



Neutral Citation Number: [2025] CIGC (FSD)70

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 203 OF 2020 (NSJ)

BETWEEN:

ABDULHAMEED DHIA JAFAR

Plaintiff

and

(1) ABRAAJ HOLDINGS (in official liquidation)

(2) GHF GENERAL PARTNER LIMITED

(in its capacity as general partner of GHF Fund LP (formerly Abraaj Growth Markets Health Fund LP) and GHF Fund (B) LP (formerly Abraaj Growth Markets Health Fund (B) LP))

(3) THE GHF GROUP LIMITED

(formerly The Abraaj Healthcare Group Limited)

(4) ABRAAJ GENERAL PARTNER VIII LIMITED

(in its capacity as general partner of Neoma Private Equity Fund IV LP (formerly known as Abraaj Private Equity Fund IV LP))

Defendants

Appearances: Lord Falconer of Thoroton and Luka Krsljanin instructed by Christopher Young and Sarah McLennan of Forbes Hare for the Plaintiff

Stephen Atherton KC and Sarah Tresman instructed by Shelley White, Matthew Goucke and Jonathan Turner of Walkers for the Second and Third Defendants

Andrew Ayres KC and Henry Phillips instructed by Jennifer Fox and Rebecca Findlay of Ogier for the Fourth Defendant

Before: The Honourable Justice Segal

TRIAL JUDGMENT – PART 1 – LIABILITY ISSUES

Introduction and overview of the claims

1. This is my judgment on liability following the trial of claims made by Mr Abdulhameed Jafar (*Mr Jafar*) arising out of loans made by him in 2017 to Abraaj Investment Management Limited (*AIML*) and possibly Abraaj Holdings (*AH*) (the First Defendant). AH and AIML are Cayman Islands companies in liquidation in this jurisdiction and insolvent (AH eventually took no part in the trial because Mr Jafar's claims against it were settled). Mr Jafar's claims are set out and pleaded in his Re-Re-Amended Statement of Claim (the *RRASOC*). At the trial Lord Falconer of Thoroton and Mr Luka Krsljanin appeared for Mr Jafar, Mr Stephen Atherton KC, and Ms Sarah Tresman appeared for the Second and Third Defendants, and Mr Andrew Ayres KC and Mr Henry Phillips appeared for the Fourth Defendant. Mr Tom Smith KC also appeared for the First Defendant.
2. The monies advanced by Mr Jafar to AIML and AH were rapidly passed on by them to two private equity funds that were part of the same affiliated group of companies, entities and funds operating under the name *Abraaj*. These funds are Neoma Private Equity Fund IV LP (*Fund IV*) and the Abraaj Growth Markets Health Fund (the *AGHF*, which Mr Jafar referred to as the Healthcare Fund) (Fund IV and the AGHF are together referred to as the *Funds*).

3. This affiliated group of companies, entities and funds was run, and Mr Jafar alleged, completely controlled, by Mr Arif Naqvi (**Mr Naqvi**). Mr Jafar made the loans at the request of Mr Naqvi and following a few meetings and conversations with him in December 2017. Mr Jafar claimed that during these meetings and discussions Mr Naqvi had fraudulently made certain statements to him that constituted representations in order to induce him to make the loans on which he had relied, and which did induce him to do so.
4. The Funds are constituted as exempted limited partnerships. In substance, the Funds are the real defendants to these proceedings albeit that they are sued via their general partners. The general partners of the Funds are (a) GHF General Partner Limited (**GHF GP**), which is the Second Defendant (and was referred to by Mr Jafar as the Healthcare GP), and the general partner of the AGHF and (b) Abraaj General Partner VIII Limited (**GP8**), which is the Fourth Defendant, and the general partner of Fund IV. The GHF Group Limited (**GHF**), the Third Defendant, was one of the companies through whom investments were made by the general partner of the AGHF. GHF also received some of the funds advanced by Mr Jafar to AH and AIML. GHF and GHF GP are together referred to as the **GHF Parties** and the GHF Parties and GP8 are referred to as the **Fund Parties**.
5. Mr Jafar accepted that only AIML and AH were borrowers and liable in debt to repay the loans that he advanced. Since both AIML and AH are in insolvent liquidation his only chance of making a substantial recovery, in addition to what he will receive by way of dividends from the liquidations and what he has already recovered from Mr Naqvi as a result of the settlement of Mr Jafar's claims against Mr Naqvi, is if he can establish claims directly against the Funds (this means against the Funds' general partners or AIML in its capacity as manager of the Funds). Mr Jafar accepted that since, *inter alia*, he had proved in the winding up proceedings of both AIML and AH in reliance on the loans he had advanced he was unable in these proceedings to maintain a positive case that he had or retained the right to rescind the loans. In substance he was to be treated as having lost the right to rescind that would arise if his claims based on Mr Naqvi's alleged fraudulent misrepresentations were otherwise made out.

