, funds had already been released and legal advice had been obtained. The timesheets in respect of EBWL record 0.2 of an hour for Mr Koller on 23 April 2008, suggesting the board meeting required no more than approximately 12 minutes of his time. The timesheets for Mr Le Ray record 1½ hours in respect of "*Other further work re signing of aircraft contract, including review of revised contract from US, email to US lawyers, liaising with [Mr Dryden] by telephone and email and work re arranging possible finance*".

86. The Minutes of the board meeting of EBWL on 23 April 2008 record that:

> "*IT WAS NOTED that Rastelo Limited had today assigned its interest in the purchase of the Delaware Company, GE Continental LLC, to Emerald bay Worldwide Limited together with the liabilities which had arisen under the terms of the Offer Letter.*
>
> *The Chairman presented to the meeting a Membership Interests Purchase Agreement between Jetstream Limited of Hampton House, Route Du Houguet, St Saviour, Guernsey, Channel Islands, GY7 9UJ (the "Seller") and Emerald Bay Worldwide Limited of Palm Grove House, P O Box 438, Road Town, Tortola, British Virgin Islands (the "Purchaser") subject to the terms and conditions contained therein for approval by the Directors of the Company.*
>
> *IT WAS NOTED that the Seller is the Sole Member and owner of all of the issue and outstanding membership interest (the "Membership Interests") in G.E. Continental, LLC, a Delaware limited liability company (the "Company") who is the Buyer of a new Hawker 4000 Jet Aircraft Serial Number RC-30 under an Aircraft Purchase Agreement dated 23 February 2000 which was assigned to the Company dated 30 October 2007.*
>
> *IT WAS FURTHER NOTED that the purchase price for the Membership Interests shall be the sum of USD23,000,000.00 (twenty three million US Dollars) less the amounts to become payable to the manufacturer USD15,899,590.00 (fifteen million, eight hundred and ninety nine thousand, five hundred and ninety US Dollars) after the closing hereunder, pursuant to the Aircraft Purchase Agreement (the "Purchase Price").*
>
> *IT WAS FURTHER NOTED that prior to the execution and delivery of this Agreement, the Purchaser had transferred the sum of USD7,100,000 (seven million one hundred thousand US Dollars) as a deposit to Insured Aircraft Title Service, Inc ("IATS") the "Escrow Agent" in connection with the transaction contemplated by this Agreement.*
>
> *After due care and consideration of the proposal IT WAS RESOLVED to approve the Membership Interests Purchase Agreement between Jetstream Limited of Hampton House, Route Du Houguet, St Saviour, Guernsey, Channel Islands, GY7 9UK (the "Seller") and Emerald bay Worldwide Limited of Palm Grove House, P O Box 438, Road Town, Tortola, British Virgin Islands (the "Purchaser") and the terms and conditions contained therein and that Mr Stephen Le Ray representing Barclays Wealth Directors (Guernsey) Limited, Director and Mr Warner Koller representing Barclays Wealth Corporate Officers (Guernsey) Limited, Director sign the Membership Interests Purchase Agreement on behalf of the Company.*"

Under the heading relating to copy documents, the Minutes record that:

> "*A copy of the Membership Interests Purchase Agreement is attached hereto and forms part of this minute."*

By approximately 4.30 pm that day Mr Le Ray informed Mr Dryden that the contract had been signed and about 15 minutes later a scanned copy of the signed MIPA was sent by Ms Bougourd as an attachment to an e-mail to Mr Dryden. Mr Dryden duly acknowledged receipt of the scanned signed copy and indicated he would be transmitting a copy to IATS.

*Subsequent events*

87. In relation to the documentation generally, the next morning, Mr Dryden informed Mr Le Ray that he was waiting for the last documents to arrive "*in Escrow*", meaning they "*should be able to complete around 1600 Delaware time*". On 30 April 2008, EBWL was billed by IATS in relation to half of the escrow closing costs (US$2,150). On 7 May 2008, Ms

Bougourd asked Mr Dryden what she should do with the original signed copy of the MIPA and requested copies of the versions signed by others. Mr Dryden asked for the original to be sent to him for binding and distribution and enquired about the completion of the structure so that the APA could be assigned. The original was sent to him on 8 May 2008. On 17 June 2008, Ms Bougourd asked Mr Dryden about the IATS invoice and whether EBWL should pay it, to which Mr Dryden replied that he would sort it out for her. As none of the parties produced a fully executed copy of the MIPA, or any other documentation that might have been received as a result of executing it relating to GEC, I have inferred than none was ever supplied to them.

88. The ongoing involvement of Mr Dryden is clear from the exchanges that followed the execution of the MIPA. His role, therefore, was not solely as some broker to source an opportunity to acquire a Hawker 4000 aircraft. For example, on 9 May 2008, Ms Mulcahy sought an update from Mr Dryden, which he provided the next morning, explaining that he was still waiting for a company registered in the Isle of Man to be set up to enable the APA to be assigned to it, but confirming that the personal choices of Mr Chernukhin to the exterior and interior of the aircraft had been incorporated by HBC into the order. Subsequently, on 2 July 2008, it was Mr Dryden who responded to an enquiry from HBC about whether the "*colour board is acceptable*", confirming that the "*interior board is good to go*". His reply was copied to Ms Mulcahy but not to anyone in Barclays Wealth. This is a further example of the disconnect between what was being done by Mr Dryden without reference to the persons responsible for EBWL unless, of course, Mr Dryden had some ongoing role in respect of GEC that has not been clarified.

89. On 15 May 2008, a draft loan agreement between Navigator and EBWL relating to a revolving credit facility of up to £250,000 was sent on behalf of Barclays Wealth to Mr Kiener. Although Mr Kiener queried why Barclays Wealth wished to put this loan agreement in place when not all loans provided by Navigator were documented, he assumed "*the monies to be drawn down from this loan facility were to facilitate the payment of on-going expenses as the loan did not form part of the deposits paid for the aircraft*". On 2 June 2008, the Defendants held a board meeting of EBWL at which they resolved to approve the draft Loan Agreement. It was duly executed by both parties, albeit that there does not appear to be any date on the Agreement. There has been no suggestion that this credit facility related to the amounts paid by Navigator to IATS as deposits in respect of the MIPA.

90. Ms Parr still wanted to speak to Mr and Mr Chernukhin about a number of matters, including the plane structure, as shown by her e-mail to Ms Mulcahy on 9 June 2008. Ms Parr then enquired of Ms Mulcahy whether the latter had provided a copy of the documents previously sent on 12 May 2008 and received confirmation from Ms Mulcahy on 12 June 2008 that it had been given to Mr Chernukhin. Ms Parr did not receive any comments and so sent it directly to Mr Chernukhin, copied to Mrs Chernukhin, on 16 July 2008, raising a number of specific questions about which confirmation was needed to finalise the proposed structure under which the aircraft would be held. She forwarded a copy of the message to Mr Kiener. All the people involved before 23 April 2008 were, it seems, continuing to play some part afterwards, thereby enabling the Court to take account of how they approached matters then so as to inform decisions about what they did or knew prior to that date.

91. On 30 June 2008, Ms Parr asked Ms Bougourd to prepare a summary of the payments made in respect of the aircraft acquisition to provide to Ms Mulcahy who was being asked by Mr Chernukhin to brief him on this. The next day, Ms Bougourd queried where the original payment of US$250,000 had come from. The inference is that, even some weeks after executing the MIPA and acquiring GEC, Barclays Wealth had not tied up the various elements of the transaction undertaken on behalf of EBWL. In October 2008, Ms Bougourd was able to explain, in response to an enquiry from EBWL's successor administrators that "*The payments were made through [EBWL's] loan with Navigator Finance*" and Mr Le Ray later clarified for the benefit of Ms Mulcahy that he understood "*that all funds were sent*

*directly by [Mr Kiener] to the agents and never came via ourselves*". When Ms Mulcahy asked for the Escrow Agreements to show "*who the beneficiaries were for both deposits*", Mr Le Ray told her that "*There were no separate escrow agreements*", with the explanation that IATS "*was party to the Membership Interests Purchase Agreement, a copy of which has been provided to Vistra*".

*The concerns of the Chernukhins*

92. On 15 July 2008, Mrs Chernukhin e-mailed Ms Parr wishing to speak about the payment schedule associated with the aircraft acquisition because they had not received anything. Mrs Chernukhin then asked the following day for a copy of the contract on the plane, querying why it was so difficult to send them anything. Ms Parr forwarded to Mrs Chernukhin copies of the MIPA, the specification for the RC-30, adding a note that the payments referred to in those documents differed, and also copies of messages sent to Ms Mulcahy confirming that EBWL only needed to make the final payment on completion. Mrs Chernukhin replied questioning the division of payments, seeking clarification as to whether the $6 million had been paid for the membership interest, asking expressly "*Does that mean that we paid that for place in line or to an agent?*" and requesting a quick response. Ms Parr did not receive that message until the morning of 18 July 2008 and asked Ms Bougourd to look into it. Despite the earlier documentation indicating otherwise, Mr Chernukhin said during the course of his evidence that this was the first time that he and his wife realised what the terms on which the transaction to acquire the Hawker 4000 aircraft were. Their immediate concern was that someone within Barclays Wealth had sold "*their*" delivery slot and they felt that there was not enough control from "*the manager*".

93. On 28 July 2008, apparently as a result of an earlier telephone conversation, Ms Bougourd attached copies of the APA, the Assignment Agreement, the specifications for the RC-30 and the signed MIPA to an e-mail she sent to Ms Mulcahy. On the same day, Mr Dryden sent to Ms Mulcahy a copy of Amendment Number Five to the APA, which changed the date on which the third additional deposit of US$1 million fell due from 15 May to 15 August 2008 and similarly deferred the scheduled delivery date by three months to November 2008. Mr Dryden had been sent this document by HBC a few days previously. This Amendment also confirmed that two additional pilot training courses at a cost of US$63,750 had been selected by the Buyer and the contract price incorporated the additional charges of US$707,400 in respect of the optional equipment selections. Quite why that correspondence was not sent to EBWL, or indeed anyone at Barclays Wealth remains unclear, albeit that such an omission is consistent with the manner in which Mr Dryden appears to have operated throughout. A similar example arose on 21 August 2008, when Mr Dryden e-mailed to Ms Mulcahy eight photographs of the aircraft, without also sending them to Barclays Wealth.

94. Within approximately half an hour of Ms Mulcahy receiving Amendment Number Five from Mr Dryden, Mrs Chernukhin sent an e-mail entitled "*Plane delivery*" to Ms Parr in strident terms:

> "*We need to discuss this urgently.*
>
> *It seems that nobody is in charge, somebody is signing the delivery extension contracts, WHICH WERE NEVER AUTHORISED. It appears that somebody is selling our delivery date. The delivery date was supposed to happen in August. Can you please conduct a full investigation as to who signed and agreed what, and who pays who etc. This process is completely out of control.*"

The next day, Ms Parr sent a holding response, pending a review of the file, explaining that she was out of the office, but arranged for Ms Bougourd to send to Ms Mulcahy copies of the comments received from Mishcon de Reya and Clifford Chance.

95. Thereafter, also on 28 July 2008, Ms Mulcahy sent an e-mail to Mr Dryden asking him "*to confirm in writing [his] role in the purchase of the new Hawker 4000*" and querying why his document relating to the aircraft had always stated the delivery date of October, whereas the contract specified August. She did not receive a response within the time expected so pursued the matter on 30 July 2008, eliciting a response that day from Mr Dryden in these precise terms:

> "*As per our telephone conversation, Barclay's wealth and their lawyers handled all of the contracts relating to the purchase of the 4000 through Sharon Parr and Steven le Ray. I assisted at your request when ever possible with items relating to aircraft operation and specification with a view to future operation.*
>
> *I suggested that the most likely delivery date for RC-30 would be in October. This had nothing to do with any contracts from Hawker only information from my engineer who was at the Hawker 4000 completion centre, in the USA.*
>
> *I have no idea what the delay is but have asked Steve Martin (you met at Farnborough) of Hawker Beechcraft to write you an explanation and have suggested to him that they find a way of compensating you, I suggested they offered you the additional two pilot training courses you requested free [of] charge.*
>
> *As a note I have never know a manufacturer deliver an aircraft on a date they usually just contract to a quarter, especially when it is of a new type. Last Challenger 605 we were involved in delivery of was 3 months late and that has been in production for over 2 years.*
>
> *As discussed we are very keen to help you in what ever way we can with your arrangements for this aircraft as we would very much like to operate it on your behalf. I apologise for my delay in responding but unfortunately one of our aircraft broke down yesterday and I had to entertain my client.*"

96. On 31 July 2008, Ms Parr reverted to the Chernukhins. She quoted a provision about delivery contained in the APA and mentioned that "*our Scheduled Delivery Date is August 2008*", thereby demonstrating that she was unaware of the change to be effected by Amendment Number Five, as effectively confirmed in an e-mail message she sent to Mr Dryden later the same day. In relation to Mrs Chernukhin's concern that "*It appears that somebody is selling our delivery date*", Ms Parr did not see how that was possible because of the purchase being for a particular serial number and fit-out. Mrs Chernukhin replied asking about the penalties for the seller being late and failing to deliver, also querying whether the serial number might be assigned to a different aircraft, in much the same way as might happen to a car. In response, Ms Parr confirmed her understanding that default by the seller would entail the return of "*all the deposit*" plus interest and that she would check with Mr Dryden about the serial number issue. Ms Parr did not clarify what amounts she was referring to as "*all the deposit*".

97. Ms Parr asked Mr and Mrs Chernukhin on 5 August 2008 for a decision about the structure for the aircraft because she wished to know whether the aircraft would be held within The Galaxy Trust structure Barclays Wealth had established or through Jersey trust structure before she left the office for her summer holiday. Mrs Chernukhin sent a holding response the following day. When there was still no response by the end of 7 August 2008, Ms Parr enquired once again. Within one hour, Ms Mulcahy e-mailed Ms Parr with a series of questions asking for an update about the aircraft, querying whether Mr Chernukhin had been kept up to date, enquiring about why the delivery date had been deferred until November by "*the addendum to the contract*" and asking whether "*our contractual rights … regarding the delayed delivery date*" had been checked. This is a further example of something written on instruction rather than on Ms Mulcahy's own initiative. Ms Parr replied by return that she had

been chasing the Chernukhins for a response on the structure to be used and, when asked by Ms Mulcahy, confirmed that she had done this by e-mail and that Mrs Chernukhin had confirmed receiving the message.

98. On 11 August 2008, Ms Mulcahy e-mailed Mr Dryden pointing out that "*It is unacceptable that I have had to continuously chase and have been made to wait two weeks to find out crucial information from Hawker Beechcraft regarding the build of our Hawker 4000*". She proceeded to complain about the inadequacy of the responses he had given relating to the strike at Hawker Beechcraft. Mr Dryden replied that evening, explaining that he had sought a letter explaining the delay and had contracted the Hawker Beechcraft contract administrator with a view to progressing that matter. When further pressed, he provided a telephone number for Steve Morgan of HBC. From this exchange, it seems that Mr Chernukhin was equally unhappy at being kept in the dark by Mr Dryden as he was about the inaction of Barclays Wealth.

99. Also on 11 August 2008, Mr Kiener e-mailed Ms Bougourd indicating that "*Our mutual client has asked me to collect the files regarding the structure for the new aircraft*". Ms Bougourd attached copies of various scanned documents to a message she sent to Mr Kiener on 19 August 2008, explaining that these included the plane specifications, copies of the various contracts relating to the acquisition, copies of the legal advice received on the contracts and the various communications relating to the tax advice on how the plane should be held and the proposed structure (although not all of the legal and tax advice was included, because they had picked out only the most relevant communications).

*Termination of Barclays Wealth's involvement with EBWL*

100. On 20 August 2008, Mr Kiener e-mailed Ms Parr and Mr Le Ray, thanking them for providing the information and adding "*In the meantime I have been informed that this structured [sic] was to be managed by Vistra in Jersey*". (Mr Kiener had sent an e-mail to the Managing Director of Vistra Marine & Aviation the previous day, apparently following receipt of the information from Ms Bougourd, which appears to have been forwarded to Vistra, stating "*I think you have already been informed that Vistra are to take over the new plane structure*".) Mr Le Ray replied to Mr Kiener the same day explaining that "*Vistra have already been in touch and we are arranging for all necessary information to be provided to them*".

101. On 21 August 2008, the Managing Director of Vistra Marine & Aviation provided some comments to Mr Kiener (copied to Ms Mulcahy) about the material provided to him as received from Ms Bougourd. Because Barclays Wealth did not have it, he could not, therefore, record that he had received Amendment Number Five as part of the package of documents provided. I consider that his analysis of the position must have been intended for the eyes of the Chernukhins. It started with a general comment that "*the contract appears to be in line with most such aircraft contracts, which tend to be heavily weighted in favour of the manufacturer and leave only remote opportunity for challenge*". He noted that Side Letter #1 and Amendment #2 to the APA were not included. He analysed the position over payments made and due, noting that US$7.1 million had been paid "*by EBW to Jetstream*" and the deposits already paid to Hawker Beechcraft totalled US$1 million, leaving a balance of US$15,899,590 payable, in accordance with Amendment #4 by way of a further deposit of US$1 million and then the remainder on delivery. He highlighted that "*A principal point in respect of this arrangement being that the balance paid between the Purchase Agreement Price and the price the Jetstream sold the contract on to EBW for would be lost should the contract be cancelled*". Ms Mulcahy responded within the hour "*As far as I am aware no monies are due to be paid now*". She indicated that some reports were awaited from Beechcraft and "*Unless V is happy to go ahead without this. I would not recommend it*". The following morning, Ms Mulcahy was maintaining the stance that "*I wouldn't pay any funds until V has had an update of the exact situation and authorises it*".

102. On 3 and 4 September 2008, personnel from HBC agreed to revised Amendment Number Five and supplied a pro forma assignment agreement to move the benefit of the APA from GEC to Thercer LLC. In doing so, they explained that there could not be "*a concession on the deposit*" because HBC already held significantly less by way of deposit than was its usual position. That comment about the amount of deposit resting with HBC indicates that the APA was sufficiently ancient by the time of its assignment to GEC that some of its terms were apparently more preferential than would have been the case had a direct order been placed with HBC in 2007 or 2008.

103. On 8 September 2008, Mr Le Ray told Vistra by e-mail that "*We have not received any formal instruction to transfer the administration [of EBWL] to yourselves*". This was relayed to Mr Kiener, who, in turn, relayed it to Mr and Mrs Chernukhin, noting that the lack of a formal instruction might be because Mr Kiener was not formally regarded by Barclays Wealth as having the capacity to provide such an instruction. This prompted an immediate message from Mrs Chernukhin to Ms Parr asking for advice on the transfer of EBWL, pointing out that this was quite urgent and "*it is very strange that nothing has happened since Aug 20*". Ms Parr duly took that as being client approval for the transfer and requested that Mr Le Ray and Ms Bougourd "*deal with it ASAP*".

104. On 2 October 2008, Mr Kiener e-mailed Ms Parr because he had been asked by Mr Chernukhin to "*go over the contracts, prices and payments for the new aircraft*". He explained that his analysis of the documentation left him wondering why US$15.9 remained due under the MIPA and the APA, albeit that this results from a mis-reading of the MIPA, and concluded:

> "*I suppose that the purchase of the membership interest also covers the purchase of the aircraft itself, and therefore the figures of the outstanding amount equals in both cases to $15.9.*
>
> *Having told V this, he was sure this not to be correct: He stated that there was 100% certainly no payment for purchasing the contract and that in case an amount of almost $16m was still outstanding. He quoted some of his conversations with you and asked to get the relevant background information from you.*
>
> *I checked the paperwork I received from [Ms Bougourd] and also double-checked with Vistra, but I could not find what V bore in mind.*"

This appears to be the first occasion on which anyone on behalf of Mr Chernukhin articulated that he had not envisaged making any payment to acquire the benefit of a contract to purchase a Hawker 4000. Ms Bougourd responded to Mr Kiener later that day, attaching a short chronology showing the sequence of events and saying:

> "*I confirm that the contract price for the purchase of the aircraft was $23m (plus extras for fittings etc of $723,765) and that to date a deposit of $7.1m has been paid.*
>
> *Hangar 8 have confirmed that a final payment is due upon delivery of $16,623,765.*"

105. On 3 October 2008, the Defendants held a board meeting of EBWL. The First Defendant was represented by Mr Koller and the Second Defendant by Ms Parr. Amongst other elements of formal business associated with terminating the relationship of Barclays Wealth with EBWL, the meeting appointed the new director and secretary, as identified by Vistra, and accepted the resignation of the Defendants "*without compensation for loss of office*", effective from close of business that day.