6. In these circumstances, Mr Jafar made two separate claims against the Fund Parties. First, he made a claim in deceit under the law of the Cayman Islands on the basis that the Funds were to be treated as responsible and liable for the fraudulent misrepresentations alleged to have been made by Mr Naqvi. Mr Jafar accepted that as a matter of Cayman Islands law he had to show not only that all the elements of a deceit claim under Cayman Islands law were made out but also that under the double actionability rule that applies in this jurisdiction to tort claims based on acts taking place abroad, he had also to show that he had a claim in deceit that satisfied the requirements of the law of the United Arab Emirates (*UAE*) (save in relation to the issue of whether Mr Naqvi's actions were to be attributed to the Fund Parties and the Funds). Secondly, Mr Jafar made a claim against the Fund Parties under the UAE law of unjust enrichment (enrichment without cause) based on the receipt by or on behalf of the Funds of payments made by AIML and AH out of the monies advanced by Mr Jafar.

Summary of my decision

7. I have concluded that Mr Jafar has failed to prove his case in relation to both claims and causes of action so that they must be dismissed.
8. I deal in this judgment with my reasons for dismissing Mr Jafar's two claims. While it is not strictly necessary for me to deal with the disputes as to the quantum of Mr Jafar's loss and the amount to be awarded to him if he succeeded in his deceit or enrichment without cause claims I propose to deliver a further and separate judgment dealing with quantum issues. Since I have also dismissed Mr Jafar's claims without having to examine whether the representations made by Mr Naqvi were in all respects false, I have not found it necessary to deal in this judgment with the dispute and the detailed factual evidence concerning the financial position of AIML, AH and the Fund Parties at the time that the loans were advanced. However, I will deal with this issue and evidence in the second judgment. I do not wish to delay any further the delivery of this already long delayed judgment or to make any longer this already very lengthy judgment.

9. As regards his Cayman Islands law claim in deceit I have concluded that Mr Jafar has not proved that Mr Naqvi said to him what he claimed in his pleaded case he had been told by Mr Naqvi, that Mr Jafar did not understand Mr Naqvi to be making, and that a reasonable prospective lender in his position would not have understood Mr Naqvi to have been making, the pleaded express or implied representations and, importantly, that in any event Mr Jafar was not induced by and did not rely to any material extent on any representations made by Mr Naqvi. As a result, Mr Jafar's claim in deceit falls to be dismissed.
10. As a result, it is not strictly necessary to decide whether Mr Jafar would also be able to establish and prove a claim in deceit under UAE law. However, I have considered that claim and the expert evidence adduced in respect of UAE law. I have concluded that Mr Jafar has also failed to prove his case in deceit under UAE law.
11. As regards Mr Jafar's UAE law claim in enrichment without cause, I have also concluded, based on my assessment and evaluation of the UAE law expert evidence, that Mr Jafar has failed to prove his case and that this claim also falls to be dismissed. This is primarily because I have accepted the expert evidence on UAE law to the effect that under UAE law Mr Jafar is unable to maintain a claim in enrichment without cause where he has decided to affirm and not rescind the loans (and the agreements to advance the loans).
12. I have found this to be a challenging case. The challenges relate both to the factual and legal issues. The challenge in relation to the factual matters and disputes arises in particular from the fact that Mr Jafar's case was based on his conversations with Mr Naqvi, and oral misrepresentations made by Mr Naqvi during the first of those conversations, which were never documented in writing. Mr Jafar was forced to rely on his own recollection of conversations that took place many years ago in circumstances where he was largely only able to say that Mr Naqvi had used words to the effect of what he said Mr Naqvi meant rather than the words themselves. While Mr Jafar often sought to give an account of conversations in which Mr Naqvi had made various precise and specific statements, the documentary evidence established that in fact Mr Naqvi was likely to have spoken in more general and less precise terms on a number of key points and that the discussions were in some important