106. On 7 October 2008, Ms Bougourd apparently spoke to Mr Kiener and then explained in an e-mail to Ms Parr that Mr Chernukhin "*is still convinced that the cost of the plane was always going to be $17m. I advised [Mr Kiener] that as far as we were concerned the cost was*

*always $23m and that is what the specs always said*". Ms Bougourd followed this up later in the day explaining that Mr Chernukhin "*does not see why the price leapt from $17m (this was the cost when the rights were assigned to the Delaware company) although as far as I recall this was never going to be the cost for us and was always going to be $23m*".

107. On 14 October 2008, the Contracts Manager of HBC wrote to GEC in Florida but addressed to the Managing Director of Vistra Marine & Aviation explaining about the strike action and other issues that had resulted in the Scheduled Delivery Date being further delayed to April 2009. She also highlighted to a colleague in HBC that "*This customer is currently in breach of their contract as they have not sent their $1,000,000.00 deposit or signed the Amendment Number Five to change the due date for this deposit*" and asked that this be communicated to them, which happened the following day.

108. On 3 November 2008, the Managing Director of Vistra Marine & Aviation e-mailed to Ms Mulcahy:

> "*There appears to be a level of suspicion about whether any commissions were paid on the asking price. As we Know the $7.1m was wired to an escrow account so it is possible that H8 and or HB had a commission agreement with the seller which was not disclosed to the principal. We have no way of finding this out.*"

He also raised with Mr Le Ray a query for the change in buyer of GEC and asked "*who the managers of Jetstream were if not Barclays Wealth?*". The next day, Mr Le Ray replied as follows:

> "*The best person to ask on these matters is probably Dustin Dryden of Hanger 8 [sic] as he was in direct contact with the client on a number of matters and was responsible for all negotiations on our behalf.*
>
> *Rastelo was incorporated by us to purchase a luxury yacht but we were informed that we needed a name immediately to insert on a contract.*
>
> *As we had to move quickly to acquire the contract to purchase the company which held the contract to purchase the plane we did not have time to form a new company to acquire the plane.*
>
> *At the time we were assured and as subsequently was proved we were told that we could assign this right to another company.*
>
> *Once we had some tax advice and in order to make sure that the plane was independent of any other assets we assigned this contract to Emerald bay.*
>
> *I do not know who the managers of Jetstream are, they are not connected to Barclays Wealth Trustees (Guernsey) Limited.*"

109. Drafts of Amendments Numbers Five, Six and Seven were forwarded from HBC to Vistra on 24 November 2008 and then forwarded to Ms Mulcahy with the comments that "*the new amendments … seem to be in line with the principal's requirements*" and "*I have sent the spec to Hangar 8, whom I understand to have agreed the changes with the principal, and [Mr Dryden] has confirmed that this is correct*". On 8 December 2008, the Managing Director of Vistra Marine & Aviation confirmed to HBC "*I have met again with the principal and finally now have his authority to proceed with the revised addendums*". It is clear that Mr Chernukhin wished to be consulted about the details of the aircraft delivery and specifications.

*Further enquiries*

110. By 2009, lawyers had been instructed to undertake further enquiries into the transaction. On 16 April 2009, Manches LLP had contacted IATS with a view to seeking "*certain documents/information*" that was missing from the file. In doing so, they explained that "*On or around 2 November 2007, Navigator Finance Limited (on behalf of our client) transferred the sum of $250,000 to IATS*" and "*On or around 11 April 2008, Navigator Finance Limited transferred a further sum of $6,850,000*". After receiving a response explaining that the funds were used for a transaction involving a membership interest purchase, the further explanation received stated:

> "*There was no escrow agreement, which is not required for closing, only the membership purchase agreements and instructions from Dustin Dryden from Hangar 8 Ltd. (as controller of Navigator Finance Ltd. as a subsidiary of Hangar 8 Ltd. specifically used for aircraft deposits in the USA) on behalf of Navigator Finance Ltd.*"

IATS added that "*The disbursement and wiring instructions [Mr Dryden] gave at the time of closing were confidential*" and so would not be released in the absence of his authorisation.

111. On 17 April 2009, the Managing Director of Vistra Marine & Aviation enquired of Mr Le Ray how they could contact the directors of GEC. Mr Le Ray informed him that "*All liaison in respect of the transfer and purchase of GE Continental was via Dustin Dryden who brokered the deal*", so Mr Dryden would be the best person to advise on this question. The Managing Director then apparently contacted Mr Dryden because he reverted to Mr Le Ray on 22 April 2009 referring to Mr Dryden's understanding that the duly executed agreement should feature somewhere in EBWL's file. That explanation prompted Ms Bougourd to explain that EBWL's original copy had been forwarded to Mr Dryden to collate the signed copies but nothing had been returned to EBWL by him. The Managing Director also then queried "*the absence of … any constitutional documents, minutes, contact details, or confirmation of current directors and registered office for GE Continental, the company that Emerald Bay purchased under the MIPA*".

112. When replying to a request for information made by Manches LLP, Barclays Wealth explained that some of the documents sought had previously been provided to Ms Mulcahy or Mr Kiener and so could would be available from them but, in respect of others, "*We have never received this documentation, as this was dealt with by Dustin Dryden of Hangar 8*". They confirmed that no legal advice was taken other than from Mishcon de Reya and Clifford Chance. Finally, on the question of GEC, the response from Barclays Wealth was:

> "*We do not have details in respect of GE Continental, including contact details for the directors. We note, from doing a Google search, that there is some publicly available information in respect of Richard Laggan, the individual who signed the assignment agreement on behalf of GE Continental. It may, therefore, be possible for you to obtain some information from Mr Laggan. We do not, however, intend to pursue this on your behalf, given that Barclays Wealth is no longer acting in this matter.*"

*The decision to terminate the APA*

113. In the meantime, the aircraft had still not been delivered. The position of the Chernukhins by August 2009 in response to the latest set of amendments proposed by HBC is evidenced by an e-mail sent by their legal advisers, indicating that they had "*lost confidence in Hawker generally*", but "*do wish to purchase the aircraft, but would like a firm commitment from Hawker that it will in fact be ready on the new scheduled delivery date of 26 October 2009*". No further advance payment by way of the previously agreed final deposit should be made and a proposal that the contract be amended for all outstanding payments to be on delivery

only should be put to HBC. On 1 September 2009, HBC's position was to agree to waive the third deposit but, in return, to revise yet again the Scheduled Delivery Date to 16 November 2009.

114. On 20 October 2009, HBC informed GEC, in a letter expressly addressed to "*Mr. Chernukhin*", that the Confirmed Delivery Date for the aircraft was 14 December 2009. GEC responded on 29 October highlighting that that date was some 17 months past the Scheduled Delivery Date specified in Amendment Number Four, and reserving its rights "*to exercise our discretion to accept or reject the aircraft on or before 29 December 2009*". HBC wrote to Stewarts Law LLP (who were by then acting in place of Manches LLP) on 16 November 2009 because it was concerned that GEC remained silent as to its intentions about the aircraft, putting GEC on notice that failure to indicate within one week whether delivery was being accepted would be treated as GEC informing HBC it was not accepting the aircraft, thereby leaving HBC with the option of terminating the agreement to purchase and entitling it to sell the aircraft to someone else. The legal advisers replied that "*our client was deeply disturbed by both the tone and content*" of that letter, which elicited an apology on behalf of HBC, coupled with an explanation that they were in the final stages prior to delivery, as shown by the photographs and information recently supplied to "*your client's representative, Mr. Dustin Dryden of Hangar8*".

115. Mr Dryden contacted HBC on 3 December 2009 explaining that "*The owner of this aircraft is still in dispute with your contracts department and I am unable to do anything … until that is resolved*". Quite who Mr Dryden meant by "*the owner*" and how he came to be corresponding in this fashion is unclear, but that is a pattern of behaviour on the part of Mr Dryden throughout these events. HBC then sent an e-mail to Stewarts Law LLP on 7 December 2009 explaining the latest schedule to which it was working in an attempt to resolve the matters raised in "*a recent communication from your client's representative at Hangar8*". That message also stated that:

> "*HBC fully understands that your client has the right up to December 29, 2009 to terminate the agreement and the $1m deposit returned. HBC still would like to deliver this Hawker 4000 aircraft to your client no later than December 29, 2009 and if not to your client then to another buyer on December 30, 2009.*"

On 14 December 2009, HBC confirmed that the schedule prior to delivery of the aircraft had been completed, almost in accordance with the envisaged schedule and that "*RC-30 is ready for delivery*". In reply, Stewarts Law LLP repeated that their client was reserving its position and was reminded by HBC of what the position would be after 29 December 2009.

116. By a letter dated 18 December 2009, GEC sent to HBC formal notice of termination pursuant to clause 7 of the APA and requested that arrangements be made for the return of the deposit of US$1 million, plus interest. The APA had crystallised following Amendment Number Four, all subsequent draft amendments having remained unexecuted. On 30 December 2009, HBC confirmed in writing that the Buyer under the APA had notified it of its intention to terminate, so HBC "*hereby unilaterally terminates the Purchase Agreement*".

117. On 6 January 2010, GEC formally requested that the refund be paid by HBC into the client account of Stewarts Law LLP. An internal Vistra e-mail of 1 February 2010 confirmed that payment of US$1,095,899.06 was made in the first week in January 2010. By letter dated 11 February 2010, GEC asked that arrangements be made to pay those funds to Navigator. As explained by Mr Kiener, this amount was credited to EBWL in the ledgers of Navigator Finance Limited as a "*Partial repayment of loan*".

118. EBWL's claim is calculated by giving credit for the refunded deposit against the amount of US$7.1 million paid out through IATS for the MIPA. The amount sought by the Plaintiff, therefore, was US$6,004,100.94, plus interest.

Principles of statutory interpretation under BVI law

119. Because the claim is based on breach of EBWL's directors' duty of care as set out in the BVI Business Companies Act, 2004, and the further defence or counterclaim of the Defendants turns on whether an indemnity is available under that Act, a central issue in this case is how to approach the relevant provisions in BVI law. It was common ground between Mr Jones QC and Mr Levy QC that the judgment of Hariprashad-Charles J in *Bebo Investment Limited v The Financial Secretary* (17 January 2008) summarised the principles of statutory interpretation in use in the BVI. They largely reflect the position in English law. As Philip Jones QC said in his oral evidence "*whether binding or highly persuasive, the BVI would, in my experience, apply English principles of statutory interpretation*". Because the Court is required to construe a number of provisions of the Business Companies Act, 2004, the BVI statute in question, I propose to draw heavily on the content of that judgment. The facts of that case are irrelevant for present purposes, so I say nothing further about the case or indeed the specific provisions of BVI law in issue therein. The case was produced during the hearing in response to a question I posed about the applicability or otherwise of the so-called rule in *Pepper v Hart* as a matter of BVI law.

120. Paragraph 21 of the *Bebo* judgment offers a salient reminder of the distinct functions of the legislature and the court in the BVI, which is consistent with the approach in other jurisdictions, including Guernsey:

> "*Before I focus on the principles of statutory interpretation, it is worthy to note that the making of law is a matter for the Legislature and not for the Court. It is apposite to quote Byron CJ as he then was in* ***Universal Caribbean Establishment v James Harrison*** *[Court of Appeal No. 21 of 1993 (Antigua and Barbuda)] where he states:*
>
> > *"The first principle to affirm is to recognise the separation of power between the Legislature and the Judiciary. It is the province of Parliament to make the law and for the Court to interpret, without basing its construction of the Statute on a perception of its wisdom or propriety or a view of what Parliament ought to have done."*"

Accordingly, I am satisfied that, were these matters to be dealt with in a BVI court, this is a fundamental principle to which the judge there would have regard, and so I will follow it.

121. At paragraph 22 of the *Bebo* judgment, the following passage from the judgment of Sir Vincent Floissac C.J. in *Charles Savarin v John Williams* (1995) 51 W.I.R. 75 at 78-79 was quoted:

> "*In order to resolve the fundamental issue of this appeal, I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of legislative intention.*"

Then, after quoting passages from the speech of Lord Reid in *Pinner v Everett* [1969] 3 All ER 257 and the judgment of Willes J in *Abel v Lee* (1871) L.R. 6 C.P 365, Hariprashad-Charles J stated the main principle as follows (at para. 26):

> "*It is obvious from the above authorities that if the language of the statute is plain and suggests only one meaning, the court should give effect to those words in light of the legislative intent notwithstanding that such may result in a harsh result. The*

> *Court is allowed to apply the rules of construction where an anomaly exists. But the Court has to be wary in doing so as not to modify the language of the statute. On this, Lord Simon of Glaisdale in* ***Stock v Frank Jones (Tipton Ltd.)*** *articulated:*
>
> > *"… a court would only be justified in departing from the plain words of the statute were it satisfied that: (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly.""*
>
> She proceeded to comment on the so-called "*anomalies test*" referred to in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 as follows (see para. 27):
>
> > "*It appears that the Court would only look to the rules of statutory interpretation when it is demonstrated that the anomalies are such that they produce absurdity or injustice which Parliament could not have intended, or destroy the remedy established by Parliament to deal with the mischief which the Act is designed to combat. It is not enough that the words though clear, lead to a manifest absurdity.*"
>
> The authority for the proposition in the final sentence, given in a footnote, is *R v City of London Court Judge* [1892] 1 QB 273.

122. A second, and well-known, principle of general application was set out in paragraph 30 of the *Bebo* judgment:

> "*Another general principle of statutory interpretation is that every clause within a statute or act must be construed in the context of and with reference to the other clauses or sections of that statute. One section or sections should not be interpreted without reference to the other sections. In* ***Case of Lincoln College*** *[(1595) 3 Co. Rep 58b, at page 59b], it was held that in interpreting an act of Parliament one must "make construction on all the parts together and not of one part only by itself".*"

Accordingly, when I come to look at specific provisions in the 2004 Act, I need to remind myself not to view them in isolation.

123. The judgment in the *Bebo* case then deals with the situation where a party is advancing a construction other than what the words literally mean. As is the case in Guernsey law, the principles of BVI law are drawn from the approach in English law, as summarised at paragraph 34 of the judgment:

> "*The purposive rule arises in instances of ambiguity where the literal rule is of necessity, displaced from application. Under the rule, words are interpreted not only in their ordinary sense but with reference to their context and purpose. It is often resorted to where strict reliance on the literal meaning would produce an absurdity.*"

The authority cited in the footnote for the final proposition is *Kammins Ballrooms Co. Ltd v Zenith Investment (Torquay) Ltd* [1970] 2 All ER 871.

124. The *Bebo* judgment also demonstrates that reliance can be placed on the third rule of statutory construction, the mischief rule, which was described in paragraph 35 in the terms used by Lindley MR in *Barlette v Mayfair Property Company* [1898] 2 Ch. 28 at 35:

> "*In order properly to interpret any statute, it is necessary now as it was when Lord Cooke reported Heydon's case to consider how the law stood when the statute to be*

> *construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief*",

and further explained as follows (at para. 36):

> "*The rule is an important aid to construction when there is lack of lucidity or ambiguity to the language in which the statute was expressed. In some regard, the purposive rule is a rephrasing of the mischief rule.*"

125. The ***Bebo*** judgment finally dealt with the use of other material as an aid to construction in paragraph 38:

> "*Recent judicial authorities have affirmed that the Courts are prepared to adopt a purposive approach which seeks to give effect to the true purpose of the legislation. It is a more liberal approach. The Courts are prepared even to look at extraneous material that bears on the background against which the statute was passed. The Court will review the historical context of the statute and give effect to it. These very points were explicated by Lord Bridge of Harwich in* ***Pepper v Hart*** *[see [1993] 1 All ER 42 at page 50] where he said:*
>
> > *"The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted."*"

126. The relevance of this principle is that I was referred to some extracts from the Hansard Report of the 22nd Sitting First Session of the 15th Legislative Council of the Virgin Islands in respect of the second reading of the BVI Business Companies Act, 2004. Although the passages from that Report drawn to my attention deal more with the general purpose of moving the enactment of that measure, rather than how to interpret any specific provisions in it, I am satisfied that a member of the BVI judiciary would either already know that background (and so not need to be reminded of it) or permit such broad reference to publicly available material to support a general contention based on it. The passage in question comes in the speech of the Chief Minister, Dr. The Hon. D. Orlando Smith, moving the Bill, where he explained:

> "*I do not at this time propose to go through the Bill in any detail, however, I would like to just briefly mention a few features of the new Act.*
>
> *First, the preservation of the look and feel of an IBC. As I mentioned earlier, one of the objectives was that the look and feel of the IBC Act and an IBC should, as far as possible, be preserved. Accordingly, all virtues of the IBC Act that users have come to know and love have been retained.*"

Insofar as it is relevant, therefore, I have borne in mind what the Chief Minister said, and said before referring to anything else, thereby implying its significance, that the new companies legislation being promulgated in the BVI at a time when external scrutiny of offshore financial centres was increasing and steps were being taken across the globe to respond to criticisms levelled by organisations such as the OECD was not intended to involve sweeping away aspects of the existing corporate regime on which that jurisdiction's economy was heavily dependent. In other words, the legislative intent was to achieve as much continuity as possible.

Breach of duty

127. Against that background, I now turn to look at what was agreed by both Advocates, relying on the expert evidence of Mr Jones QC and Mr Levy QC, as being the law of the BVI relating to a company director's statutory duty of care.

128. It was common ground that the standard of care required of the Defendants was that imposed by section 122 of the BVI Business Companies Act, 2004:

> "*A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation,*
>
> *(a) the nature of the company;*
>
> *(b) the nature of the decision; and*
>
> *(c) the position of the director and the nature of the responsibilities undertaken by him.*"

129. In order to put a director's powers into context, section 122 needs to be read with section 109 of the Act, which deals with the management of the company by its directors, providing that "*The Directors of a company have all the powers necessary for managing, and for directing and supervising, the business and affairs of the company*", although "*subject to any modifications or limitations in the memorandum or articles*" and section 121, which provides that "*A director shall exercise his powers as a director for a proper purpose*". The directors' duties are set out in section 120 of the 2004 Act, which provides:

> "*(1) Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company.*
>
> *(2) A director of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the memorandum or articles of the company, act in a manner which he believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.*"

Amongst the list of agreed facts in relation to the law of the BVI submitted jointly by the experts, it was accepted that EBWL "*was a wholly owned subsidiary of [BWTG] within the meaning of the BVI Companies Act 2004*". Accordingly:

> "*The Defendants as directors were entitled when taking their decision about the MIPA to have regard to the fact that the Plaintiff and its assets were assets of the Galaxy trust structure such that the interests of the Plaintiff equated to the interests of those holding the real economic interest in the Plaintiff namely the beneficiaries of the Trust (per Mr Levy); alternatively, such that the interests of the Plaintiff equated to the interests of [BWTG] in its capacity as the trustee of the Galaxy trust (per [Mr] Jones), which difference of view as between the experts is not material to the instant case.*"

As a result, insofar as it is necessary, the experts were agreed that the effect of section 120(2) is to enable directors of a wholly-owned subsidiary, which EBWL is, to have regard to the interests of the parent company, which in this case was acting in its capacity as trustee of The Galaxy Trust.

130. In respect of reliance on records and reports, section 123 of the 2004 Act provides:

> *"(1) Subject to subsection (2), a director of a company, when exercising his powers or performing his duties as a director, is entitled to rely upon the register of members and upon books, records, financial statements and other information prepared or supplied, and on professional or expert advice given, by*
>
> *(a) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;*
>
> *(b) a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence; and*
>
> *(c) any other director, or committee of directors upon which the director did not serve, in relation to matters within the director's or committee's designated authority.*
>
> *(2) Subsection (1) applies only if the director*
>
> *(a) acts in good faith;*
>
> *(b) makes proper inquiry where the need for the inquiry is indicated by the circumstances; and*
>
> *(c) has no knowledge that his reliance on the register of members or the books, records, financial statements and other information or expert advice is not warranted.*"

There has been no suggestion from the Plaintiff that the Defendants did not act otherwise than in good faith. However, it was submitted that the directors could not legitimately rely to the extent that they apparently did on the matters they now say they relied on. Accordingly, the proper approach to section 123 in the circumstances of this case will be a significant factor in determining whether or not the Defendants have breached their duties of care. Moreover, because of section 123(1)(c), the reliance placed on Mr Le Ray, as representative of the First Defendant, by Mr Koller, as representative of the Second Defendant, means that each of the Defendants has a slightly different line of argument in relation to the question of reliance.