respects preliminary and inconclusive. In addition, the Court has had to form a view on what Mr Naqvi really said without receiving evidence from him, the other crucial party to the discussions. Furthermore, and to my mind (as I explain below) the Court has had to form a view on what Mr Naqvi really said without hearing evidence from Mr Jafar's son, Mr Badr Jafar (*Badr*). As I have found, Mr Jafar chose not to call Badr and require him to give evidence when he could have done. I regard this as a serious and significant omission. It is clear beyond doubt that Badr was a close family friend of Mr Naqvi and was having detailed and intimate discussions with Mr Naqvi at the time that the loans were being negotiated. He was also a director of AH. Mr Jafar's decision to make his claims without having Badr give evidence is in my view very damaging. It created the impression that he was seeking to litigate his case by withholding critical evidence (even accepting of course that he gave discovery and evidence himself) without making full disclosure to the Court of and without the Court being given the full picture (and an opportunity to hear from Badr and evaluate his evidence in cross-examination). Putting the point more neutrally, Mr Jafar made it much more difficult for himself to succeed by failing to produce Badr as a witness. Mr Jafar did produce Mr Varoujan Nerguizian (*Mr Nerguizian*), his banker, who was closely involved in most of the key discussions but crucially Mr Nerguizian was not present at the first Jafar-Naqvi meeting at which the alleged representations were made and was clearly conflicted because of his personal and professional interest in a successful outcome of Mr Jafar's case. As a result of these limitations on the witness testimony presented to the Court, the Court has had carefully to examine and to rely (without ignoring the witness testimony) on the vast but incomplete documentary record, most of which was adduced in evidence by the official liquidators of AH, in order to test Mr Jafar's and Mr Nerguizian's evidence and to form as accurate a picture as possible of what was said and happening and the relevant context. Factual challenges also arise because of the limited direct witness evidence as to the manner in which AH, AIML and the Fund Parties operated. It has been necessary to reconstruct this based on further voluminous documentary evidence.

13. The challenge in relation to legal matters and disputes arises in particular from the fact that Mr Jafar's targets are indirect recipients of the funds he advanced as loans to AIML and possibly AH. He has been forced to pin down and establish the roles that Mr Naqvi was

playing and the capacity in which he was acting when negotiating the loans in circumstances where Mr Naqvi did not deal with this or make the position clear in his discussions with Mr Jafar. Because even on Mr Jafar's case the only two entities with whom he entered into any agreements or legal relations were AIML and possibly AH, Mr Jafar has had to make a case that Mr Naqvi was also formally acting on behalf the Fund Parties, when the Fund Parties were not assuming any liabilities to Mr Jafar and did not need to engage with him. This was always an uphill struggle which in my view Mr Jafar was unable to climb. Mr Jafar had abandoned his previous case based on the Fund Parties' liability as participants in the alleged fraud or liability as accessories. In substance, he was forced to try to fit an accessory liability claim into a deceit claim where the factual basis on which his claim was based was thin and contested. In addition, Mr Jafar's decision not to rescind the loans he had made to AIML and possibly AH (the agreements to lend and advance these loans) forced him to rely on novel and untested principles of UAE law which on any basis made his UAE law claim in unjust enrichment much more difficult to establish.

14. As regards the overall merits, I have a good deal of sympathy for Mr Jafar since he has ended up being drawn into Mr Naqvi's Ponzi scheme and losing a substantial amount of money. Things have turned out very badly for him and his family which is undeniably most unfortunate. But I have concluded, after as careful a review of the evidence as I can muster, that he was the author of his own misfortune because he allowed himself to be seduced by Mr Naqvi's stellar reputation and the prospects of a huge and rapid profit (reinforced in all probability by the urgings of Badr, Mr Naqvi's close friend and confidant).
15. The result of this review and assessment of all the evidence has unfortunately been a number of findings that are adverse to and highly critical of Mr Jafar and Mr Nerguizian and involve findings critical of the conduct of Badr based on the documentary record and inferences drawn from those documents as well as the context and inherent probabilities. I have not made these findings lightly but have felt driven to them by the evidence and an assessment of what was in reality happening when Mr Jafar was negotiating and making the loans. I say unfortunately because I accept that Mr Naqvi was the fraudster and wrongdoer in this case and that Mr Jafar and Mr Nerguizian are not defendants accused of wrongdoing. I am also

very conscious and respect the fact that Mr Jafar is a very successful and well-regarded businessman. I do not intend to impugn what I have no doubt is a thoroughly well-deserved reputation. I am not saying that Mr Jafar was a wrongdoer. But I have concluded that he was aware of aspects of Mr Naqvi's misconduct and was prepared to and did turn a blind eye to it to assist Mr Naqvi and allow Mr Naqvi to deal with his existential crisis. Mr Jafar became caught up in and drawn into Mr Naqvi's crisis and the emergency that required corners to be cut and proper disclosures not to be made in order to avoid the Abraaj pack of cards from collapsing. I have also found that Mr Jafar has not given this Court an entirely true and accurate account of what happened. He admitted that he was concerned about Badr being put on the spot if he was required to give evidence and having to choose between giving potentially damaging evidence or perjury and no doubt he felt that it was justifiable to sanitise and repackage his evidence to improve his case and his chances of recovering what he believes was taken from him by fraud. That may be so, but I have had to conclude that I must reject significant parts of his evidence (and that of Mr Nerguizian also).

16. There was a dispute between the parties as to whether this was ultimately a case of a conflict between and amongst competing innocent victims of Mr Naqvi's fraud. The Fund Parties claimed that they, and in particular their investors, were also innocent victims of the fraud as much as Mr Jafar. Mr Jafar claimed that the Fund Parties were participants in Mr Naqvi's fraud through their de jure directors and management. While it is unclear how much the investors have lost, and that Mr Jafar's claims are against the Fund Parties and not the investors, I accept that the Fund Parties have a real point. If Mr Jafar succeeds, the investors in the Funds who were the victims of Mr Naqvi's Ponzi scheme will suffer and lose out. This is a zero-sum game. This reality does not drive or determine the legal outcome of the dispute but does demonstrate that there are innocent parties whose interests are affected by the outcome and being defended by those now representing the Fund Parties.
17. I have seen the force of the claim (almost a plea) made by Lord Falconer on Mr Jafar's behalf that in a case involving a massive all pervasive corporate fraud conducted and orchestrated by a central and dominant corporate leader (sadly a not uncommon event) where funds are received almost randomly by one corporate entity and then passed on to and around the

corporate entities without regard to their separate identities or legal formalities for the purpose of furthering the fraud, the Court should lean strongly in favour of granting relief. I have certainly taken into account the overall situation and context that I have described but the Court must decide Mr Jafar's claims on the facts and law as it finds them (as I have sought to do). I would note that the plea made on Mr Jafar's behalf loses much of its force where Mr Jafar did not seek to pierce the veil or rely directly on the failure to treat the Abraaj entities as separate entities or, as I have said, bring claims directly against the Fund Parties as participants in or accessories to the fraud.

18. I must apologise to the parties and their legal teams for the huge amount of time it has taken me to complete this judgment. I have sought regularly to provide them with updates but even then have ended up taking longer than I had hoped and predicted. As I have explained, there was initially a delay of a number of months because I needed to complete three other urgent judgments in relation to hearings that had taken place shortly before the trial in these proceedings began. While I was able to write up the key points arising from hearing the evidence shortly after the conclusion of the trial I was unable to make further progress in drafting the judgment for a number of months. Subsequently delays have been caused in part by the need to spend an enormous amount of time checking the documentary record and also by other competing judicial commitments.

Background

19. The group of companies of which AH was the holding company and the various private equity funds and other entities associated with that corporate group often used the Abraaj name and were together often referred to, by both those within and outside the entities, as the Abraaj group (although the precise meaning of that term and the entities intended to be covered by it as it was used in particular contexts is disputed in these proceedings). The founder of and a key figure in the management of these companies, entities and funds was Mr Naqvi. Mr Naqvi was, as I have explained, the individual who requested and the person with whom Mr Jafar discussed and negotiated the Loans (as defined below). As we will see, Mr Naqvi was a close friend of Badr, who was a non-executive director of AH.