Discussion

*The parties' cases*

131. The Plaintiff's case is that, when the Defendants resolved to enter the MIPA, they "*exercised no or no proper care in relation to or [in their] consideration of*" the MIPA and "*they failed to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances*" (para. 10 of its Cause). Those circumstances related to committing EBWL to the MIPA when that was not in the best interests of EBWL because clause 3.2 of the MIPA provided that the two "*Deposits*" payable, which had actually been paid prior to consideration by the Defendants of the draft MIPA, despite the much larger, second tranche being stated to be payable into escrow simultaneously with executing the MIPA, would "*be deemed to be non-refundable for all purposes hereunder, subject only to the Seller's timely compliance with its obligations*". Accordingly, given the terms of the APA, EBWL was exposed to the risk of HBC committing a breach leaving EBWL with the choice of accepting it and requiring the return of just US$1 million, plus interest, which is what happened, or being left with an APA that was capable of being breached by HBC almost with impunity.

132. On behalf of the Defendants, there was an outright denial of "*each and every allegation of breach of duty and causation and loss and damage*" (para. 11 of *Les Defences*). Advocate

Dunster homed in on the non-refundability issue as being the only particular breach of duty alleged by the Plaintiff. In his submission, the only issue for the Court was whether the decision to agree to that specific provision in the MIPA fell below the standard of care required by the Defendants. In support of that contention, Advocate Dunster referred to the answer given to a request for further information made pursuant to rule 60 of the Royal Court Civil Rules, 2007 relating to the Plaintiff's allegation in paragraph 9 of its Cause that the monies had been caused to be paid away before having sight of the MIPA. The answer was that paragraph 9 constituted "*a particular of the breach of duty pleaded against the Defendants*". Accordingly, in his submissions, Advocate Bell sought to broaden the allegations levelled against the Defendants to a general complaint that the Defendants had not exercised the care required, with the reference to the effect of clause 3.2 of the MIPA being the principal consequence in terms of loss.

133. I have approached the case in the manner suggested by Advocate Bell. Although the Cause might have been pleaded more extensively to make this clearer, on an overall reading of the pleadings, I am satisfied that the allegations made against the Defendants are that their decision to execute the MIPA on behalf of EBWL was, when taken in the round, a decision where they failed to exercise their duties of care to the standard required. The relevance of clause 3.2 of the MIPA is that this was the element of the transaction that potentially, and actually, led to the loss in respect of which the Plaintiff now sues the Defendants. Because the Defendants have pursued a total denial of every allegation, I do not regard that conclusion as prejudicing the way they came to the hearing to defend themselves. The same issues fell to be determined either way.

*Preliminary comments*

134. Before moving on to resolve the central questions in this case, I will touch first on a number of more peripheral issues, if only because they inform the decisions I have reached. The parties' lists of issues took a different approach to what the Court needed to resolve. On behalf of the Defendants, Advocate Dunster concentrated on high-level issues such as whether there was a breach of duty at all and, if so, whether there was a causative link to the loss alleged by the Plaintiff and, in any event, whether the indemnity in EBWL's Articles of Association provided a full answer to the Plaintiff's claim. On behalf of the Plaintiff, Advocate Bell identified significantly more issues to be determined, each of which dissects the larger issues into what he suggested were component parts. Without any disrespect to him, I have decided that it would make my task overly complex to try to determine each of those issues distinctly, but I will deal with many of them during the course of what follows.

135. Because of the allegations against the Defendants, the focus has to be on the decision reached by Mr Le Ray and Mr Koller, as their respective representatives, at the EBWL board meeting on 23 April 2008. The Advocates were unable to agree whether the proper approach was to start with that meeting and then work backwards in time and consider what each of those gentlemen knew as a result of earlier involvement, or whether to take the meeting on 22 October 2007 as the first relevant event and then build, almost layer upon layer, a complete picture of the knowledge reposing in them by the end. In either case, it was accepted that I could properly have regard to events following the board meeting, but only to decide whether the evidence relating to earlier events was reliable and credible or not. Because this case turns on whether or not Mr Le Ray and Mr Koller fell short of the standard of care required of each of them, I consider that the preferable approach is to look first at the decision-making that took place on 23 April 2008 and to have regard to what occurred beforehand as informing the levels of reliance that were permissible when taking the decision that they did. However, I have also tested my conclusions by approaching the issues the other way round and find that the outcome is the same.

*Language barrier*

136. On behalf of the Plaintiff, it was suggested that Mr Chernukhin's command of the English language, especially at the material times in 2007 and 2008, was not good enough for him to understand adequately everything about which the people at Barclays Wealth sought his input or to express himself so that they would fully understand his wishes. This suggestion was offered as an explanation for him not have a full understanding of the nature of the aircraft acquisition through the MIPA, resulting in the Defendants making repeated and factually incorrect assumptions about the state of his knowledge about the transaction to which they committed EBWL.

137. When giving his evidence, Mr Chernukhin explained that he did not always understand English, or have the ability to articulate well what he wished to say in English. However, he came across to me as having a fair understanding and gave the impression of being a forceful personality who would ensure that those with whom he was dealing could understand what he wanted them to do. It is, I accept, possible that his command of the English language has improved since the time these events took place. I am satisfied that he had told Ms Parr that she should talk to him rather than send him documentation because it was not his business "*to read complex technical or legal or other documents*". For her part, Ms Parr accepted that she had to choose her words carefully to ensure that they were not too complicated for Mr Chernukhin to understand.

138. Whilst appreciating that English is not Mr Chernukhin's first language, I do not consider that any language barrier at the relevant times created any impediment to him participating, or involving himself, in the aircraft acquisition transaction in the manner and to the extent that he wished. Further, I formed the clear impression that he is someone who, perhaps because of his position and resources, had access to persons who could assist him in understanding what was taking place. Although he took an interest in some of the minutiae of what was involved, the cost of pilot training being just one example, he is obviously someone who believes in paying other people to give effect to what he wishes to achieve. Whilst there may have been occasions when communications broke down, those breakdowns did not, in my view, result from any misunderstandings from the use of English. The overall impression I have formed is that this was a case where the left-hand did not always seem to know what the right-hand was doing and that is where communications have fractured rather than as a result of English being used. For example, Mr Dryden was providing information to Ms Mulcahy, no doubt intended for the eyes of Mr Chernukhin, but all too often that same information was not being relayed to Barclays Wealth. All the people involved appear to have been operating almost along the rim of a wheel, passing snippets of information along, but with no one being at the hub. Of course, Barclays Wealth should have been at the hub.

*The end of Barclays Wealth's involvement with EBWL*

139. Although the time at which Barclays Wealth ceased its involvement with EBWL post-dates the decision which is alleged to have been a breach of duty, the relevance of this issue goes towards my overall impression of the witnesses' accuracy of recollection. It is a small point, but was something on which Advocate Dunster relied to put into question whether Mr Chernukhin was a reliable witness on other, more significant, differences that arose between his evidence and that of Ms Parr and, to a lesser extent, Mr Le Ray.

140. Mr Chernukhin's recollection about the way in which the relationship with Barclays Wealth ended, given at paragraph 30 of his witness statement and expanded upon in evidence to be that it was his belief that Barclays Wealth dropped the deal "*absolutely unexpectedly*" is, in my view, inaccurate. That probably explains why Mr Kiener's understanding of the position contained the same misunderstanding. The documentation produced to the Court shows that a decision was made, without consulting Barclays Wealth, to place the business relating to the structure in which the new aircraft would be held with Vistra. It was not, as stated by Mr

Chernukhin, Ms Parr who suddenly announced at a meeting with him in September 2008 "*that Barclays Wealth were no longer interested in dealing with Emerald Bay or managing [the] new aircraft*". The sequence of events through the summer of 2008 shows that it was Mr Chernukhin who had become frustrated by the wish of Barclays Wealth to reach agreement to finalise an appropriate structure under The Galaxy Trust for holding this asset with which he was not entirely comfortable, largely it seems because he did not like the advice being given by BDO and had no wish to pay fees in respect of that advice. Accordingly, the events at that time, supported by the contemporaneous documentation, shows that that was the reason he chose instead to proceed on the basis of arrangements that were already in place in Jersey with Vistra.

141. Because I have found that I prefer Ms Parr's account of the termination of Barclay's Wealth's relationship with the Plaintiff, as supported by the contemporaneous documentation, to that offered by Mr Chernukhin, it means that I have carefully considered how much of Mr Chernukhin's version of other events I accept, especially where his recollection is similarly at variance with the documentation produced. Just because I prefer Ms Parr's evidence on this issue to that of Mr Chernukhin does not mean that I have treated all of Mr Chernukhin's evidence as being an unreliable recollection of events. I do not regard this difference, or any of the other differences I have found between the divergent recollections, as meaning that Mr Chernukhin has deliberately recounted a version of events he knows to be wrong. In general, he presented to me as a witness who was doing his best to remember what happened.

*The role of Ms Mulcahy*

142. On behalf of the Defendants, it has been suggested that they can rely on Ms Mulcahy having accurately relayed to them what Mr Chernukhin wanted and had agreed. She was seen as a central figure in providing to Barclays Wealth material emanating from Mr Chernukhin, entitling them to treat what she said and wrote to them as being Mr Chernukhin's position. On this basis, Ms Parr and Mr Le Ray rely on the commercial transaction to acquire a Hawker 400 aircraft in the way EBWL did having been fully negotiated by others and the terms of the transaction having crystallised without any input from them and that, through Ms Mulcahy, the deal approved by Mr Chernukhin was presented to them only to formalise it.

143. In her witness statement, Ms Mulcahy explained that she had only a "*limited involvement*" in the matter. She described her role generally as "*co-ordinating Mr Chernukhin's diary, arranging personal and business meetings and acting on the instructions of Mr Chernukhin to undertake various administrative tasks*". In Ms Parr's experience, high net worth individuals, and she included Mr Chernukhin within that term, have a "*fulcrum person*" through whom things pass. In relation to Mr Chernukhin, Ms Parr thought this was Ms Mulcahy. As a result, Ms Parr thought that Ms Mulcahy would inevitably refer all important documents to Mr Chernukhin for his personal attention and that it was only after 23 April 2008 when she realised that she needed to be more explicit in order to ensure that they would be or when that was not necessary. By way of example, when she sent through some material from BDO in May 2008 about the proposed structure for holding the aircraft, Ms Parr added the comment to Ms Mulcahy that she was not suggesting that the information needed to be relayed to Mr Chernukhin "*but wanted you to be aware what was being proposed.*" For his part, Mr Chernukhin accepted that Ms Mulcahy was a good personal assistant.

144. I regard these descriptions of the role played by Ms Mulcahy as being quite consistent with the position frequently held by someone like her. When she sent messages, particularly her e-mails, although they might read as if she were directly involved and interested in the subject-matter, I find that the style and tone demonstrates that they had been dictated by, or the content written under the direction of, Mr Chernukhin. As an example, I find that the message sent by Ms Mulcahy relating to signing the Offer Letter by making use of Rastelo resulted from input from Mr Chernukhin. Ms Parr had wished to speak directly with him but instead had messages relayed through Ms Mulcahy. However, given the limitations on Ms

Mulcahy's authority, when she referred to the RC-30 document being the one "*I was waiting for*", she was, I firmly believe, speaking in terms of what Mr Chernukhin was waiting for. I am satisfied, therefore, that on 22 February 2008 Mr Chernukhin approved the signing of the Offer Letter and the progression over the following weeks of a formal membership interests purchase agreement. Similarly, when Ms Mulcahy refers in her statement to *her* concern or anxiety about matters, I treat that as reflecting her concern about the effect of inaction on Mr Chernukhin rather than such inaction directly affecting her.

145. Ms Mulcahy was a conduit through whom correspondence passed and was not exercising any real authority in her own right. However, she was pivotal in pulling the various strands of what was happening together and this may have meant that everyone involved did not fully appreciate what other people were doing. This is one of the drawbacks of conducting matters like this at a distance. For example, the documentation produced to the Court shows that she was getting information from Mr Dryden by e-mail and not always sharing it, at least straightaway, with Barclays Wealth. This appears to have produced the effect of Ms Parr and others assuming that everything was being organised on Mr Chernukhin's behalf before being relayed to them to be given effect, whereas Mr Chernukhin has explained that he was expecting something more back from Barclays Wealth. I believe this is a factor in the different perceptions they now hold of what occurred. As I have said, Barclays Wealth should have been the hub of everything that was happening and should not have been excluded from any exchanges. With the benefit of hindsight, the people at Barclays Wealth should have been insisting that everyone else involved keep them fully informed of developments as they happened. Had they done so, they would not have been making assumptions but would have had a real basis informing their decision-making.

*The role of Barclays Wealth*

146. It was apparent that Ms Parr was keen for Barclays Wealth to acquire the additional business that Mr Chernukhin's personal affairs would generate. This was why, in her words, she made "*a pitch*" for that business in October 2007. In doing so, I take the view that she may have given Mr Chernukhin the impression that Barclays Wealth would be able to accommodate what he wished to achieve with greater flexibility in its approach than proved to be the case and raised expectations that his wishes would be given effect without more ado.

147. In Mr Chernukhin's mind, the relationship he had with Barclays Wealth was for their people "*to deal with all aspects of the transaction*"; Mr Chernukhin was not going to involve himself in "*day to day matters regarding the purchase*". As Mr Chernukhin put it in his statement, "*The common understanding between me and Barclays Wealth was that Barclays Wealth would assume all the duties, obligations and executive powers of directors in managing the corporate structures, employing external expert advisers, such as lawyers and tax experts, as the need arose*". As a trust beneficiary, he considered he was entitled to express his wishes and offer opinions, but he knew he was not dictating outcomes, despite being quoted in an e-mail from Steve Bridgford of Edmiston & Company SAM as having said: "*Sharon will do as she is told – she does not have a remit to make decisions*". He felt he was paying others, including Barclays Wealth, handsomely to manage these matters for him. However, the correspondence later on, especially after he switched this aspect of his business from Barclays Wealth to Vistra, shows just how closely he was involving himself in matters.

148. The role undertaken by Barclays Wealth was described in their letter of 8 June 2009 as having been:

> "*… to advise upon and set up an appropriate structure for the acquisition of the aircraft, taking into account specialist advice where necessary. The acquisition of the aircraft was agreed in principle by the time we were instructed. We were not … instructed to evaluate or advise upon the commercial terms of the deal. It was not within our remit to reopen the commercial negotiations between the parties. We were*

> *therefore not instructed to advise upon or take decisions in respect of the protection required by the beneficial owners in the event that the aircraft was not delivered on time.*"

Having carefully considered the evidence given, in particular by Ms Parr and Mr Le Ray, I am satisfied that this accurately reflects what they thought they were engaged by Mr Chernukhin to do. The whole tenor of the material I have seen is that Barclays Wealth personnel were concentrating on creating a structure for holding the proposed aircraft that was consistent with how their organisation was prepared to hold assets in a legitimate and tax-efficient fashion. There has been no evidence suggesting that any of them gave more than a cursory thought to whether the transaction should or should not be agreed; it was going to happen unless and until someone else indicated to them that they should not proceed. The extent to which their understanding of their role is consistent with the positions they had as directors of EBWL is another matter. This is tantamount to an admission that they did not feel there was any need to exercise any independent judgment in respect of the affairs of EBWL.

*Navigator Finance Limited and Mr Kiener*

149. Mr Kiener confirmed that the beneficial ownership of Navigator rested with Mr Chernukhin, further explaining generally that the new aircraft acquisition had not been discussed with him in detail, but only within the "*financial or the cash planning side*". In Mr Le Ray's words, Mr Kiener had said that he "*would consult with Mr Chernukhin before he did anything, before he moved any monies*". Ms Parr's impression of Mr Kiener was that he seemed to be "*as close as Mr Chernukhin got to having a trusted personal advisor*". Having seen both those gentlemen give evidence, I can understand how she formed that impression of the relationship. Unlike other witnesses, Mr Kiener did not attempt to justify what had happened with the benefit of hindsight. Quite properly, he confined himself to dealing with what he knew and, as might be expected from someone in his position, I found him to be a cautious and careful witness. That said, in relation to the first deposit of US$250,000 made at the beginning of November 2007, his statement does say that "*it was Barclays Wealth who requested that I arrange, on behalf of Navigator Finance, the necessary funds transfer*" when the contemporaneous documentation shows that that was not the case. It was Mr Dryden who first raised the need for the deposit to be paid through the escrow account at IATS. Those funds were paid into the escrow account without any involvement of Ms Parr or anyone else at Barclays Wealth. However, that slip does not affect my overall impression that he was a reliable witness.

150. In Ms Mulcahy's witness statement, she clarified that this initial payment into escrow of US$250,000 was needed "*in order to gain access to the details of the contract to purchase a Hawker 4000 aircraft*". Mr Kiener acknowledged in his evidence that he sought and obtained confirmation from Mr Chernukhin that the latter was happy for this amount to be paid out of Navigator's monies. Accordingly, I have no hesitation in finding that Mr Chernukhin was aware of the need for this refundable deposit before he authorised Mr Kiener, through Navigator, to make this payment.

151. The precise nature of the deposit being made is not entirely clear from a review of the documentation. The first deposit required for placing a direct order with HBC at that time was US$250,000, to be paid whilst the formal order documentation was finalised. Mr Dryden's e-mail of 30 October 2007 does, however, refer to the "*position owner*", from which a clear inference can be drawn that this cannot mean the manufacturer, HBC. Accordingly, because Mr Kiener discussed the making of the deposit with Mr Chernukhin, I am satisfied that Mr Chernukhin must have known that this payment was not a deposit against a direct order placed with HBC. The fact that a deposit of US$250,000 was required in respect of what transpired to be two quite different transactions, both of which related to the money being required in relation to the production of a more formal document, is probably the reason why some confusion about it has subsequently arisen. However, because the money was paid

by Navigator without reference to anyone at Barclays Wealth, what Ms Parr understood about the payment of the deposit can only be ascertained from what she said when she discovered it had been paid. In other words, because she did not know at the time that the deposit was being paid, she cannot have known the purpose of paying it until later.

*The relationships with Mr Dryden*

152. Because Mr Dryden did not give evidence, he has been more of a shadowy, than substantial, figure in these proceedings. Ms Parr indicated in her statement that "*It was always clear to me that Mr Dryden had a major role in negotiating the plane purchase*". In evidence she said that "*the deal wouldn't have happened without Dustin*", indeed, it would not "*even have been put on the table*". I accept that Mr Dryden's role was a central one. He was the conduit through whom first the Offer Letter and then the MIPA came to Barclays Wealth. He exerted pressure for both documents to be executed. When this was not done as quickly as he wanted, as explained by Ms Bougourd to Ms Mulcahy on 18 April 2008, it was Mr Dryden who liaised with HBC to explain to HBC that the MIPA would be executed and the APA would then be progressed under a new ultimate purchaser. When the question of whether the MIPA could be concluded by EBWL rather than Rastelo arose at the last minute, it was Mr Dryden who consulted with whomever it was he consulted, quite possibly someone associated with Jetstream Limited, to ascertain whether they were happy for that assignment of the benefit of the Offer Letter to take place. On each occasion, however, it is not entirely clear to me whether he was acting solely, or even principally, on behalf of Barclays Wealth or, more particularly at the end, EBWL, or even on behalf of Mr Chernukhin or rather for some unidentified third party or parties. It is a troubling aspect of this case that this level of uncertainty about Mr Dryden remains.

153. Despite the central role played by Mr Dryden, Ms Parr admitted in evidence that she "*never actually met Mr Dryden*". It also seems that no one else from Barclays Wealth met him. Given the reliance placed upon him by the Defendants, and especially by Mr Le Ray, I find this quite astonishing.

154. In his e-mail of 30 July 2008, Mr Dryden himself sought to downplay his role in the aircraft acquisition transaction: "*Barclay's wealth and their lawyers handled all of the contracts relating to the purchase of the 4000 through Sharon Parr and Steven le Ray. I assisted at your request when ever possible with items relating to aircraft operation and specification with a view to future operation.*" However, his assertions are not, in my view, borne out by a full review of the documentation that was generated and other people's recollections. I have noted particularly the response given by IATS when asked about the transaction. As people who are external to the parties, they are neutral to the dispute and I take the view that their perception of Mr Dryden's position as giving instructions demonstrates how closely involved he was with every step of the dealings that led to the execution by EBWL of the MIPA.

155. Mr Dryden came across to Mr Le Ray as "*Mr Chernukhin's advisor on aircraft*". Mr Le Ray "*relied on Mr Dryden's word*". Mr Le Ray further understood that Mr Dryden saw Mr Chernukhin every week and, therefore, that they regularly spoke about the acquisition of the Hawker 4000. Whilst this perhaps also demonstrates something about the level of involvement Mr Chernukhin was understood by Barclays Wealth to be having in the acquisition, it indicates, in particular, that Mr Le Ray was effectively totally dependent on what Mr Dryden relayed to him about everyone else's apparent happiness with the MIPA.

156. Barclays Wealth's due diligence on Mr Dryden and Hangar 8 was undertaken by Mr Le Ray. He did no more than a cursory check of publicly accessible information. He and Ms Parr relied on the fact that Mr Chernukhin had introduced Mr Dryden to Barclays Wealth. In my view, it is simply not good enough for them to have placed such complete reliance on Mr Dryden without taking further steps to assure themselves that he was beyond reproach. Moreover, the absence of more comprehensive due diligence has an impact on the fact that

Mr Le Ray stated that he did not question the deal, or think the lawyers consulted should have done so, because "*the commercial deal had been agreed by Mr Dryden with Mr Chernukhin*".

157. Mr Chernukhin maintained that his relationship with Mr Dryden was limited to the latter operating the Hawker 850XP for his benefit and, therefore, as someone from whom he quite sensibly took advice about his wish to acquire a better aircraft. Mr Chernukhin was adamant that Mr Dryden and Hangar 8 were not "*authorised to act as an agent for me or for any corporate or other entity connected with me*". He accepted in the course of his evidence that, through Ms Mulcahy, Mr Dryden had been put in touch with Barclays Wealth. To that extent, he understood how Ms Parr might have formed the impression that Mr Dryden was sourcing the aircraft.

158. Mr Chernukhin was also at pains to try to disassociate himself with what Mr Dryden had done. For example, in his evidence, Mr Chernukhin explained that anything Mr Dryden might write, taking as his example the e-mail to Mr Mulcahy of 30 October 2007, could be whatever Mr Dryden chose to communicate, effectively saying that Mr Dryden was not acting in any shape or form on his behalf. The pattern of how Mr Dryden seems to have dealt with matters shows that he was communicating with, or for the benefit, of Mr Chernukhin more than he was relaying matters to Barclays Wealth. To that extent, I regard Mr Dryden as being aligned within the group of people acting on Mr Chernukhin's behalf. His exact role, though, remains unclear. For example, I do not have a full understanding of why Mr Dryden apparently sought legal advice on the draft MIPA from lawyers in three separate jurisdictions. Mr Chernukhin did not suggest that this was done for his benefit, although Ms Mulcahy's terse e-mail of 17 April 2008, which I find was dictated by Mr Chernukhin, refers to this having been done "*before we sent the contract to*" Barclays Wealth. If those steps were being taken for Mr Chernukhin's benefit, then it is very surprising that the advice was not shared with Barclays Wealth for them to rely on without the need to duplicate the effort and expense, and necessitate further delay. Accordingly, the inference I draw is that Mr Dryden took that step for the benefits of others, whether the vendor of the membership interests or for his own purposes. Either way, I am left with the impression that Mr Dryden may not have been working exclusively for the benefit of Mr Chernukhin, and that affects the entitlement of personnel at Barclays Wealth, and particularly Mr Le Ray, to rely on him to the extent that they did.

*The October 2007 meeting*

159. Both Advocates emphasised the importance of determining what was said about the aircraft acquisition at the meeting on 22 October 2007. If an instruction was given, or at least a request made, at that meeting (or indeed subsequently), as has been claimed by Mr Chernukhin, to the effect that no intermediary should be involved, or that no premium over the list price for the aircraft should be paid, then it is obvious that that instruction or request was ignored or disregarded and that in itself calls into serious question whether the Defendants' duties as directors of EBWL were breached.

160. In her witness statement, Ms Parr asserted that it was clear to her at the meeting on 22 October 2007 "*that Mr Chernukhin had already found a new plane; indeed this was how it was introduced to me*". She stated that she was told "*they could get the plane they wanted quickly, something they appeared very pleased about, which is why I remember it*". The difficulty with her recollection of events is that it does not explain why details of what could be purchased by ordering directly from the manufacturer were later sent to her. That information offered a useful reference point, because it demonstrated the costs and timescales involved in placing an order directly with HBC. However, no one has suggested that, at the time of providing those details, this was the purpose underlying their provision. Had the decision to buy an assignment of an existing contract already been made by Mr Chernukhin, there would have been no purpose in the information supplied by Mr Dryden then being forwarded to Ms Parr.

161. In her statement, Ms Parr suggested that the comparison between the HBC list price in late 2007 and the overall cost of acquiring GEC reflected the commercial deal, suggesting "*a 10% premium to "jump the queue"*". I believe that in saying this, Ms Parr is attempting to justify her recollection rather than her recollection of what was said at the meeting being accurate. Whereas Mr Dryden and Mr Chernukhin may have been considering options at that time, I do not accept that Mr Chernukhin, with assistance from Mr Dryden, had identified and agreed "*the deal*" as at the time of the meeting on 22 October 2007. Had that been the case, I am satisfied from the way in which Ms Parr presented her evidence that she would have taken steps to have recorded that position in writing somewhere. As I have already indicated, I am satisfied that Ms Parr wanted to secure Mr Chernukhin's personal business for the benefit of Barclays Wealth and, therefore, had it been clear to her that there was already a decision to acquire a new plane in this fashion, I am quite clear that she would have recorded the details so that she could immediately proceed to carry out Mr Chernukhin's wishes. The fact that Barclays Wealth did not even know at that time whether it would secure this type of personal business from Mr Chernukhin supports that conclusion; things were still up in the air in late October 2007.

162. I do not, however, accept Mr Chernukhin's version of events of the meeting on 22 October 2007. In particular, I do not find that Mr Chernukhin expressly told Ms Parr anything about not wishing to involve intermediaries or about not paying any premium for whatever reason. This is because I am clear that, had it been given, Ms Parr would not have ignored such an explicit instruction.

163. The impression I formed of Ms Parr when she gave evidence was of an experienced businesswoman who, as might be expected of someone in her position, maintains records of important matters. The absence of any note from her about avoiding intermediaries or the payment of a premium supports her recollection of this issue. Although Ms Parr said she was given a single sheet of paper about the aircraft at the meeting, which she proceeded to annotate, I think it is more likely than not that the document produced in evidence was a copy of what was subsequently sent through by Ms Mulcahy on the e-mail on which her annotations were then made. Some of those annotations are inconsistent with what she would have gleaned from the short conversation at the meeting to which she refers and so are more likely to have been added some time later. That said, whether or not the notes were made at the meeting or later, I am satisfied that Ms Parr would have recorded an instruction of this importance, had it been given, and also that she would have ensured that everyone else at Barclays Wealth was aware of it and complied with it thereafter. It is, quite simply, unbelievable that Mr Chernukhin's wishes would have been so completely ignored when every other indicator is that Barclays Wealth desired to meet Mr Chernukhin's wishes in order to benefit from the fee income his business would generate.

164. Where Mr Chernukhin refers in his statement to having indicated at the meeting that he required Ms Parr and her colleagues to "*advise on the commerciality of the agreements relating to the purchase of the aircraft*", which is strenuously disputed by Ms Parr in her statement, I consider that he is also seeking to be wise after the event. At that time, I am satisfied that he did not know what was involved and I find it surprising that at a meeting of such a preliminary nature that there would be any reference to "*commerciality*". This is a further reason for preferring Ms Parr's account of that meeting to Mr Chernukhin's. Finally, I have taken into account the analysis of events set out in Mr Kiener's e-mail of 2 October 2008, which refers to Mr Chernukhin having told him about his conversations with Ms Parr but without spelling out anything directly having been said at this particular meeting. Had Mr Chernukhin's recollection been as clear in October 2008 as it subsequently became, I believe it would have been included in that message, which is an additional reason for preferring Ms Parr's version of events.

*The origins of, and negotiations about, the transaction*

165. In his evidence, Mr Chernukhin emphasised that "*The transaction was not found by me and Mr Dryden. The transaction was found by Mr Dryden.*" However, he did acknowledge that he was the decision-maker and that it was his choice to look for a Hawker 4000, which "*would be much more appropriate*" than some other model of aircraft. It was Mr Dryden's job to "*find opportunities*". Mr Dryden apparently found three opportunities, although it was not entirely clear what each was, although I understand that one of those options not pursued must have been to place an order for a new aircraft directly with HBC. Mr Chernukhin explained that it was not his business to decide which of those opportunities to take. He expressed the wish that he "*wanted to get [the aircraft] as early as possible*", although he also said he was disinterested in the timing of the delivery of it. He expressly denied that he and his wife were involved in any negotiations about the aircraft. The inference, however, must be that the material being supplied to Barclays Wealth represented the choices available to them. Accordingly, whilst there was material relating to a direct order with HBC at the outset, thereafter the only choice apparently being progressed was to acquire GEC and take the benefit of the original order placed by Mr Pielenz. That was the only transaction on which Mr Dryden and Ms Mulcahy were focusing. The Defendants' case has, therefore, proceeded on the basis that the underlying deal was presented to Barclays Wealth as being something negotiated and agreed by others. Ms Parr thought it was an amalgam of Mr and Mrs Chernukhin, Ms Mulcahy and Mr Dryden who had "*negotiated the commercial terms*" of the deal to acquire the aircraft. Mr Le Ray stated that "*The aircraft transaction was always presented to us as a done deal*". Neither he nor Ms Parr were involved in negotiating the commercial deal. As Ms Parr commented, "*Mr Chernukhin had a choice – he made that choice and we then acted upon it.*"

166. Ms Parr formed the impression from her initial discussions that the Chernukhins had found a way to "*jump the queue*", and consistently referred to this concept. She explained that she compared what was being paid to be able to jump the queue with what would have had to be paid to place an order directly with HBC and accept the much later delivery date then being offered. She understood that the Chernukhins were pleased at the prospect of early delivery. However, I take the view that, by discussing matters in this way, Ms Parr is looking backwards with the benefit of what she now knows rather than remembering the way matters were considered at the time. Calculating what the premium actually being paid over the list price was offers a reasonable explanation for why the proposed transaction to acquire GEC with the benefit of the APA was justifiable. Had that reasoning been undertaken at the time, given the wealth of documents produced in this case, I would have expected there to be a note setting out that this had been considered. Moreover, the chronology of events and how information came to Barclays Wealth and, in particular, to Ms Parr, leads me to conclude that the precise details of the respective costs were not apparent until at least the Offer Letter and possible not until the APA was actually provided by Mr Dryden as late as April 2008.

167. Ms Parr's reaction to the payment of the first deposit of US$250,000 without involvement from Barclays Wealth was that it demonstrated to her that "*the commercial terms of the plane deal had been negotiated at this point, as there was a clear intention to transact*". However, I do not accept that. Mr Dryden had explained to her and to Ms Mulcahy that this payment was "*in order to gain access to the details of the contract to purchase a Hawker 4000 aircraft*". There could not, I believe, be any question of there being a negotiated agreement before the documentation had even been obtained. There may well have been a preference, even a strong preference, to obtain earlier delivery of an aircraft already ordered as opposed to placing a fresh order directly with the manufacturer, but the precise deal cannot, on any analysis, have been concluded at the time of that deposit being paid into escrow with IATS. Even by mid-February, Ms Parr was recording that Mr Chernukhin had an "*option on an early delivery slot*", which is not entirely consistent with the Defendants advancing the position that it was a concluded deal in or around October 2007. Indeed, in her e-mail of 20 February

2008, when referring to the aircraft, Ms Parr admitted that "*I don't know where it is being purchased from*", which is, in my view, consistent with the conclusion I have reached that receipt of the draft Offer Letter was not in itself sufficient to confirm the terms of the transaction envisaged. Even at that comparatively late stage, things were still potentially subject to change because withdrawal from the transaction with any deposit becoming refundable remained available.

168. From the different versions advanced by the witnesses, I find that Mr Chernukhin, or perhaps his wife, was keen in the autumn of 2007 to secure an early delivery of this brand new model of aircraft. The impression I have formed is that they would have regarded it as something of a status symbol to be within the first phalanx of those able to fly around in such a new model of aircraft. It was only much later that Mr Chernukhin lost confidence in HBC and realised the downsides of being amongst the first to be involved with such a new plane, including the risks attaching to training pilots to fly it because they might then leave and work for someone else. I have, therefore, reached the conclusion that the Chernukhins wished to have use of a Hawker 4000 and that Mr Chernukhin made that wish clear to Mr Dryden and to Ms Parr. Although it arises from an inference to be drawn from what happened next, I am satisfied that Mr Dryden was tasked to identify how a Hawker 4000 could be acquired for the Chernukhins' use, to replace the Hawker 850XP, at the earliest opportunity. I very much doubt that he was given a blank cheque for this purpose. In other words, this was not a case where money was no object at all. However, as a commercially-aware person, I am satisfied that Mr Chernukhin understood the difference between placing an order directly, thereby paying the manufacturer's list price, and buying the benefit of a pre-existing order that could then be tailored to the Chernukhins' personal specifications. Indeed, Mr Chernukhin accepted in his evidence that he was aware that a deal to acquire an aircraft was going on and that he probably discussed it with Mr Kiener. That they did so on a general level was acknowledged by Mr Kiener and supports my conclusion that Mr Chernukhin understood that the route being taken was not a direct order with HBC but also that he was not fully conversant with all the finer details of the terms being put forward through the medium of Mr Dryden. I also find support for this conclusion in the terms of the e-mail sent on Mr Chernukhin's directions on 16 April 2008. By referring to the concept of the contract being "*sold from under us*", I am satisfied that Mr Chernukhin knew before the MIPA was executed on behalf of the Defendants that the transaction being pursued was not a direct order with HBC. This is also evidence that, had his assertion about telling Ms Parr at the meeting on 22 October 2007 not to involve intermediaries been correct, he would not have been dictating this type of wording to Ms Mulcahy at that time.

169. The options identified by Mr Dryden, whatever they all were, remained open until such time as a decision to proceed with one of them was finalised. This occurred when Mr Dryden presented to Barclays Wealth the terms for the acquisition of GEC, which then resulted in the agreement in principle represented by the Offer Letter. In February 2008, when this was taking place, Ms Parr and her colleagues had assumed that Mr Chernukhin understood what the terms were for acquiring the membership interests in GEC. However, it is apparent that there were confusing messages emanating from Barclays Wealth about just what was involved in taking this route. The terminology used referred to "*deposits*" when the substance of the agreement made clear that there was a mixture of deposits and payments, with the deposits that were previously refundable in the event of the parties not proceeding to a final agreement becoming non-refundable on completion. By failing to explain these differences and assuming that Mr Chernukhin had approved these arrangements, and without ascertaining anything about the other entities involved from Mr Dryden, the people at Barclays Wealth placed more trust in there being support from Mr Chernukhin than they should have done.

*The documentation*

170. The earliest date on which anyone at Barclays Wealth saw the APA as vested in GEC following the Assignment Agreement was not really clarified during the course of the

evidence. Because a copy of it was sought from Mr Dryden on 8 April 2008 to forward to the lawyers instructed by Barclays Wealth, I find it is more likely than not that this was the first occasion on which that document was seen by them. Further, had the APA and Assignment Agreement been provided by Mr Dryden to Ms Mulcahy at some earlier date, I consider it likely that she would have forwarded them to Barclays Wealth. The inference I draw, therefore, is that Mr Dryden had not shared these important documents with anyone else before. They had not been seen by Mr Chernukhin and so not considered by him, whether alone or in consultation with Mr Kiener.

171. Given the circumstances of the provision of these documents, once again, this means that complete reliance was being placed on Mr Dryden that what was contained in this key document had been seen and approved by Mr Chernukhin. In the light of Mr Chernukhin's denial that he was familiar with the finer details, I am unable to draw the inference that this was the case. As I have indicated, I am satisfied that Mr Chernukhin was aware that the route to acquiring early use of a Hawker 4000 was to acquire the benefit of a pre-existing order rather than to place a new order with HBC, but the references to "*deposits*" littering the documentation are sufficient for me to conclude that he was not aware that the nature of all the monies referred to as deposits would change on completion in the way they did. The connection between the Offer Letter and the APA does not appear to have been explained to him by anyone at Barclays Wealth. Indeed, the analysis of what the different options that might have been taken, and the financial consequences of each, does not appear to have been undertaken within Barclays Wealth until afterwards. The reason for this is that everyone at Barclays Wealth proceeded on the basis that Mr Chernukhin was happy to move forward with the acquisition of a Hawker 4000 aircraft in this way to be held within a structure to be developed by them.

172. A further example of Barclays Wealth not appearing to keep a close enough eye on developments in the documents relating to the transaction is shown by the absence of any explanation on or about 22 February 2008 as to why the document came from Jetstream Aviation Ltd and what checks, if any, were undertaken in relation to this company's bona fides. When the MIPA came through, the identity of the owner of the membership interests had become Jetstream Limited. There was no inquiry about this change of entity. Whilst this issue is not something about which the Plaintiff has made any specific complaint, the absence of any enquiry on the part of Mr Le Ray or Mr Koller, as representatives of the Defendants, affects my overall impression of what was, or was not done, by the personnel of Barclays Wealth as part and parcel of their handling of this transaction.

*The question of refundability of the deposit money*

173. On behalf of the Plaintiff, Mr Chernukhin's consistent position, as summarised in his statement, has been that "*I wanted to be certain that I would get my money back and have appropriate remedies in the event that there was any problem with the delivery of the aircraft*". I will disregard the fact that the money in question was not strictly Mr Chernukhin's own money because what was being spent was trust property of The Galaxy Trust that had been settled and will treat this as a reference to his wish that any monies to be spent should be recoverable. At the time in April 2008 when the MIPA was concluded, he believed sums paid were still refundable and his "*only concern*" at the stage was "*when the aircraft would be available for use*".

174. I have looked very carefully at what has been said about deposits and the documentation at the time relating to the deposits payable in respect of whichever option might have been followed to acquire the aircraft. It is perhaps unfortunate that the amounts of what have been called "*deposits*" involved in each are so closely aligned. I can, therefore, understand how confusion could have arisen. The document referring to RC-59 and RC-62, supplied to Ms Parr from Mr Dryden through Ms Mulcahy, set out a deposit schedule for a direct order with HBC. The first payment required was US$250,000. Apart from the reference to "*position*

*owner*" in Mr Dryden's e-mail to Ms Mulcahy, which was then discussed between Mr Kiener and Mr Chernukhin before Navigator transmitted US$250,000 to IATS in November 2007, there is nothing explicit setting out what course of action was being followed at that time. I regard it as significant that this deposit was made without any involvement from anyone at Barclays Wealth. However, when Ms Parr contacted Mr Kiener on 5 December 2007, giving "*a heads up that we are likely to need $250k as the initial deposit shortly although we have still not finalised the structure*", her reference to "*initial deposit*" looks much closer to the wording on the RC-59 and RC-62 document than any other transaction being in her mind. Thereafter, when comparing the aggregate of the amounts stated on that same document as being deposits payable for an order placed directly with HBC and what became payable under the MIPA, they are both in the region of US$7.1 million, again potentially adding to the confusion. Indeed, no one seems to have worried that the amounts actually paid into escrow with IATS were paid in different tranches and at different times to how it was set out in the MIPA, albeit that the aggregate remained accurate. Accordingly, I can understand why Mr Chernukhin, whether at the time, or with the benefit of seeing the documents now, can state in his evidence that his wish that all the deposits always remained fully refundable was a significant issue for him and one where his understanding of the position differed from the reality.

175. I believe that Mr Dryden's reference in his message to Ms Mulcahy on 30 October 2007 to the deposit of US$250,000 he was asking be paid to IATS being "*fully refundable*" indicates that refundability of deposits was an issue that he and Mr Chernukhin had spoken about. Similarly, when Ms Mulcahy forwarded to Ms Parr the draft Offer Letter on 31 January 2008, her covering message, which is, I believe, a further example of wording being dictated by Mr Chernukhin, drew attention to the need to progress matters swiftly because, within a short time, "*our deposit will become non-refundable*". Having listened to Mr Chernukhin and considered all the relevant material, I am satisfied that the refundability of the deposits until the transaction was completed was something about which he was concerned. Of course, the transaction that did complete was the acquisition of GEC under the MIPA and the deposits paid on behalf of EBWL were, until that time, fully refundable; it was only on completion that those monies became non-refundable, but the deposits paid by Mr Pielenz under the APA then became a benefit to EBWL, through its ownership of GEC. Mr Chernukhin's concerns about refundability, however, were not, as far as I can ascertain, explicitly clarified with Ms Parr or anyone else at Barclays Wealth. As I have already indicated, it was not a topic raised at the meeting on 22 October 2007. At best, communications such as the two to which I have just referred, when closely reviewed, demonstrate that this was something in his mind.