20. Mr Jafar's claims relate to substantial payments he made, with the assistance of the Bank of Sharjah (**BOS**), and following discussions with Mr Naqvi in late 2017. The payments were treated by Mr Jafar and Mr Naqvi as three separate loans and I shall refer to them separately as the **First Loan**, the **Second Loan** and the **Third Loan** (as those terms are used the **RRASOC**) and together as the **Loans**.
21. The payments were made, as I have said, to AH and AIML (I discuss below whether AH was formally and as a matter of law a borrower). AIML is a subsidiary of AH. AIML acted as the investment manager of the AGHF and Fund IV, and other Abraaj private equity funds. These were in the main part constituted as exempted limited partnerships pursuant to the then prevailing Revision of the Exempted Limited Partnership Act (the **ELPA**). AH and external investors invested in these funds.
22. Mr Jafar is a leading and very successful businessman who founded the Crescent Group in the early 1970s. The Crescent Group is a family business group which has been operating in the MENA region since 1971. The Crescent Group has two main subsidiaries: Crescent Enterprises (**CE**) and Crescent Petroleum International Company Limited (**Crescent Petroleum**). Mr Jafar is non-executive chairman of the board of these companies. His son Badr (whose role in relation to the subject matter of these proceedings was hotly contested and is discussed in detail below) is the President (and CEO) of Crescent Petroleum while Mr Jafar's other son, Mr Majid Jafar (**Majid**), is the CEO of Crescent Enterprises. Crescent Enterprises was a founding shareholder and limited partner in certain Abraaj funds.
23. Mr Jafar claims that the payments were loans to AH and AIML for which they are liable as borrowers. He has filed proofs of debt in the winding up proceedings for both AH and AIML. In addition, he claims that he was induced to make the Loans by fraudulent misrepresentations (express and implied) made by Mr Naqvi, that Mr Naqvi when making the misrepresentations was acting for or with the authority of the Funds and that as a result, in addition to his claims against AH and AIML in debt, he has claims in damages for deceit against the Funds. Mr Jafar also maintains a claim in enrichment without cause under UAE

law against the Funds as a result of their receipt of sums paid to them by AH and AIML out of the payments made to them by Mr Jafar.

24. As exempted limited partnerships the Funds have no separate legal personality. They are constituted by an agreement (a limited partnership agreement) between a general partner and one or more limited partners. Fund IV is a single limited partnership. But the AGHF involves three exempted limited partnerships domiciled in the Cayman Islands, namely (a) Abraaj Growth Markets Health Fund LP (the **Partnership**), (b) the Abraaj Growth Markets Health Fund (B) LP (the **Parallel Fund B**) and (c) the Abraaj Growth Markets Health Fund (C) LP (the **Parallel Fund C**, which, together with the Parallel Fund B, are referred to as the **Parallel Funds**).
25. From inception and to date Fund IV's general partner was GP8. Prior to 20 June 2019 and at the time that Mr Jafar advanced the Loans, the general partner of each of the limited partnerships that make up the AGHF was Abraaj Growth Markets Health Fund General Partner Limited (the **AGHF GP**, referred to by Mr Jafar as the Former Healthcare GP). The general partner of the AGHF after that date and currently is GHF GP. AGHF GP and GHF are both Cayman Islands exempted limited companies.
26. The AGHF was established for the purposes of investing in healthcare opportunities in growth markets and did so via various companies. GHF was one of those companies. Since 27 March 2017 GHF has been wholly owned by GHF Holdco Mauritius 2 Limited (**HoldCo I**), which is wholly owned in turn by GHF Holdco Mauritius 1 Limited (**HoldCo 2**).
27. The Loans were made during the period 21 December – 28 December 2017 on short notice following a few brief meetings and a few telephone calls, emails, and text (including WhatsApp) messages. The First Loan was advanced on 21 December 2017, the Second Loan was advanced on 27 December 2017 and the Third Loan (which has been repaid) was advanced on 28 December 2017.

28. The first meeting at which the Loans were discussed was attended only by Mr Jafar and Mr Naqvi (the ***First 20 December 2017 Meeting***). This was the key meeting on which Mr Jafar's claims in deceit are based. There was a second meeting on 20 December 2017 that was attended by Mr Jafar, Mr Naqvi, and Mr Nerguizian of BOS, who was Mr Jafar's banker and financial adviser. A third meeting was held on 27 December 2017 which was attended only by Mr Naqvi and Mr Nerguizian. The relevant telephone calls, emails and messages were between Mr Jafar, Mr Nerguizian, Mr Naqvi, and Badr.
29. Mr Jafar claims that during the First 20 December 2017 Meeting Mr Naqvi made certain statements (see [20] of the RRASOC). He sets out what he claims Mr Naqvi said (he avers that Mr Naqvi made the nine statements set out in [20] of the RRASOC "*or used words to the same effect*"). Mr Jafar claims that by making these statements, Mr Naqvi is to be taken to have made three representations, which are set out at [25] of the RRASOC. He further claims that in making these representations, Mr Naqvi also made three implied representations and thereby conveyed a particular message which he refers to (in [26] of the RRASOC) as the ***Overarching Message***.
30. Mr Jafar claims that the Overarching Message was untrue. He also claims that one of the statements made by Mr Naqvi at the First 20 December 2017 Meeting was a separate representation and untrue. This is the statement set out in [20(8)] of the RRASOC: "*Senior representatives of [investors in AGHF] and [the International Finance Corporation] had assured Mr Naqvi that funds returned to investors would be re-invested before the end of January 2018.*" This is referred to as the ***Reinvestment Representation***.
31. Mr Jafar claims that Mr Naqvi knew that the Overarching Message and the Reinvestment Representation were untrue (and that he failed to correct them prior to Mr Jafar advancing the Loans).
32. In summary, Mr Jafar asserted that Mr Naqvi had told him that substantial loans were urgently needed by Abraaj entities before the end of 2017 to deal with a short-term financial problem caused by unjustified demands for the return of uninvested capital (the ***Uninvested***

Capital) by investors in the AGHF (the *Healthcare Investors*). Mr Jafar said that in response to a number of questions which he had raised with Mr Naqvi concerning the reason why the Healthcare Investors could not be paid their Uninvested Capital within the timeframe they had demanded, the Healthcare Investors' rights to demand repayment of their Uninvested Capital, the sources that would be available to repay the proposed loans and the financial position of the Abraaj entities concerned, Mr Naqvi had assured him that the Loans could and would be repaid in early 2018. Mr Jafar said that he had relied on these assurances and that these assurances had induced him to advance the Loans. He said that it was apparent from what Mr Naqvi had said that Mr Naqvi was seeking loans and monies for the ultimate benefit of the Funds. Mr Jafar claimed that therefore Mr Naqvi was to be treated as having been acting, when he met with and spoke to Mr Jafar for the purpose of arranging the Loans, for and on behalf of at least the companies, entities and limited partnerships for whose benefit the Loans were to be made, all of which he controlled, and was to be taken as having made representations in the Loan negotiations on their behalf (Mr Jafar also claimed that Mr Naqvi was to be treated as having acted for each and every Abraaj entity but since he was only making claims against the Fund Parties, and the Funds, there is no need to adjudicate on a wider range of claims, although the credibility of the claim that Mr Naqvi was to be treated as acting for an unspecified number of unparticularised other entities and partnerships does affect the assessment of the credibility of the claim and the likelihood that Mr Naqvi really was acting or representing that he was acting in this way). This meant that the implied representations (giving rise to the Overarching Message) and the express representation (constituting the Reinvestment Representation) on which his deceit claim was based were made on behalf of such companies, entities and partnerships, and not just by and on behalf of AH and AIML.

33. I have said that Mr Jafar made the Loans with the assistance of BOS. Initially, according to Mr Jafar, he had suggested to Mr Nerguizian, a senior manager at the BOS, that he and the BOS each advance half of the sum requested by Mr Naqvi (that is half of the US\$90 million initially requested by Mr Naqvi). However, since neither AH nor AIML (nor any other Abraaj entities) were at that time customers of BOS, when Mr Nerguizian discussed with Mr Naqvi the structure and terms of the proposed Loans it rapidly became apparent that before

BOS could itself directly advance funds to AH and AIML or any other Abraaj entities to whom Mr Naqvi wished the funds to be paid, they would need to become BOS customers. But for that to happen it would be necessary for BOS to complete (and for the companies to provide to BOS relevant information required for) the know-your-client (*KYC*), anti-money laundering (*AML*) and other regulatory checks that were required before BOS could take on a new customer, and there was insufficient time for these checks to be done in view of the need to advance the funds urgently. Therefore, Mr Jafar and Mr Nerguizian said, Mr Nerguizian had suggested a different structure for the lending that would allow BOS to fund the Loans and assume half of the risk related to the proposed US\$90 million advance without making loans directly to the Abraaj companies. An Abraaj company nominated by Mr Naqvi would issue post-dated cheques to Mr Jafar and BOS would then discount the cheques (pursuant to a discounting facility between BOS and Mr Jafar) and pay to Mr Jafar the amount of the cheques (less a fee) by crediting this sum to his accounts with BOS. Mr Jafar could then advance the full amount of the Loans to the Abraaj companies nominated by Mr Naqvi. Mr Jafar would assume a liability to pay BOS the value of the cheques to the extent not paid by the relevant Abraaj company on presentation save in respect of US\$45 million. BOS would enter into a loss sharing arrangement with Mr Jafar so that BOS would assume the risk of non-payment of US\$45 million of the initial advance of US\$90 million.