176. The issue of refundability of what were described as "*deposits*" in the draft MIPA was expressly raised in the legal advice obtained by Barclays Wealth. Ms Parr's response to a question about the role of her and her colleagues being to pass on concerns raised in the advice taken was "*as directors, did we deem it to be a risk for the company that the deposits, that they'd made a point about non-refundability? We looked at what premium we were paying, we looked at the price of the plane and we didn't deem it appropriate, I think, to pass it on, which is why we didn't pass it on.*" Because Ms Parr and Mr Le Ray believed that the terms of the transaction had Mr Chernukhin's seal of approval, neither of them took the steps of running through the details of the MIPA with him, even when the legal advice highlighted "*The fact that the deposits are non-refundable is unattractive*", although that advice was relayed to Mr Kiener and Mrs Chernukhin without eliciting any response.

*Mr Le Ray's involvement*

177. Before April 2008, it is clear that Ms Parr was the person at Barclays Wealth principally involved in considering matters relating to the aircraft acquisition. Although Mr Le Ray was kept abreast of developments, the leading role was being undertaken by Ms Parr. Prior to him taking over responsibility for the transaction when Ms Parr went on her holiday, she kept him informed "*at a high level*". Accordingly, until that time, I do not regard him as being familiar

with the finer details of the transaction and believe that his participation in the board meeting of Rastelo on 22 February 2008 for the purpose of considering the Offer Letter was broadly similar to Mr Koller's involvement with the EBWL board meeting on 23 April 2008.

178. Mr Le Ray had been informed that Mr Chernukhin did not want Ms Mulcahy to deal with Mr Le Ray but rather that she was required to deal with Ms Parr. Mr Chernukhin confirmed that that was the case. Several times during his evidence, Mr Le Ray mentioned that he "*was not allowed to speak to Mr Chernukhin*". Mr Le Ray did not think this was anything personal; he and Ms Parr thought it was because Mr Chernukhin wished to deal with the most senior person at Barclays Wealth. Having listened to the way Mr Chernukhin talked about both of them, I formed the impression that he did not repose much confidence in Mr Le Ray. It is possible that he only formed that opinion of Mr Le Ray as a result of subsequent events, but it is clear to me that Mr Le Ray was nervous about upsetting Mr Chernukhin and the consequences that would have on the amount of the latter's business Barclays Wealth might enjoy. I believe that the inability to communicate directly affected the way Mr Le Ray approached matters. He ended up placing even greater reliance on Mr Dryden than would have been the case had Ms Parr continued to be involved in the way she had previously.

179. The conversations Ms Parr had immediately before she went on holiday on 3 April 2008 are, therefore, of relevance and significant because this was the start of the time when Mr Le Ray assumed responsibility within Barclays Wealth for this transaction. Ms Parr had fully expected the execution of the MIPA to occur during her absence and so needed to brief Mr Le Ray. She also spoke with Mr Chernukhin. However, perhaps the most important aspect is that Ms Parr sent to Mr Kiener a copy of the Offer Letter. Given the relationship between Mr Kiener and Mr Chernukhin, I find it inconceivable that the broad terms of what was being done remained unknown to Mr Chernukhin at that time. Accordingly, although Mr Chernukhin has tried to give the impression that the nature of the acquisition of GEC and so the benefit of a pre-existing order set out in the APA was unknown to him (or Mrs Chernukhin) until later in 2008, as I have indicated earlier, I am satisfied that the general terms, if not the detail, of what was about to take place were known to Mr Chernukhin and those around him outside Barclays Wealth.

180. As I have already noted, it was Mr Le Ray who undertook due diligence on Hangar 8 and Mr Dryden on behalf of Barclays Wealth. Because Hangar 8 employed in excess of 100 people, that was sufficient to satisfy him that the company, and so Mr Dryden, was reputable enough to do business with. However, he undertook little or no due diligence on Jetstream Limited, the vendor of the membership interests in GEC. He did not spot that the name of the company in the draft MIPA was not the same as, although it was similar to, the counterparty to the Offer Letter. When the second set of lawyers asked for any documentation Barclays Wealth had about GEC, there was nothing they held that could be provided. By the time of executing the MIPA on 23 April 2008, Mr Le Ray did not even know who the directors of GEC were. All he could point to was a connection to a Richard Laggan and refer to publicly accessible material. The answer to why he did not take any steps to find out more always came back to the same thing: he placed reliance on Mr Dryden and the fact that Mr Dryden was "*Mr Chernukhin's advisor on aircraft*".

*Pressure*

181. Both Ms Parr and Mr Le Ray referred to pressure being exerted to complete the transaction and to that pressure increasing in April 2008. As Mr Le Ray said, there was "*a lot of pressure from Mr Dryden to sign the contract*". Mr Le Ray's desire to conclude the MIPA was such that, on 22 April 2008, he indicated that an urgent board meeting might have been held by telephone outside ordinary office hours to meet Mr Dryden's concerns about any further delay. Because Mr Le Ray thought that both of them were pursuing Mr Chernukhin's wishes, bowing to such pressure is perhaps understandable, but he still does not appear to have questioned in his own mind whether Mr Dryden had some other ulterior motive and, if so, its

effect on his own judgment. Where Ms Parr refers in her witness statement to "*the pressure was starting to be ramped up on execution from both Mr Dryden and Ms Mulcahy*" in April 2008, whilst I cannot say whether there was any other reason for Mr Dryden being interested in the transaction concluding quickly, in Ms Mulcahy's case, that pressure would inevitably have come indirectly from Mr Chernukhin. In Mr Dryden's case, it is also apparent that HBC was exerting some pressure through him to conclude the MIPA. This may have been as a result of the deadlines for reaching decisions under the APA and HBC's wish to know who was taking the benefit of Mr Pielenz's contract, but it does reinforce the impression I have got that Mr Dryden was central to all these discussions and may not have always been clear as to what he was doing on whose behalf.

182. No one has suggested that any pressure being exerted, or just perceived, excuses any shortcomings in the approach taken by the Defendants on 23 April 2008. I regard the relevance of these comments about pressure as indicating that choices were being made by Barclays Wealth about what the appropriate level of scrutiny of the transaction was. They had no wish to delay matters still further. When seeking advice on the draft MIPA, documents were being despatched without any accompanying explanation. Mr Le Ray acknowledged that he had expected Ms Bougourd to have sought further legal advice more quickly than she did. This slippage in their ideal timeframe to conclude the transaction may have added to the time pressures under which Mr Le Ray appears to have been labouring. As background to the events at the board meeting on 23 April 2008, the inference I draw is that, having not been informed about any deal-breakers by the lawyers, the MIPA was going to be executed at the earliest opportunity, without further detailed discussion.

*23 April board meeting*

183. Although Ms Parr explained that she was unavailable at the time the EBWL board meeting was held on 23 April 2008, otherwise she would have attended, I doubt that if she had been there anything would have been done differently. The only difference is that, if she had been present in place of Mr Koller, the level of reliance on others for the Second Defendant would inevitably have been less.

184. In relation to discussions held between them before the meeting, Ms Parr explained that she *"would have discussed*" matters with the other directors so as to have aided their knowledge. However, she then clarified that she remembered discussing the Clifford Chance legal advice with Mr Le Ray on 21 April 2008, the first day on which they were both back in the office. She remembered this in part because Mr Le Ray was not permitted to speak directly to the Chernukhins. The inference I draw from this is that she did not engage in other detailed discussions about the transaction in the period of 21 to 23 April 2008. During her absence, Mr Le Ray had become fully involved in handling this transaction on behalf of Barclays Wealth and there was no need for her to duplicate his efforts thereafter. Accordingly, I cannot conclude that Mr Koller, in particular, had had the benefit of a full briefing from Ms Parr immediately prior to his attendance at the board meeting. In Mr Le Ray's case, I am satisfied that he was making use of his more up-to-date knowledge of events in the run-up to the board meeting and had relied on Ms Parr's knowledge only for the more historical background.

185. Ms Parr thought it "*highly unlikely*" that she had not made sure Mr Chernukhin was comfortable with the MIPA, but could find no documentary evidence to support the fact that she did. In Mr Chernukhin's words, "*it was a huge surprise for us that somebody signed it without consultations with us*". Given the way in which so much documentation has been generated, I find the omission of any confirmatory document of such a discussion supports Mr Chernukhin's recollection that he was not consulted and so conclude that Ms Parr did not check the position with Mr Chernukhin in the run-up to this board meeting.

186. The board meeting on 23 April 2008 was Mr Koller's main involvement in these matters. When he gave his evidence, I found him rather hesitant, which may have indicated caution or

may have indicated personal concerns at what, with hindsight, he realised were potentially valid criticisms of the approach taken. Although he had attended EBWL's formation board meeting on 9 April 2008, when he attended the meeting on 23 April 2008 he was relying heavily on what he had been told, having seemingly had no other direct involvement in dealing with Mr Chernukhin's personal affairs. In his witness statement, all he could do was to set out the questions he "*would have asked*" of Mr Le Ray and to note that, if not satisfied by the answers given, he "*would not have voted in favour of the resolution at the board meeting or have signed the MIPA*".

187. Because Mr Koller was "*one of the principal signatories in the office*", he explained that he was involved with many meetings and so did not recall the specifics of his involvement in this matter. He accepted that he had no communications about these matters with anyone outside of Barclays Wealth. Put simply, on behalf of the Second Defendant, his reliance on others, particularly Mr Le Ray, was as complete as it could be. This was clear from his evidence where he said "*one of the directors at the meeting had considered the terms prior to the meeting*", indicating to me that he was relying on the view formed and articulated by Mr Le Ray. Although he said in his evidence that he could "*remember being told that Mr Chernukhin had negotiated the commercial terms and that… he was very keen to have this aircraft at this time and, as a result, he was prepared to pay a premium*" and he referred to there having been "*endless liaison*" with Mr and Mrs Chernukhin about the transaction, I did not get the impression that this was anything other than a typical directors' meeting for him where he was not the lead person involved and, apart from asking his stock of standard questions and receiving bare answers from Mr Le Ray, that was the extent of his participation in the decision-making.

188. Mr Le Ray suggested that he and Mr Koller had had other conversations about the transaction that Mr Koller could not recall. I prefer Mr Koller's recollection and think that Mr Le Ray may now wish that Mr Koller had been more fully conversant with matters but, as I have found, Mr Koller was little more than the required second decision-maker, relying almost completely on Mr Le Ray. Indeed, Mr Le Ray accepted that Mr Koller had to rely on his more detailed knowledge about the aircraft acquisition, although he suggested that Mr Koller was not merely "rubber-stamping". The difficulty I have with that is that Mr Koller accepted that there were errors on the face of the MIPA document he subsequently executed and expressed his surprise that they had got through the eyes of so many people, including two sets of lawyers. In saying that, he had overlooked that the draft on which comments were made was not the final version the Defendant directors had to consider at this board meeting. As a consequence, I do not accept Mr Le Ray's assertion that Mr Koller was "*meticulous with detail over the MIPA*". Mr Koller may well be a meticulous person ordinarily but, on this occasion, there are too many internal inconsistencies and errors in the draft MIPA under consideration at this board meeting to apply that description here. The function of scrutinising the actual document fell to the humans present as directors in their own rights, subject only to whatever level of reliance on the other was permissible. As Mr Le Ray explained about the board meeting pack, everything was prepared and presented to the less involved representative director and, barring something fundamental being identified, those present would proceed to consider what was being proposed and agree it. The conclusion I have reached is that Mr Koller came as close to being a mere "rubber-stamper" of the transaction as he could have been.

189. As the person present with the detailed knowledge of what was being proposed, I was mildly surprised that Mr Le Ray accepted that he did not compare in detail the terms of the MIPA with the content of the Offer Letter. Equally, however, the lawyers consulted were not, it seems, provided with a copy of the Offer Letter to compare whether the draft MIPA was consistent with what the parties had already agreed. Mr Le Ray accepted that perhaps he and Mr Koller made a mistake in not picking up the errors on the face of the MIPA they executed, in particular the failure to insert any date into clause 4. In itself, this is perhaps not all that

significant, but I find that it is indicative of an overall lack of care on their parts. Similarly, Mr Le Ray's admission that he did not look at Jetstream Limited "*a huge amount*" is concerning. He was playing the leading role in committing EBWL to spend several million dollars on acquiring a Delaware company without looking for himself at the entity selling its ownership interests. Although he explained that he was relying on the lawyers and Mr Dryden not having raised any issues about Jetstream Limited, there was insufficient evidence about Jetstream Limited to provide the level of comfort that really should have been sought on behalf of EBWL.

*Levels of reliance*

190. As I have already indicated, because of the minimal involvement of Mr Koller in understanding the finer details of the MIPA, as a representative of the Second Defendant, he was reliant on Mr Le Ray's understanding. Mr Le Ray was initially reliant on Ms Parr's understanding because it had been Ms Parr who was more fully involved from October 2007 to the beginning of April 2008 but, once he assumed responsibility for taking the draft MIPA itself forward and, in particular, the taking of legal advice on it, Mr Le Ray was making use of his own knowledge and understanding in acting as a representative of the First Defendant. Accordingly, the key issue in this case is whether Mr Le Ray was entitled to rely on the matters he did so as to fulfil his duty of care to EBWL because Mr Koller is one further step removed due to his primary reliance, in accordance with section 123(1)(c) of the 2004 Act, on Mr Le Ray's own reliance on such matters.

191. In his evidence, Mr Le Ray said that: "*I hadn't spoken directly to Mr Chernukhin. As I said, I relied on Mr Dryden who had negotiated the deal, I relied on Ms Mulcahy who was closely involved, and I relied on the advice we received from the lawyers*". He regarded these people as being those who were close to the agreement and so thought they were speaking on behalf of Mr Chernukhin. He further explained that "*We had to make a decision based on what was presented in front of us. We didn't necessarily need to consider in detail all parts of the terms, all parts of the commercial terms. We could rely on the advice we'd been given. We did do that, from a number of sources.*" In relation to Mr Dryden, Mr Le Ray "*relied on three things to make sure the plane agent was reputable: I relied on the fact that he had been introduced to us by Mr Chernukhin; I relied on my internet search; and I relied on my conversations I'd had with Mr Dryden.*" Mr Le Ray also said in evidence that Mr Dryden had confirmed to him that Mr Chernukhin "*was happy with the contract*". As Mr Le Ray said, "*it was a significant transaction, so I had a number of conversations with Mr Dryden*" to "*make sure [the transaction] made sense*". Mr Le Ray also spoke to Mr Kiener on a number of occasions. However, in my view, it was Mr Le Ray's communications with Mr Dryden which formed the central plank on which he relied to reach the decision he did as a representative of the First Defendant.

192. In my judgment, the proper way to approach the issue of reliance is to pay close attention to what is set out in section 123 of the 2004 Act. The reliance to which Mr Le Ray referred does not engage paragraph (a) of subsection (1). None of the people on whom he said he relied is "*an employee of the company*". That description certainly does not apply to Mr Chernukhin, Mr Dryden or Ms Mulcahy. In terms of paragraph (b), each lawyer consulted is clearly "*a professional adviser or expert*". I do not, however, think that description can be applied to Mr Chernukhin or to Ms Mulcahy. Whether it applies to Mr Dryden is a matter to which I will return shortly, particularly by reference to subsection (2). Finally, whilst Mr Koller has relied heavily on Mr Le Ray in accordance with paragraph (c), there remains a question as to whether what Mr Le Ray has done was within his "*designated authority*". However, in the absence of anything pointing away from him having the general authority of each of the directors of EBWL to exercise his powers or perform his duties in the way he has, for example through taking legal advice, I am satisfied that he was not acting outside any designated authority, with the consequence that Mr Koller, on behalf of the Second Defendant, benefits from section 123(1)(c).

193. In relation to section 123(1)(c), there is potentially a further question as to whether Mr Le Ray was entitled to rely on what he learnt from Ms Parr as being a fellow director. I have concluded that he does not need to rely on Ms Parr because his own knowledge once he assumed primary responsibility for this transaction within Barclays Wealth was more than adequate for him to form his own view without any reliance on her. However, insofar as it is relevant, I also take the view that, under the strict terms of section 123(1)(c), Mr Le Ray is precluded from relying on Ms Parr because the Defendants' directorships of EBWL only arose on 9 April 2008, which was after Ms Parr's involvement with the transaction. As with his purported reliance on Mr Chernukhin's position, in my opinion, this background information gleaned from Ms Parr relates more to the nature of the decision that the directors of EBWL had to take at the board meeting on 23 April 2008, which is one of the circumstances to take into account under section 122, rather than being an aspect of permissible reliance under section 123.

194. Looking first at the advice he took and received from the lawyers, Mr Le Ray indicated that he had not expected the lawyers to comment on the commerciality of the deal. This was one of the reasons why he did not expressly revert to Mr Chernukhin, whether directly or indirectly through Mr Dryden or Ms Mulcahy, on the specific points raised by both sets of lawyers in that regard. Accordingly, because Mr Le Ray did not make use of the lawyers' advice to determine whether the transaction under consideration made commercial sense, I find that Mr Le Ray did not rely on the legal advice received for anything other than whether there existed any legal "*deal breakers*". When it was confirmed that there was nothing in law preventing EBWL executing the MIPA, however unattractive it might appear to be commercially, that was the extent of his reliance on the legal advice received. The consideration he gave to the commercial aspects of the transaction turned on other matters, such as his knowledge that the deal had been brought to Barclays Wealth by Mr Dryden, believing that that was done with the approval and support of Mr Chernukhin.

195. One consequence of the permitted reliance on what the lawyers advised being limited in this fashion is that I do not find that the Defendants can rely on that advice as offering any comfort in relation to the existence or standing of GEC and Jetstream Limited. Although Ms Parr said in evidence that she found it "*inconceivable that Clifford Chance would have given us an opinion on a transaction that involved those two companies without making sure neither were in liquidation or had been struck off the register*", I disagree. There was nothing in the instructions provided to Clifford Chance to indicate that they were to carry out any such work. In particular, the documentation showed that Jetstream Limited had a Guernsey address and so would more readily have been capable of being scrutinised by the Defendants than by the legal advisers who were simply given the draft MIPA and asked to comment. The lawyers were not even told about the background of the transaction or provided with a copy of the Offer Letter showing what the parties had already in principle agreed. Consequently, the function performed by the lawyers on behalf of EBWL, or more widely Barclays Wealth, was to consider the terms of the draft contract and to advise if anything in it contravened Delaware law or might be dealt with more appropriately. There is nothing in the content of their advices to suggest that they undertook any work in relation to Jetstream Limited or even in relation to GEC.

196. In relation to Mr Dryden, I have considered very carefully how Mr Le Ray's admitted reliance on him fits into section 123 of the 2004 Act. Although Mr Le Ray referred to Mr Dryden as the "*plane agent*", there really was no evidence that Mr Dryden was formally appointed by EBWL, or even more broadly by Barclays Wealth, as an agent acting on its behalf. Such an appointment would have been permissible for EBWL under section 131 of the 2004 Act. At best, Mr Dryden was an intermediary or a conduit through whom material passed. None of the communications with him produced to the Court amounts to someone at Barclays Wealth (and so ultimately on behalf of EBWL) asking Mr Dryden for advice in a professional capacity or approaching him as an expert in the field of aviation-related matters.

Accordingly, my primary conclusion in relation to Mr Dryden is that Mr Le Ray, as a representative of the First Defendant, is unable to rely on Mr Dryden in any professional advisory or expert capacity under section 123.

197. If I am wrong in that primary conclusion, and Mr Dryden is someone who falls within section 123(1)(b) as a professional adviser or expert, then I am not satisfied that Mr Le Ray, or anyone else at Barclays Wealth, complied with section 123(2)(b), which requires the director concerned to make "*proper inquiry where the need for the inquiry is indicated by the circumstances*". Whilst I understand that Mr Le Ray has placed reliance on the fact that Mr Dryden was introduced to Barclays Wealth by Mr Chernukhin, I consider that it was incumbent on him to undertake an appropriate level of inquiry consistent with what it became apparent Mr Dryden was doing, or to have caused such inquiries to be undertaken by others within Barclays Wealth. Mr Dryden was the source of all the documentation relating to the transaction. He supplied the draft Offer Letter to Barclays Wealth and the draft MIPA. On both occasions, it was unclear on whose behalf this was done. Neither Mr Le Ray nor anyone else at Barclays Wealth took steps to make any inquiries about GEC itself or Jetstream Limited (or even Jetstream Aviation Limited). To the extent that Mr Dryden was being relied on as a professional adviser or expert, his advancement of the position of the counterparty to these agreements made it even more important that Mr Le Ray made proper inquiries into the role being played by Mr Dryden. I take the view that the ongoing involvement of Mr Dryden meant that the circumstances calling for the director of EBWL to make inquiry, or to be satisfied that proper inquiry had already been made, changed. I take the view that Mr Le Ray failed to make the type of proper inquiry about any involvement Mr Dryden may have had with the other party to the MIPA (or before it the Offer Letter) or whether he had any role in GEC. Accordingly, section 123(2) was not satisfied, meaning that subsection (1) could not apply and the Defendants, as directors of EBWL, could not rely on Mr Dryden under the terms of section 123.

198. The consequence of this analysis of section 123 is that it does not assist Mr Le Ray, on behalf of the First Defendant, at all. The matters to which he referred as being matters on which he relied are actually elements of the knowledge he had which have a bearing on the standard of care required of him under section 122. However, the position of Mr Koller is different. Because he was so heavily reliant on Mr Le Ray, and asked the stock of standard questions he asked, I take the view that he had just managed to cross the thresholds set in section 123 through making appropriate inquiry and can rely on what Mr Le Ray told him. If he could not rely on his fellow director representative, it would make the functioning of a company such as EBWL much harder than it is. As a result, the conclusion in respect of whether or not Mr Le Ray met the standard of care required of him will apply equally to Mr Koller because his reliance on Mr Le Ray was either justified or it was not.

*Section 122 factors*

199. Mr Le Ray (and his colleagues) took into account that EBWL was a single purpose vehicle, meaning there was a presumption that executing the MIPA was in its best interests. He explained his view that EBWL was "*set up to own this plane*". Accordingly, there was less need to consider whether the transaction under consideration was commercially beneficial. As was said on behalf of the Defendants, the underlying purpose of acquiring GEC was to own what was probably going to be a wasting asset. Advocate Dunster submitted that Mr Le Ray was entitled to take all this into account under section 122 of the 2004 Act. In contrast, Advocate Bell submitted that the proper approach on how to view EBWL was that it was no more than a trust asset. EBWL's officers were appointed by BWTG and this was done by it in its capacity as the trustee of The Galaxy Trust. Although he spent some time considering the role of the Family Council under the Declaration of Trust, this was done as much as anything to demonstrate that there was a way in which steps could have been taken within the overall trust structure to get a formal level of approval of the decisions to be reached by the Defendants as directors of EBWL. He submitted that the fact that they had not undertaken the

steps that were potentially available to them proved, or at least reinforced, his argument that this showed that what was actually done could not be taken into account under the 2004 Act in the manner suggested by Advocate Dunster.

200. In my view, Advocate Bell's submissions overlook section 120(2) of the 2004 Act, which it was agreed by the expert witnesses enabled EBWL's directors to act in the best interests of BWTG, as the holding company of EBWL, and more particularly in the context of being the trustee of The Galaxy Trust. Provision was made by Sub-Regulation 9.3 of EBWL's Articles of Association permitting the directors to act in the best interests of the company by reference to the best interests of the holding company. I understand this to mean that, when considering section 122 of the 2004 Act, a BVI court would be entitled to recognise that the directors of EBWL could take into account that EBWL itself was an asset-holding company, and not a trading company, and that the overall interests of the wider trust structure of which it formed a component could be borne in mind when reaching a decision about EBWL acquiring an asset. Accordingly, the nature of the decision the directors had to take was whether to acquire full ownership of another company, GEC. The value of that company lay in it having had assigned to it the benefit of being the Buyer under the APA, to which Mr Pielenz was originally the party. The real benefit of that APA lay in the order having been placed many years earlier at an overall lower price than would have been available had a new order for a Hawker 4000 aircraft been placed with HBC and the delivery date, although not definite, was some months, if not more than a year, earlier than would otherwise have been available. The main disadvantages of the GEC purchase under the MIPA were financial. Adopting this means of acquiring the aircraft meant that the total amount to be expended by EBWL was greater than the placing of a direct order would have been. It also meant that some of the money that would be expended was in respect of buying the ownership interests and would, upon completion of that transaction, become unrecoverable. The directors were, therefore, required to balance those competing advantages and disadvantages and reach a conclusion on all the terms of the transaction involving the draft MIPA.

*Conclusion*

201. Whilst I have some sympathy with the position in which Mr Le Ray found himself, I have reached the conclusion that in the overall scheme of things he did not meet the standards of care that he was required by section 122 of the 2004 Act to exercise, with the consequence that the First Defendant breached its duty of care as a director. I consider that Mr Le Ray's position was hindered by him knowing that he could not make contact with Mr Chernukhin directly. His position was further complicated by the timing of what went on. With the benefit of hindsight, it is unfortunate that the key events took place at a time when Ms Parr and Mr Le Ray were only in the office at the same time for a couple of days, by which stage matters had moved on considerably from when Ms Parr was involved and Mr Le Ray had become the primary point of contact at Barclays Wealth. Too many assumptions were made by him and not enough care was exercised to ensure that the decision to be taken was in the best interests of the company or even in the best interests of the holding company as trustee of The Galaxy Trust.

202. In my judgment, the most significant failings of Mr Le Ray related to Mr Dryden and the paucity of due diligence work undertaken in respect of him, if only so as to understand how he fitted in with GEC, HBC and Jetstream Limited. The position of the humans associated with the Defendants has throughout been that the detailed terms of acquiring a Hawker 4000 aircraft to be held within The Galaxy Trust structure were matters presented to them rather than something on which their advice was sought. The problem is that there is no identifiable document or exchange in which that was spelt out explicitly. For her part, Ms Parr sought to rationalise the choice that must have been made by, or on behalf of, Mr Chernukhin, by reference to the different costs and delivery dates, but that does not appear to have been an exercise that she went through in late 2007 or early 2008. Further, she did not expressly put the choices in this regard to anyone else. Instead, there seems to have been an assumption

that, because Mr Dryden was liaising with Mr Chernukhin, what Mr Dryden put forward must have Mr Chernukhin's full blessing. That assumption has affected the way in which the Barclays Wealth personnel progressed matters. As shown by the response from Barclays Wealth about the extent of their instructions in their letter of 8 June 2009, they did not have a role in evaluating or advising upon the commercial terms of the deal. However, as directors of EBWL, in my view, the Defendants need to be able to point to something on which they can formally rely under section 123 of the 2004 Act or something more concrete than an assumption to satisfy section 122(b) of the Act before they can distance themselves from exercising the type of independent judgment that directors should display.

203. Up until the execution of the MIPA, the monies paid into escrow with IATS were returnable; there was no absolute commitment to proceed and the position of BWTG on behalf of The Galaxy Trust was salvageable. Moreover, the impression I formed of Mr Chernukhin is that he takes an interest in the bigger picture, for example, his wish to have use of a Hawker 4000 aircraft, and occasionally the minutiae of something, the prime example being pilot training, but did not trouble himself with the details on what might be regarded as an inbetween level, leaving those to be sorted out in the best way possible by those he paid well for making it their business to handle those matters on his behalf. This should have been apparent to Barclays Wealth from their dealings with him. Accordingly, against that background, it became even more important to undertake some proper inquiries of their own into Mr Dryden specifically relating to the transaction that he was pushing through to them. Many of these problems were capable of resolution in a simple way. A series of direct questions could have been put to Mr Dryden himself or to Mr Chernukhin himself. The answers given would have provided the comfort that Barclays Wealth should have sought or would have raised issues requiring further thought.

204. Perhaps the most startling aspect of this case is that no one on behalf of the Defendants made any, or any adequate, enquiry about GEC or Jetstream Limited (or even Jetstream Aviation Limited, which was the party, with Rastelo, to the Offer Letter). As such, when EBWL agreed to acquire GEC, the directors of EBWL had no idea who the directors of that company were or for whose benefit EBWL's monies were being paid. Whilst I appreciate that the terms of the MIPA offered a level of legal comfort, as confirmed by the advice taken, that appropriate warranties were being offered, the Defendants, in my view, had an incomplete understanding of whether those warranties were really worth the paper on which they were written. Mr Le Ray did not address his mind independently to the question of whether Jetstream Limited was an entity with which EBWL should do business. I regard that omission alone as constituting a breach of the First Defendant's duty of care. When coupled with the various other matters to which I have already referred, including not double-checking directly with Mr Chernukhin that this course of action was in accordance with his expressed wishes, rather than just through Mr Dryden, and not checking the detail of the MIPA closely enough, having regard to the civil standard of proof, I am satisfied that the Plaintiff has demonstrated the First Defendant's breach of the section 122 duty when taking the decision it did at the board meeting on 23 April 2008.

205. Although technically one step removed, the position of the Second Defendant should, I think, be treated in the same way. Given the extent to which Mr Le Ray had taken the position he had as a result of what Mr Dryden had told him, Mr Koller should have made more enquiries about how safe it was to place that amount of trust in Mr Dryden and, in any event, he also should have realised that the directors needed to know more about the company they were acquiring and the other party to the agreement EBWL was considering entering before agreeing to execute the MIPA. Consequently, I have concluded that he also fell short of the standards expected of a director of EBWL in relation to the MIPA transaction because, from the information presented to him, he did not properly ascertain whether the MIPA was in the best interests of EBWL or BWTG as trustee of The Galaxy Trust.

Causation

206. Having decided that there was a breach of director's duty on the part of both Defendants, the next question is whether those breaches caused the loss claimed by the Plaintiff. This aspect of the case was not argued in as much detail as the other issues to be determined. My reasons for finding that causation has also been established are, therefore, similarly abbreviated.

207. On the one hand, I can understand the argument pursued on behalf of the Defendants that, if the omissions and other failings had not occurred, the directors of EBWL would still have proceeded to resolve to execute the MIPA and that the alleged losses sustained by EBWL did not arise from the decision to enter the MIPA, but rather from the decision to terminate the APA. Had the revised delivery date confirmed by HBC been incorporated into a formal Amendment to the APA, the aircraft would have been accepted or GEC would have been in a worse position. It was only because the scheduled date for delivery in the terms then in place had slipped so far back without agreement to modify what was in the APA on the part of the Buyer that the option to terminate and recoup the deposits of $1 million plus interest was available to GEC. In other words, the deal for acquiring the RC-30 Hawker 4000 aircraft as represented by the MIPA was the deal that was going to be concluded come what may and even if the directors of EBWL had not fallen short of the standard of care required and had checked everything as they should have, the decision to execute the MIPA on the terms contained therein would still have been taken.

208. On the other hand, events that occurred after the purchase of the membership interests in GEC can, as argued on behalf of the Plaintiff, be regarded as flowing from that flawed decision. By executing the MIPA and acquiring GEC, EBWL took the benefit, and the burdens, of the APA. The decisions taken by GEC, quite possibly with the concurrence of the new directors of EBWL, in relation to not agreeing a revised later scheduled delivery date and then exercising the option to terminate the APA, were a form of mitigation. If one compares the choices made in respect of the failure by HBC to deliver the aircraft in accordance with the agreed schedule with the position had a direct order been placed, or some other means of purchasing a Hawker 4000 aircraft been taken, the choice would still have been whether to accept the slippage that was arising because of the problems experienced by HBC or to exercise the option to terminate the purchase agreement. The difference, however, is that the deposit monies repayable by HBC would have represented all, or nearly all, of the outlay of EBWL rather than approximately US$6.1 million having been paid out without any prospect of those monies being returned.

209. Having carefully considered those two competing arguments, on balance, I prefer the argument that it was the decision for EBWL to enter the MIPA that left it in the position where subsequent choices would result in what amounted to the purchase price for the membership interests in GEC being lost for ever. On behalf of the Defendants, Advocate Dunster accepted that, if liability, including the causal link, were established, the loss sustained by EBWL amounted to the difference between the monies paid under the MIPA and the deposit, plus interest, returned from HBC to GEC and then to EBWL and Navigator. No one has suggested that EBWL should have sought to obtain a better return, perhaps by seeking to assign the benefit of the APA, with or without the later modifications proposed by HBC, for an amount greater than the returned deposit money, so I say nothing further about the question of quantum of damages. Accordingly, because I am satisfied that the Defendants' breaches of their directors' duties then led to the loss claimed by EBWL, they are jointly and severally liable to EBWL for the full amount claimed of US$6,004,100.94, subject only to the position in respect of the indemnity under EBWL's Articles of Association raised by them as a defence or counterclaim extinguishing all of that liability.

The indemnity

210. The indemnity claimed by the Defendants is found at Regulation 14 of the Articles of Association of EBWL, which provides as follows:

> "*14.1 Subjection to the limitations hereinafter provided the Company shall indemnify against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred in connection with legal, administrative or investigative proceedings any person who:*
>
> *(a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was a director of the Company; or*
>
> *(b) is or was, at the request of the Company, serving as a director of, or in any other capacity is or was acting for, another company or partnership, joint venture, trust or other enterprise.*
>
> *14.2 The indemnity in Sub-Regulation 14.1 only applies if the person acted honestly and in good faith with a view to the best interests of the Company and, in the case of criminal proceedings, the person had no reasonable cause to believe that their conduct was unlawful.*
>
> *14.3 The decision of the directors as to whether the person acted honestly and in good faith and with a view to the best interests of the Company and as to whether the person had no reasonable cause to believe that his conduct was unlawful is, in the absence of fraud, sufficient for the purposes of the Articles, unless a question of law is involved.*
>
> *14.4 The termination of any proceedings by any judgment, order, settlement, conviction or the entering of a nolle prosequi does not, by itself, create a resumption that the person did not act honestly and in good faith and with a view to the best interests of the Company or that the person had reasonable cause to believe that his conduct was unlawful.*
>
> *14.5 The Company may purchase and maintain insurance in relation to any person who is or was a director, officer or liquidator of the Company, or who at the request of the Company is or was serving as a director, officer or liquidator of or in any other capacity is or was acting for, another company or a partnership, joint venture, trust or other enterprise, against any liability asserted against the person in that capacity, whether or not the Company has or would have had the power to indemnify the person against the liability as provided in the Articles.*"

At paragraph 78 of *Les Defences*, the Defendants rely on Regulation 14 as meaning that EBWL has no cause of action against them or, in the alternative, its claim fails for circularity. In the alternative, the indemnity in Regulation 14 is pleaded as a counterclaim (paragraph 86).

The position of EBWL involves asserting (at paragraph 40 of its *Replique*) that:

> "*The indemnity provision in Regulation 14 of EBWL's Articles provides indemnification in relation to claims by third parties against directors and former directors. It does not, as ought to be obvious to the Defendants, provide for indemnification from EBWL in respect of causes of action held by EBWL itself against its own directors or former directors.*"

EBWL accepts that "*no allegations have been or are made that the Defendants acted otherwise than honestly and in good faith*", explaining that its case has been "*that they failed to act with a view to its best interests*" (paragraph 39).

211. This issue raises for determination a pure question of BVI law. With the benefit of hindsight, the parties may feel that this question might sensibly have been taken as a preliminary issue. The possibility of doing so was canvassed by me with Counsel at the conclusion of the evidence of the two experts. It was clear, and accepted by both Advocates, that, if the Defendants' argument succeeded, Regulation 14 of EBWL's Articles of Association provides a full answer to the Plaintiff's claim. Indeed, the issue might more readily and satisfactorily have been litigated in Tortola, thereby avoiding the slight nervousness I feel at being called upon to resolve what is apparently a novel question of BVI law. However, the parties were not in agreement about adopting that course of action, so I decided it was more consistent with the overriding objective in rule 1 of the Royal Court Civil Rules, 2007 to continue with the full trial and to proceed to decide the main dispute between them on liability. What follows is the explanation of how I have approached and decided this aspect of the case.

212. It was on this issue that the parties relied most heavily on the respective expert evidence of Mr Jones QC and Mr Levy QC, who differed markedly in the approach that a court in the BVI would take to this question. As may have been inevitable in the circumstances, during the course of giving evidence, they occasionally slipped into the role of advocate for the party calling them, and became argumentative on behalf of that party. However, overall, they helpfully fulfilled their duty to assist the Court on the matters within their expertise in accordance with rule 9 of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011. Further, because they did not agree on how this issue would be resolved if litigated under the law of the BVI, in accordance with section 20(3) of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009, it falls to me to "*decide which evidence is to be preferred in determining the proceedings*".

213. The essence of the dispute between the two experts is whether section 132 of the BVI Companies Act, 2004 permits or prohibits a company incorporated under that Act to indemnify its directors, or former directors, against causes of action vested in the company itself. In summary, Mr Jones QC has opined that a BVI court would rule that the Act does not permit that to happen, with the result that Regulation 14 in EBWL's Articles of Association is ultra vires section 132 of the 2004 Act, at least to the extent that it purports to confer such an indemnity and Mr Levy QC has opined that there is nothing in the wording of section 132 leading to that result, with the consequence that EBWL was left with a choice as to whether to extend to its directors and any former directors such a broad indemnity as Regulation 14 has.

214. Section 132 of the 2004 Act bears the marginal note "*Indemnification*" and provides in full, after its amendment in 2005, as follows:

> "*(1) Subject to subsection (2) and its memorandum and articles, a company may indemnify against all expenses, including legal fees, and against all judgements, fines and amounts paid in settlement and reasonably incurred in connection with legal, administrative or investigative proceedings any person who*
>
> *(a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was a director of the company; or*
>
> *(b) is or was, at the request of the company, serving as a director of, or in any other capacity is or was acting for, another body corporate or a partnership, joint venture, trust or other enterprise.*

*(2) Subsection (1) does not apply to a person referred to in that subsection unless the person acted honestly and in good faith and in what he believed to be in the best interests of the company and, in the case of criminal proceedings, the person had no reasonable cause to believe that his conduct was unlawful.*

*(2A) For the purposes of subsection (2), a director acts in the best interests of the company if he acts in the best interests of*

*(a) the company's holding company, or*

*(b) a shareholder or shareholders of the company;*

*in either case, in the circumstances specified in section 120(2), (3) or (4), as the case may be.*

*(3) The termination of any proceedings by any judgment, order, settlement, conviction or the entering of a nolle prosequi does not, by itself, create a presumption that the person did not act honestly and in good faith and with a view to the best interests of the company or that the person had reasonable cause to believe that his conduct was unlawful.*

*(3A) Expenses, including legal fees, incurred by a director in defending any legal, administrative or investigative proceedings may be paid by the company in advance of the final disposition of such proceedings upon receipt of an undertaking by or on behalf of the director to repay the amount if it shall ultimately be determined that the director is not entitled to be indemnified by the company in accordance with subsection (1).*

*(3B) Expenses, including legal fees, incurred by a former director in defending any legal, administrative or investigative proceedings may be paid by the company in advance of the final disposition of such proceedings upon receipt of an undertaking by or on behalf of the former director to repay the amount if it shall ultimately be determined that the former director is not entitled to be indemnified by the company in accordance with subsection (1) upon such other terms and conditions, if any, as the company deems appropriate.*

*(3C) The indemnification and advancement of expenses provided by, or granted pursuant to, this section is not exclusive of any other rights to which the person seeking indemnification or advancement of expenses may be entitled under any agreement, resolution of members, resolution of disinterested directors or otherwise, both as to acting in the person's official capacity and as to acting in another capacity while serving as a director of the company.*

*(4) If a person referred to in subsection (1) has been successful in defence of any proceedings referred to in subsection (1), the person is entitled to be indemnified against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred by the person in connection with the proceedings.*

*(5) A company shall not indemnify a person in breach of subsection (2) and any indemnity given in breach of that section is void and of no effect.*"

215. It is apparent from a comparison of the wording in Regulation 14 of EBWL's Articles of Association and the wording of section 132 of the 2004 Act that Regulation 14 has been crafted to reflect the statutory provision. By way of example, section 132(1)(a) has been transposed into Sub-Regulation 14.1(b), with minor modifications only in terminology and which do not affect the substance, and section 132(3) has been transposed verbatim into Sub-

Regulation 14.4. Regulation 14 has the appearance of a standard provision. This was confirmed by both experts; Mr Levy QC bluntly stating that he regarded it as "*bog standard*". Accordingly, whilst section 132(1) is permissive rather than mandatory, providing as it does that "*a company may indemnify*" (emphasis added), EBWL appears to have chosen to create an indemnity to the fullest extent available under that provision. As it appears it would have been entitled to have done, it has not limited through its memorandum and articles the persons to whom an indemnity is provided or the situations in which an indemnity is provided to its directors and former directors. There is nothing explicit on the face of Regulation 14 disapplying the indemnity in the case of directors in the position of the Defendants and the issue, therefore, turns solely on the construction of section 132 of the 2004 Act.

*First report of Philip Jones QC*

216. In his first report dated 8 March 2012, Mr Jones QC offered the view that (at para. 49):

> "*… it strikes me as odd that a company can pursue a claim against a director or former director for breach of the statutory duty of care and successfully obtain a judgment, only for the director to have an indemnity as the case is proceeding in respect of his ongoing expenses and then a full indemnity in respect of the judgment, provided it cannot be established that he has acted dishonestly or in bad faith.*"

He then drew attention to the fact that section 122 of the 2004 Act does not begin with the words "*subject to the memorandum or articles of a company*", contrasting that with a number of other provisions which do. In his view, the absence of those words in section 122 means that the duty to perform a director's duties with "*the care, diligence and skill that a reasonable director would exercise*" cannot be varied by a provision, such as Regulation 14, in a company's Articles of Association. He took the view, therefore, that section 132 and Regulation 14 "*are to be construed as being limited to legal, administrative or investigative proceedings brought by persons other than the company itself*" (para. 53), although he accepted (at para. 56) "*that the contrary arguments to mine are respectable and have force, but I think my view to be the better one*".

*First report of Robert Levy QC*

217. The first report of Mr Levy QC is dated 4 April 2012. He comments directly on the opinion offered in the first report of Mr Jones QC and, albeit with great respect, had "*no hesitation whatsoever in concluding, very firmly, that he is wrong on this point*" (para. 65) and set out his reasons for doing so as follows:

> "*(a) Neither s132 nor regulation 14, on their face, impose any limitations as to their applicability. On their face they are applicable in actions commenced by the company of which the directors were directors.*
>
> *(b) Absent any such limitation, there is no warrant to imply one. Mr Jones appears to be troubled by the idea that by permitting reliance upon an indemnity the duties imposed on the directors are somehow watered down. In my view, BVI law would not consider that to be the case. In my view, a BVI Court would conclude that s.132/Regulation 14 in no way limits or water down the director's obligations. They simply provide that in certain circumstances the company will afford the director an indemnity.*
>
> *(c) In a Jersey decision,* ***Viscount of the Royal Court of Jersey v Barry Shelton*** *[1986] 1 WLR 985 the Privy Council was considering an appeal from the Court of Appeal of Jersey. One of the issues for the Judicial Committee was whether certain acts by directors, which were alleged to have been ultra vires, were exonerated by a particular provision in the company's Articles of Association. The provision in question read:*

> *"(1) Every director, officer or servant of the company shall be indemnified out of its funds against all costs, charges, expenses, losses and liabilities incurred by him (a) in the conduct of the company's business, or (b) in the discharge of his duties; and (2) no director or officer of the company shall be liable (a) for the acts, defaults or omissions of any other director or officer, or (b) by reason of his having joined in any receipt for money not received by him personally, or (c) for any loss on account of defect of title to any property acquired by the company, or (d) on account of the insufficiency of any security in or upon which any moneys of the company shall be invested, or (e) for any loss incurred through any bank, broker or other agent, or (f) for any loss occasioned by any error of judgment or oversight on his part, or (g) for any loss, damage, or misfortune whatever which shall happen in the execution of the duties of his office or in relation thereto, unless the same shall happen through his own dishonesty."*

*The Privy Council held that the provision exonerated a director even where his innocent participation had resulted in an ultra vires act. Giving the opinion of the Committee, Lord Brightman said, at page 991 F "A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him". At page 992 D, Lord Brightman observed that the exoneration provision did not have the effect of rendering intra vires an act which, but for the provision would have been ultra vires; it merely restricted the person who could be sued for the loss which the ultra vires act had caused.*

*(d) I am of the very firm view that the same position pertains where the act under consideration is a breach of duty as opposed to an ultra vires act, and would consider that a BVI Court would find the Privy Council's decision in* ***Shelton*** *to be persuasive. Far from driving a "coach and horses" through the statutory duty, a BVI Court would, in my opinion, conclude that the duty remains the same; it is merely the consequences that are different.*

*Mr Jones QC fails to note, or give sufficient weight to, the fact that s132 is, to an extent, "optional". It is permissive in that it provides that "a company* ***may****" (emphasis added) offer the type of indemnity mentioned therein. Thus a company's articles need not offer the indemnity in question, and if they did not then of course the director would not have the benefit of the indemnity. Equally, if, as in the present case, the company has chosen to include the indemnity, there is no reason why it would not be enforced. (I note en passant that it would have been open for a company's Articles to provide for an indemnity "save in relation to claims brought by the company against the director etc." No such provision was made in the instant case.)*

*(e) I am not much taken by Mr Jones QC's justification for his conclusion by reference to public policy in paragraph 52 of his report, where he notes that indemnity provisions have been void in England since 1929. He is, of course, quite correct that such provisions have been void in England since 1929. However I simply fail to understand what relevance English public policy has to the construction of a provision of a BVI Act which has no equivalent in English law; if relevant, (which I do not believe it to be) it would be the public policy of the BVI that Mr Jones QC should have regard to.*

*(f) In any event, the alleged "public policy" consideration is also misplaced because, in so far as it is a matter of "public policy", English public policy has set its face against affording directors an indemnity, whether in relation to claims brought*

*directly by the company or otherwise. Not even Mr Jones QC would suggest that the indemnity afforded by s132/Regulation 14 is ineffective in actions not brought by the company. Therefore, to my mind "public policy" does not afford Mr Jones QC any real refuge. If (which I would say is wholly impermissible) he wishes to seek to justify his construction by reference to English public policy, he must go further and explain, by reference to that policy, why certain indemnities are permissible, whilst others are not.*

*(g) It is surprising that Mr Jones has not referred to any authority in support of his conclusion. Having noted that indemnity provisions were lawful in England before 1929, he notes that it was common for articles of association to exempt directors (save in certain circumstances), and that the Courts gave effect to them. Yet his conclusion that the indemnity would not be available in an action brought by the company itself does not sit at all comfortably with English authority. The indemnity itself was considered enforceable by Neville J in* ***Brazilian Rubber*** *ante, which was an action brought by the liquidator of the company. I doubt whether, on this point, Mr Jones QC would wish to distinguish between actions brought by the liquidator of a company, and the company itself.*

*(h) Similarly, in* ***Shelton*** *ante the Privy Council was concerned with a case where the claim was brought by the Plaintiff "against the directors to recover on behalf of the company" (see page 987 G). I do not profess any expertise in Jersey law, but it seems to me that the Plaintiff's claim there could have arisen if the company itself had a claim.*

*(i) Thus it seems to me that there is clear authority that the indemnity can be relied upon in a claim brought by the company, and no basis for the limitation thereon that Mr Jones QC construes into s132/Regulation 14.*"

218. At paragraphs 66 to 68 of his first report, Mr Levy QC then undertook some comparative analysis of company law statutes in other jurisdictions. The implication is that a court in the BVI might find it helpful to consider the position elsewhere in construing its own legislation. This would, of course, only become relevant if the wording of section 132 gave rise to any ambiguity.

219. Some jurisdictions make any indemnity provision void. His first example was the United Kingdom (now section 232 of the Companies Act 2006) and his second was Jersey. Although the section to which he referred in his report is incorrect, if only to put something closer to home into the context of the difference in the provisions in the BVI 2004 Act, section 77(1) of the Companies (Jersey) Law 1991 provides:

> "*Subject to paragraphs (2) and (3), any provision, whether contained in the articles of, or in a contract with, a company or otherwise, whereby the company or any of its subsidiaries or any other person, for some benefit conferred or detriment suffered directly or indirectly by the company, agrees to exempt any person from, or indemnify any person against, any liability which by law would otherwise attach by reason of the fact that the person is or was an officer of the company shall be void.*"

Although not referred to by the experts, the Companies (Guernsey) Law, 2008, in sections 157-159, makes similar provision in respect of exemptions and indemnities, rendering all but qualifying third party indemnities void.

220. Other jurisdictions have adopted indemnity provisions very similar to those in section 132 of the 2004 Act. Mr Levy QC refers specifically to Grenada, St Lucia and the Commonwealth of Dominica, all of which are in similar, if not identical, terms to section 57 of the BVI's International Business Companies Act, 1984, to which I will need to return in due course.

Indeed, from the dates of those other enactments, I regard it as a reasonable inference that those measures were modelled on the earlier BVI 1984 Act. He also refers to section 112 of the Companies Act 2006 of the Isle of Man. Save for the fact that subsection (1) commences with slightly different wording, albeit potentially to the same effect ("*Subject to subsection (2) and subject to contrary provision in its articles,*"), the wording of section 112 follows that in section 132 of the BVI 2004 Act before it was amended by the insertion of the additional subsections in 2005.

221. The report of Mr Levy QC also refers to those jurisdictions that have chosen to deal with the position of an action by a company expressly, thereby establishing what might conveniently be described as a "halfway house" between the two extremes to which he had already referred. The example he quoted was in section 99 of the Companies Act 1995 of Antigua and Barbuda, which provides:

> "*(1) Except in respect of an action by or on behalf of a company or body corporate to obtain a judgment in its favour, a company may indemnify:*
>
> *(a) a director of the company,*
>
> *(b) a former director of the company,*
>
> *(c) a person who acts or acted at the company's request as a director or officer of a body corporate of which the company is or was a shareholder or creditor*
>
> *and his legal representatives, against all costs charges and expenses (including an amount paid to settle an action or satisfy a judgment) reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being, or having been, a director or officer of that company or body corporate.*
>
> *(2) Subsection (1) does not apply unless the director or officer to be so indemnified-*
>
> *(a) acted honestly and in good faith with a view to the best interests of the company; and*
>
> *(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, had reasonable grounds for believing that his conduct was lawful.*"

Provisions in very similar, if not identical, terms have been included in the companies legislation of Anguilla, Montserrat and St Vincent and the Grenadines. The latest date of those enactments is 2000.

222. Mr Levy QC then explains that his comparative review of other jurisdictions has demonstrated that there are "*three different, relatively standard, statutory provisions dealing with whether, and, if so, in what circumstances, a company may indemnify its directors*" (para. 69). He continues (at para. 70) by commenting that he took the view that the draftsman of the BVI 2004 Act "*was not drafting in a vacuum*" and that "*It is quite obvious that the core provisions of s132 of the BCA were similar to s57 of the International Business Companies Act 1984*", making it "*absolutely clear that a choice was made not to adopt a provision which excluded indemnities in actions brought by the company against a director*".

*Second report of Philip Jones QC*

223. Mr Jones QC comments on the first report of Mr Levy QC in his second report dated 4 July 2012. In doing so, he acknowledges, with the benefit of hindsight and because Mr Levy QC

had referred to it, that he ought to have considered the predecessor to section 132 of the 2004 Act "*because it is clear that the draftsman of the BCA 2004 has used the predecessor s.57 IBCA 1984 as a template for starting his drafting of s. 132 BCA 2004*" (para. 65). In doing so, he disagreed with the conclusion reached by Mr Levy QC because Mr Levy QC had apparently not considered section 54 of the BVI 1984 Act, which he quoted, with his own added emphasis, in para. 66, under the marginal note "*Standard of care*":

> "*(1) Every director, officer, agent and liquidator of a company incorporated under this Act, in performing his functions, shall act honestly and in good faith with a view to the best interests of the company* ***and*** *exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances*.
>
> *(2) No provision in the memorandum or articles of a company incorporated under this Act or in any agreement entered into by the company relieves a director, officer, agent or liquidator of the company from the duty to act in accordance with the memorandum or articles* ***or*** *from any personal liability arising from his management of the business and affairs of the company*."

The conclusion he draws from reading sections 54 and 57 of the 1984 Act together is that "*nothing in the memorandum or articles of a company or in any agreement entered into by the company can relieve a director from any person liability to the company arising from his management of the business and affairs of the company*" (para. 67). He considers that there would be an inconsistency with the duty imposed by section 54 and the availability of an indemnity in respect of proceedings brought by the company itself against one of its directors for breach of the director's standard of care.

224. The consequence of his opinion that the predecessor 1984 Act did not permit a company to indemnify a director, whether present or former, in respect of an action brought against that director by the company itself, is that the examples offered by Mr Levy QC of other jurisdictions adopting the equivalent of section 57 of the 1984 Act are in the same position, under which such an indemnity is legally unavailable (para. 70). His report does not, however, offer any authority, whether from the BVI or elsewhere, in support of his construction of section 57 of the 1984 Act or its equivalent. He also considered that when one analyses the transposition exercise that the draftsman of the 2004 Act has undertaken, subsections (1) and (2) of section 57 have, with only minor modifications, been re-enacted as subsections (1) and (2) of section 132 of the 2004 Act. Accordingly, he considers that the legislature "*must have intended them to have the same effect, namely, that they do not include proceedings by the company against a director*" (para. 71).

225. Mr Jones QC continues to analyse the destination of provisions from the 1984 Act to the 2004 Act in relation to section 54. He notes that subsection (1) has been divided into sections 120 and 122 of the 2004 Act albeit that "*One does not find expressly set out in the BCA 2004 what was to be found in s.54(2) IBCA 1984*". His explanation for this is that, as he had previously noted, some provisions in the 2004 Act commence with the words "*subject to the memorandum or articles of a company*" and, where those words are absent, it means that the memorandum or articles of association cannot modify what is prescribed in the statute. This, in his opinion, is the position in respect of section 122. Therefore, although there is nothing explicit in the 2004 Act reflecting section 54(2) of the 1984 Act "*its effect is replicated as regards the standard of care*" (para. 72).

226. As a result, having analysed the origins of section 132 in the 2004 Act, having been pointed in that direction by Mr Levy QC, his conclusion had become firmer than previously, because he was (at para. 74):

> "*... now of the clear view that s.132 BCA 2004 does not include claims by a company against a former director for breach of the duty of care owed by that director to the*

> *company. The same interpretation follows in respect of regulation 14 of EBWL's articles of association. It therefore provides no defence to the claims brought in the present proceedings against the directors.*"

*The joint report and the Appendix thereto from Mr Levy QC*

227. This fundamental difference between the two experts' opinions was noted at para. 18 of the joint report from them dated 18 July 2012. The rejoinder of Mr Levy QC on this issue was set out in an Appendix bearing the same date and rests on three grounds.

228. The first point made by Mr Levy QC is set out as follows in para. 11 of that Appendix:

> "*In Mr Levy's view the words in s54 which Mr Jones relies upon did not prevent a company affording a director an indemnity at all; rather, as they expressly say, the words prevent a company's memorandum or articles from relieving him of liability. Thus, under the regime provided for by the IBCA the director owed his duty of care and was personally liable for it. However offering a director an indemnity does not relieve him of his personal liability; it merely indemnifies him for his liability. Mr Levy is surprised that Mr Jones considers that an indemnity for a liability could be said to relieve the person indemnified of his liability.*"

229. The second reason given by Mr Levy QC for disagreeing is that the construction of section 54(2) of the 1984 Act by Mr Jones QC "*is in fact far broader than simply preventing the company indemnifying a director in relation to claims brought by the company*" (para. 12). The third reason given by Mr Levy QC for disagreeing, particularly with the inferences drawn from the transposition of section 57(1) and (2) of the 1984 Act into section 132(1) and (2) of the 2004 Act, is that Mr Jones QC has overlooked the fact that the words in section 54(2) of the 1984 Act have not been included in the 2004 Act with the consequence that (at para. 14):

> "*… even if the language of s54(2) had the effect for which Mr Jones contends (and Mr Levy is clear that it did not), then its exclusion is an absolute answer to Mr Jones' argument. In short, Mr Levy contends that one cannot construe a statute by words which (a) do not appear, and (b) seem to have been expressly omitted.*"

*Third report of Philip Jones QC*

230. In his third and final report dated 10 August 2012, Mr Jones QC took the issue one step further in rebuttal of the points made by Mr Levy QC in his Appendix to their joint report. He accepted conceptually that "*indemnity clauses can include an indemnity against any proceedings brought by the indemnifier against the indemnified for breach of duty owed by the indemnified to the indemnifier*" (para. 15) and then quoted a passage from the 5th edition of Lewison's *Interpretation of Contracts* (at p. 615):

> "*Indemnity clauses in contracts fall into two broad categories.*
>
> *The first category consists of clauses where one party agrees to indemnify the other against liability which that other may have towards him. In such a case the indemnity is "the obverse of an exempting clause". In substance such a clause is an exemption clause.*
>
> *The second category consists of clauses in which one party to the contract agrees to indemnify the other party against liability which that other party may incur towards third parties. There is no legal impediment to the inclusion of an indemnity clause of either category.*"

The authority cited in that work for the words quoted in the middle paragraph is *Smith v South Wales Switchgear Ltd* [1978] 1 WLR 165 and the authority for the following sentence is

*Farstad Supply A/s v Enviroco Ltd* [2010] 2 Lloyd's Rep. 387, a case which Mr Jones QC then briefly analysed, comparing it with the sentence in *Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985, 991F that "*A company has no cause of action against a director in respect of a matter against which the company had agreed to indemnify him*". This analysis led him to opine that "*one would expect that if the intention is to prevent the bringing of proceedings the clause would be framed as an exclusion or exemption provision, not an indemnity provision*" (para. 18).

231. Consequently, Mr Jones QC took issue with the first point made by Mr Levy QC in para. 11 of his Appendix to the joint report, as set out above (at para. 25):

> "*... if the indemnity is construed as covering a claim by the company against the director: it relieves the director from any liability to the company. As is clear from the authorities cited by me ..., the effect of such an indemnity clause is to exclude liability altogether. It means there is no cause of action. It relieves the director from the liability he would otherwise have.*"

In support of that opinion, he then repeated his contention that the omission to transpose explicitly what was found in section 54(2) of the 1984 Act into the 2004 Act had been addressed by not using any qualifying words such as "*subject to the memorandum or articles of a company*" in section 122 of the 2004 Act, meaning that that duty of care cannot be overridden so that it is in substance excluded from applying for the benefit of the company itself. He also suggested that "*it would be surprising*" if the BVI legislature had permitted a change from the position under the 1984 Act when enacting the 2004 Act because that "*would be a retrograde step and would be going against the modern trend*" (para. 31).

*The experts' oral evidence*

232. Neither of the experts on BVI law changed his position as a result of cross-examination; indeed, if anything, they became more robust in the assertion that each of their opinions was the correct opinion and should be adopted by the Court.

233. In the evidence of Mr Jones QC he reiterated that his firmer view on the construction to afford to section 132 of the 2004 arose through considering the position under the 1984 Act and considering sections 54 and 57 in the following way:

> "*They are simply the flip side of the same thing. It is clear that what section 54(2) is dealing with is the liability to the company, and you can't exclude that. Then what 57 is dealing with is the liability to third parties. It makes perfect sense. In my view, it is the only interpretation.*"

When he was asked about whether section 54(2) of the 1984 Act dealt more broadly with personal liability than just in respect of the standard of care, whilst acknowledging that there was a point that could be made about that broader construction, the way he was putting it was that section 54(2) came immediately after section 54(1), indicating that the personal liability being referred to was any liability arising from the manner in which the duty of care was being exercised, with the result that purporting to relieve the director from that personal liability was not permissible.

234. Mr Jones QC drew attention to the oddity created by the fact that section 132 of the 2004 Act enables a company to indemnify a director against the legal fees being incurred by that director during the course of proceedings. He suggested that this created an absurdity if this indemnity were available in respect of an action brought by the company against the director. Its effect would be that the company would be paying both sides' legal fees during the proceedings. This was a new point that had not been addressed in any of the experts' written reports.

235. When pressed by Advocate Dunster about the position in the Isle of Man, Mr Jones QC conceded that, because there was no statutory provision about the duty of care, it being left as a common law principle, its 2006 Act meant that "*you can exclude what would otherwise be a duty of care. You can limit the duties to simply acting honestly and in good faith*". He regarded this position as contrary to "*the way the modern world is going*".

236. Mr Levy QC again started his analysis with the express language of section 132 of the 2004 Act, offering the view that "*the language of the section is absolutely open. There is no express limitation on the circumstances in which the indemnity may be offered or relied upon*", save possibly in two respects, which he then dealt with. He robustly dismissed the concerns expressed by Mr Jones QC about the availability of an indemnity to a director in respect of legal proceedings during their course (as provided for in section 132(3A)), pointing out that this subsection had not, in any event, been transposed into Regulation 14 of EBWL's Articles of Association. Therefore, although the 2004 Act enabled a company to provide such a broad indemnity, whether or not it had would depend on the company's documentation rather than the statutory framework.

237. In the course of his evidence, Mr Levy QC reminded the Court that, in English law, "*prior to 1929, it was perfectly acceptable for companies to give indemnities to directors, and there is no common law objection*". His further comment on the proper construction to give to section 54(2) of the 1984 Act was not that it was limited in relation to claims made by the company because "*the effect of section 54(2) would also be to exclude the indemnity in relation to claims brought by third parties, yet we know that section 57(2) included those indemnities, and Mr Jones concedes as much*".

238. Mr Levy QC further focused on the use of "*relieves*" in section 54(2) of the 1984 Act, offering the view that this word indicates that liability continues to exist, instead of being removed entirely. Consequently, if the liability were ordinarily to be established, there would then be an indemnity in respect of the effect of it. As he subsequently explained in more detail:

> "*The breach is there and the liability is there. All that happens is that, in some cases, where the claim is brought by the company, the cause of action fails for circuity of action, but he is still liable, he is just entitled to his indemnity, and it is because he is entitled to his indemnity that the cause of action fails, but the cause of action brought by the third party does not fail*".

He subsequently accepted that this provision meant that it would be unlawful for a company to purport to release a person from liability and that a release from, or removal of, the liability is distinct from an indemnity. In doing so, he relied upon the way in which Lord Brightman had drawn such a distinction in the Jersey case, ***Shelton***.

239. When dealing with the similarly worded provision in the Isle of Man's Companies Act, he commented as follows:

> "*… whether the duties of directors remain unwritten, whether they be the fiduciary duties of common law duties, or whatever else, or whether they are set down in an Act of Parliament or in a BVI Act, it is fanciful that – a BVI court would consider it fanciful to suggest that because – that the same words have different effect, because in one case the duties are written down in the Act and, yet, in the other case, the Isle of Man, the duties are only to be found in the law books rather than the statute.*"

He regarded this as a further reason why the opinion offered by Mr Jones QC about how to construe the BVI legislation must be wrong, because it would lead to a different outcome in the BVI and in the Isle of Man in respect of legislative provisions that are in very similar, if not identical, terms.

240. Finally, although he acknowledged that the majority of section 57 from the 1984 Act had been re-enacted in section 132 of the 2004 Act, by reference to section 132(5), which appeared not to have been part of the former regime, he gave the opinion that "*it suggests that some thought was given to the circumstances in which indemnities – some close thought was given to the circumstances in which indemnities were available*". What I take from that answer is that, having found evidence in the drafting of such close thought having been given to one aspect, the natural inference is that the decision not to introduce the type of halfway house provision dealing expressly with the position in relation to actions brought against its director by the company, as in Antigua and Barbuda and the other jurisdictions he had mentioned in his first report, Mr Levy QC was emphasising that the BVI legislature had made a conscious choice to retain as a feature of its companies law regime the availability of the broadest directors' indemnities.

*Conclusion*

241. Having carefully reviewed the evidence of both learned experts in accordance with duty conferred on the Court by section 20(3) of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009, and the ways in which those different opinions given and the reasons for them have been adopted and converted by the respective Advocates into their closing submissions, I have no hesitation in concluding that I prefer the evidence tendered by Mr Levy QC.

*Analysis of section 132 of the 2004 Act*

242. I am persuaded that the approach a BVI court would take to the question of statutory construction involved here would be to concentrate first and foremost on the plain meaning of the words in the extant legislation, namely the 2004 Act. I fear that too much time and energy has been expended on what might well be a nice academic question of historical statutory interpretation when the court's task is to consider the provision in force at the relevant time rather than starting with its origins. As the principles of statutory interpretation drawn from <u>*Bebo Investment Limited v The Financial Secretary*</u> (*supra*) demonstrate, I am satisfied that a BVI court would start, just as we would in Guernsey, by recognising that it is the role of the legislature to enact provisions and the duty of the courts to interpret what the legislature has enacted "*without basing its construction of the Statute on a perception of its wisdom or propriety or a view of what Parliament ought to have done*". The court would, therefore, take as its starting point the need to divine the legislative intention from "*the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context*".

243. In the manner suggested in the evidence of Mr Levy QC, when I consider the words of section 132 of the 2004 Act, approaching it as I understand a BVI court would, there is nothing on the face of that provision creating any limitation on the availability of an indemnity to a director, or former director, in respect of a claim by the company against him or her. Accordingly, at that very simple level of looking at the words and giving them their ordinary meaning, which is still recognised as the cardinal rule of statutory interpretation, Regulation 14 of EBWL's Articles of Association is not inconsistent with the extent of indemnity lawfully available to be given to persons, including directors of the company itself, even in an action brought by the company. In many respects, that opinion, and construction, provides a complete answer to the question.

244. I am quite satisfied that a BVI court would be as alive to the fact that section 132 is permissive rather than imposing any obligation on a company to offer an indemnity, whether through its articles of association or separately. Indeed, this element of choice in the relationship between the company and its directors is emphasised by the inclusion in subsection (1) of the words "*<u>any person</u> who … is or was, <u>at the request of the company</u>, serving as a director*" (emphasis added). In my view, this demonstrates that the members of

the company make a choice as to the directors they wish to serve in that office and so choose, subject only to any limitations placed on them by statute, the terms on which the directors hold office, including whether to indemnify them fully or partially. As such, EBWL had a choice as to whether to indemnify at all.

245. It is, I believe, only fair to make the comment that Regulation 14 of EBWL's Articles of Association appears to follows the wording of section 57 of the 1984 Act rather than the wording of section 132 of the 2004 Act and, in particular, that wording once amended in 2005 in the light no doubt of early experience of the new BVI companies legislative framework. It is not inconceivable that the seemingly standard form wording of the articles of association of companies being incorporated by organisations such as Equity Trust (BVI) Limited, even in 2008, had not advanced from the template being used previously under the 1984 Act. For example, if one compares section 57 of the 1984 Act and section 132 of the 2004 Act, there does not appear to be any equivalent of section 57(3) in the newer indemnity provision. However, Sub-Regulation 14.3 of EBWL's Articles of Association closely follows the wording that featured in section 57(3) of the 1984 Act. Such differences are not, however, determinative of the issues in this case.

246. I am further satisfied that a BVI court would, as it is required to do, have regard to the terms of section 132 in the context of the 2004 Act as a whole – a single provision must not be construed in isolation. It was the opinion given by Mr Jones QC that it was significant that section 122 of the 2004 Act did not commence with any words of qualification such as "*subject to the memorandum or articles of a company*", particularly when the other provisions listed by him did. This was, as I understood it, his strongest point about how to construe the 2004 Act. However, I take the view that a BVI court would not regard that argument as providing the answer to what is otherwise the natural meaning of section 132. As Mr Levy QC noted, it is not a normal canon of construction to have regard to words that might have been omitted, although that is something about which I need to deal more fully when turning to the alternative view that the court would consider the meaning of the 2004 Act in light of the meaning of its predecessor 1984 Act. As I have already indicated, section 122 of the 2004 Act imposes a duty of care on all directors. If words such as "*subject to the memorandum or articles of a company*" had been inserted at the beginning, that would affect the meaning of section 122. It would then, in my view, leave open the possibility that a company might, in its memorandum or articles of association, modify the duty of care in some way. Instead, by omitting that formulation of words, the BVI legislature has made provision for an unmodifiable duty of care to "*exercise the care, diligence and skill that a reasonable director would exercise*" in the circumstances in question. That duty is, in any event, dependent on other factors, such as the nature of the company or the nature of the particular decision and is, on the basis of its relationship with section 132, capable of being dealt with by way of an indemnity, such an indemnity being afforded through the company's memorandum or articles or by some other permissible means. Accordingly, I am of the opinion that a BVI court would not consider that the construction argument put forward by Mr Jones QC, based on considering sections 122 and 132 in the light of the wording of other provisions in the 2004 Act, would assist EBWL.

247. In passing, I should perhaps also refer to the fact that no one has suggested that the indemnity relied on by the Defendants cannot be relied on because it is contained in EBWL's Articles of Association. It was acknowledged that section 11 of the 2004 Act provides that:

> "*(1) The memorandum and articles of a company are binding as between*
>
> *(a) the company and each member of the company; and*
>
> *(b) each member of the company.*

> *(2) The Company, the board, each director and each member of a company has the rights, powers, duties and obligations set out in this Act except to the extent that they are negated or modified, as permitted by this Act, by the memorandum or the articles.*"

The binding nature of the articles of association set out in section 11(1) does not extend to the relationship between a company and its directors. The Defendants were not the members of EBWL. However, it has been accepted by the Plaintiff that, if Regulation 14 of EBWL's Articles of Association does not fall to be construed in the narrow way proposed by it because of the narrower construction to be given to section 132 of the 2004 Act, then the indemnity can be relied upon by the Defendants. This has been the accepted position under English law (see, eg, *Molineaux v London, Birmingham and Manchester Insurance Co.* [1902] 2 KB 589) and the evidence of the experts was that the law of the BVI pays close regard to the common law of England and Wales. Further, although it was not a line of opinion advanced by either of the expert witnesses, I can see that a BVI court might also be persuaded that the effect of section 11(2), when read with sections 122 and 132, and especially where there is no equivalent of section 54(2) of the 1984 Act, is to enable a company's memorandum or articles of association to establish the extent to which indemnities are to be available generally, provided always that they do not extend beyond what section 132 actually permits.

248. I am further comforted that the ordinary meaning should be given to section 132 of the 2004 Act because the inclusion of subsections (2A), (3A), (3B), (3C) and, in particular, (5) when the section was amended in 2005 is indicative that close attention was paid to the wording of the provision at that time. It has not been a straightforward re-enactment of section 57 of the 1984 Act. The inference that I understand a BVI court could, and would, draw from this factor is that the legislature gave consideration to the operation of indemnities and decided not to include any explicit provision about when an indemnity would be "*void and of no effect*" save for the clarification made in the newly inserted subsection (5). By that time, the trend elsewhere, to which Mr Jones QC made more than one reference, has been seriously to constrain the availability of indemnities and one can readily infer that the legislature would have been made aware of developments taking place in what might be regarded as competitor jurisdictions. Instead, as is its entitlement, the BVI legislature has enacted legislation that, on the construction I accept should be given to it, leaves open to companies the discretion as to how broad an indemnity to confer on persons associated with it, including any of its directors. Accordingly, this was a matter for EBWL to decide whether or not to provide as far-reaching an indemnity as it has under Regulation 14 of its Articles of Association; there was no obligation on it to do so.

*Analysis of position prior to 2004 Act*

249. Although I do not think that a BVI court would be obliged to offer a view on the interpretation to be given to the provisions in the 1984 Act, it is quite possible that a BVI court would indicate whether or not it agreed with the argument put forward on behalf of the Plaintiff based on continuity of the previous position. Accordingly, I will set out briefly why I consider that Mr Levy QC is also right about this issue. In doing so, I must note that I am mildly surprised that there are apparently no decided cases, whether from the BVI or from other jurisdictions with similarly worded legislation, indicating one way or the other which of the alternative interpretations offered by the experts in this case is the correct interpretation. Because neither of them drew attention to any authority, I have no choice in considering their evidence but to assume that none exists and that a BVI court would also have had to approach this issue in a vacuum of authority.

250. The opinion given by Mr Jones QC depends on a finding that section 54(2) of the 1984 Act affected section 57 in such a way that an indemnity could not, as a matter of BVI law, be given to a director in respect of an action brought by the company against that director for breach of the duty of care. That subsection materially provided that "*No provision in the*

*memorandum or articles of a company incorporated under this Act … relieves a director … of the company … from any personal liability arising from his management of the business and affairs of the company.*"

251. Again, I consider that the evidence given by Mr Levy QC represents the position that is more likely to be accepted by a BVI court and so prefer it to the line pursued in the evidence given by Mr Jones QC. Mr Levy QC has taken as his starting point *In re Brazilian Rubber Plantations and Estates, Limited* [1911] 1 Ch 425, where article 151 in the articles of the company provided that "*No director shall be liable … for any loss, damage, or misfortune whatever which shall happen in the execution of the duties of his office or in relation thereto, unless the same happen through his own dishonesty*". Neville J commented (at page 440):

> "*I think upon its construction this article is intended to relieve directors who act honestly from liability for damages occasioned even by their negligence, where such negligence is not dishonest. And, having regard to the above decision [in Molineaux v London, Birmingham and Manchester Insurance Co.], I do not see how to escape from the conclusion that this immunity was one of the terms upon which the directors held office in this company. I do not think that it is illegal for a company to engage its directors upon such terms. I do not think, therefore, that an action by this company against its directors for negligence, where no dishonesty was alleged, could have succeeded.*"

Accordingly, the English common law position, which the experts said would have continued to have applied to an "ordinary" BVI company, ie, not one incorporated under the 1984 Act, was that a company could go as far as to relieve a director from the personal liability that would otherwise attach to the performance of his functions. Such a provision operates as an exoneration of the director from any liability (see, eg, *In re City Equitable Fire Insurance Company, Limited* [1925] 1 Ch 407) and provides immunity from suit.

252. The decisions under English law to which the experts referred led to a recommendation being made by the Company Law Amendment Committee in its 1925-26 Report (Cmd. 2657) that "*any contract or provision (whether contained in the company's articles or otherwise) whereby a director, manager or other officer of the company is to be excused from or indemnified against his liability under the general law for negligence or breach of duty or breach of trust should be declared void*". That recommendation was translated into legislation in 1929. It is perhaps noteworthy that the recommendation expressly dealt with two different aspects, namely excuse and indemnification.

253. In his submissions based on the evidence of Mr Jones QC, Advocate Bell closely analysed the decision at first instance of Romer J in the *City Equitable* case, emphasising that the relevant clause under consideration in that case was regarded as covering two separate elements. At page 430, his Lordship had remarked that the first part of the clause was "*concerned with actions and claims against the directors brought or made by persons other than the company itself*" and afforded an indemnity for such third party claims and the second part, providing "*that the directors are not to be answerable*", amounted to an exclusion clause. Because the language derived from the first part of such a clause had found its way into section 57(1) of the 1984 Act and was subsequently dealt with in the same way as section 132(1) of the 2004 Act, he submitted that this meant that the BVI court would read into section 132 (and its predecessor) that it was only effective to cover indemnities in respect of third party actions. It was suggested that this common law position must have underlain the legislative intention when enacting the 1984 Act, the two strands drawn from the *City Equitable* case being reflected in section 57(1) and section 54(2) respectively. Accordingly, albeit without expressly saying so, section 57(1) was inevitably limited to indemnification in respect of third party claims.

254. The difficulty with that submission, as explained by Mr Levy QC, is that the wording of section 57(1) of the 1984 Act omitted any words of limitation. As a result of applying the principles set out in the ***Bebo*** case, I believe the BVI court would not have needed to look further than the Act itself to decide what its meaning was. Even if it had thought fit to consider the background against which the 1984 Act had been enacted, the common law position was not that indemnities were only available in respect of third party claims. The legislature, therefore, retained a choice as to the extent to which to make exclusion of liability or indemnities void. The view I have accepted is that the BVI legislature chose through section 54(2) to prohibit international business companies from excluding the personal liability of directors, in the sense of not permitting blanket immunities across the board, including in respect of third party actions, but left to those companies the choice as to whether or not to afford their officers any form of indemnity and, if so, to what extent.

255. This issue was further dealt with in the Jersey Privy Council case to which Mr Levy QC referred in his first report (*Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985). Article 46 of the articles of association of the company in question has already been set out in full within the extract from that first report extensively quoted above. In giving judgment, Lord Brightman said (at page 991D):

> "*In the opinion of their Lordships article 46 is worded in a manner which is apt to exonerate a director who has innocently participated in an act which is ultra vires the company, and to excuse him from the obligation which would otherwise have lain upon him to reimburse the company for any loss thereby occasioned. … The directors are prima facie liable to the company for the loss. But that liability was incurred "in the conduct of the company's business." The directors are therefore entitled to be indemnified against such liability. A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him.*"

His Lordship continued (at page 992C):

> "*An article which exonerates a director from personal liability for a loss incurred by the company by reason of an ultra vires act in which the director has participated, does not have the indirect effect of validating the act which caused the loss. The act remains ultra vires notwithstanding that the company is precluded from suing the director. The clause does not ratify the ultra vires act, but only restricts the persons who can be sued for the loss which the ultra vires act has caused.*"

256. It was common ground that a court in the BVI would have regard to these cases as persuasive authority. Despite Advocate Bell's attempts to explain that Mr Levy QC had failed to grasp the distinction being drawn by Mr Jones QC between the two separate consequences of the directors' act being discussed in the ***Shelton*** case, I have reached the conclusion that a BVI court would appreciate that the use of the word "*relieves*" in section 54(2) of the 1984 Act addresses the type of provision dealt with in the ***Brazilian Rubber Plantations*** case and would not apply, because of the way in which section 57 remained open-ended, to an indemnity. The two-stage analysis given in the ***Shelton*** case would, in my view, persuade a BVI court (in the same way that the competing arguments in the evidence of the experts have persuaded me) that the position under BVI law as it stood after the enactment of the 1984 Act was that an international business company was left with a choice, in accordance with section 57, as to whether to provide an indemnity and, if so, the extent of such an indemnity. That is consistent with the common law position applicable at that time to BVI companies that were not incorporated under the 1984 Act and I certainly do not find it unsurprising that the same principles would be applicable to both types of company. An international business company could not, however, have included any provision completely releasing, in the sense of "*relieving*", a director from incurring the liability in the first place. As such, had a BVI court felt the need to consider the provisions in force prior to the enactment of the 2004 Act so as to

assist it in construing section 132, in the manner suggested by Mr Jones QC, I am satisfied that it would not have concluded that section 54(2) of the 1984 Act prohibited a company from giving an indemnity under section 57 to a director against the consequences of breaching the duty of care owed by the director to the company. Accordingly, the position before and after the enactment of the 2004 Act has remained consistent, such continuity apparently have been acknowledged by the Chief Minister as being one of the fundamental motivators when the BVI legislature was considering the new Act.

*Effect of conclusion*

257. The consequence of accepting the evidence of Mr Levy QC in preference to that of Mr Jones QC is that the Defendants succeed in raising the indemnity given to them through Article 14 of EBWL's Articles of Association. Although the end result of that conclusion amounts to the same thing, namely that the Plaintiff's claim for damages fails, because Mr Levy QC adopted the two stage analysis given in the ***Shelton*** case, by which the liability is incurred before the indemnity can apply, if called upon to do so I would offer the view that this means that the Defendants' counterclaim succeeds rather than there being a defence to the Plaintiff's claim as set out in para. 78 of *Les Defences*. In saying that, I am conscious that Lord Brightman commented in the ***Shelton*** case that "*A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him*", which suggests that my preference for treating the counterclaim as succeeding is wrong. However I am relying on the way the position was put in the expert evidence which I am obliged to consider, hence my reference to the way I understood Mr Levy QC to explain the ***Shelton*** decision by reference to a two-stage analysis which he suggested could equally be applied in this case.

Interest

258. The Advocates left open and unargued their different submissions about the way in which interest on any damages awarded should be calculated. Given the conclusion I have reached, the question of interest has become redundant and so I do not propose to add anything further on that topic.

Outcome and costs

259. For the reasons given I have decided that, by reference to the civil standard of proof, the Plaintiff has succeeded in establishing that both Defendants breached their duties of care to EBWL and, although this issue is very finely balanced, that the breaches caused the Plaintiff to sustain the loss alleged of US$6,004,100.94. However, I have also decided that EBWL's Articles of Association affords the Defendants, as former directors of EBWL, an indemnity against the money judgment and their costs because these are within the wording in Sub-Regulation 14.1, indemnifying them against "*all expenses, including legal fees, and against all judgments ... in connection with legal ... proceedings*". Therefore, the effect of the indemnity is to extinguish the judgment that would otherwise have been given in favour of the Plaintiff.

260. As regards costs, unless the parties wish to address this question further, in which case an intimation should be given to the Greffe within 14 days of this judgment being handed down, with the case being re-listed before a suitable Interlocutory Court, in accordance with the terms of regulation 14 of EBWL's Articles of Association, the order I make is that the Defendants shall have their costs, to be taxed if not agreed, on a full indemnity basis, pursuant to the implied term of the contract between them.

Postscript

261. I apologise to all concerned for the length of the judgment which, in turn, has meant that the time taken to finalise it has considerably exceeded the period in which I would have hoped to

have completed it. I have endeavoured to set out as fully as I can the events that took place and to extract from the contemporary documentation a detailed analysis of who said and did what at each stage so that all those involved get a clearer understanding of the decisions I have reached. If I have descended into an unwarranted level of detail, I am sorry, but I believe it to be helpful to have explained in detail why it is that what might otherwise have seemed almost an everyday decision at Barclays Wealth fell the wrong side of the line under the terms of the BVI Companies Act and why the indemnity available under BVI law exists and avails the Defendants in the way I have found it does.