34. Mr Jafar is now unable to recall, with limited exceptions, the precise words used by Mr Naqvi at the First 20 December 2017 Meeting (or the subsequent meeting). He (and Mr Nerguizian) did not keep *any* written record of the meetings with Mr Naqvi or of the statements or representations which Mr Jafar now says that Mr Naqvi made. They did not refer to such representations in *any* emails or other messages sent at the time. The only documentary evidence of liability in respect of the Loans is the post-dated cheques issued by AIML together with some documents recording the cheque discounting facility between BOS and Mr Jafar, some of which refer to AIML and AH and one of which was signed on behalf of AIML (in relation to the Second Loan). Written loan agreements between Mr Jafar and AIML or AH were not entered into. There was therefore no document confirming the identity of the borrower and obligors in respect of the Loans or setting out the terms of the Loans or setting out and confirming any representations made in relation to the Loans and

their negotiation. The only direct evidence of the statements and representations alleged to have been made by Mr Naqvi to Mr Jafar comes from Mr Jafar himself. His account is supported by the evidence of Mr Nerguizian. However, as I have said, Mr Naqvi did not give evidence.

35. Initially, AH was a defendant to these proceedings but as I have noted Mr Jafar's claim against it was settled before the start of the trial. In addition, at the commencement of the trial and up to the close of the evidence, the claim made by AH's joint official liquidators (*JOLs*) against GHF (in FSD 150 of 2020) in respect of the payments made by AH to the GHF was also being tried. However, that claim was settled before the start of the parties' closing speeches.

The evidence

36. I heard evidence both from factual and expert witnesses with most of the factual witnesses having been tendered by Mr Jafar. The expert witnesses dealt with issues of UAE law and valuation. The valuation evidence related to the value of certain assets which Mr Naqvi had transferred to Mr Jafar pursuant to a settlement agreement (the *Settlement Assets*) in respect of claims made by Mr Jafar. It was common ground that Mr Jafar must give credit for payments and assets received from Mr Naqvi.
37. For Mr Jafar:
- (a). Mr Jafar provided two witness statements (*Jafar 1* and *Jafar 2*) and was cross-examined over three and a half days.
 - (b). Mr Nerguizian provided a witness statement (*Nerguizian 1*) and was cross-examined for just over two days.
 - (c). Mr Tushar Singhvi served a witness statement (*Singhvi 1*) and was cross-examined. Mr Singhvi is the Deputy CEO and Head of Investments at CE. Mr Singhvi gave evidence as to CE's relationship with and investments in the Abraaj entities up to 20

December 2017, as to the settlement between Mr Jafar and Mr Naqvi and the Settlement Assets and as to the process for selling them, which Mr Singhvi was responsible for overseeing and managing on behalf of Mr Jafar.

- (d). Mr Sean Cleary provided a witness statement (*Cleary I*) and was cross-examined. Mr Cleary gave evidence at the request of both Mr Jafar and the JOLs. He had been a director of AH from 18 March 2010 until his resignation on 26 June 2018, following the appointment of the AH JOLs. He gave evidence as to his professional experience and role as chairman of the board of directors of AH from 8 February 2018 until his resignation; the structure of the Abraaj entities (including the role and composition of the board of directors of AH, the allocation of responsibilities between the board and management and Mr Naqvi's role at AH and across the Abraaj entities); his and the other non-executive directors' awareness of the alleged misappropriation and commingling of monies across the Abraaj entities, the Loans provided by Mr Jafar to AH and AIML in December 2017, AH's financial position in late 2017 and his role in 2018 once the board of AH was advised and became fully aware of the alleged misappropriation and financial problems of AH and the other Abraaj entities.
- (e). Mr Peter Coats provided two expert reports dealing with the valuation of some of the Settlement Assets and was cross-examined. Mr Coats is a partner in Ernst & Young Ltd in Zurich Switzerland and a qualified chartered accountant.
38. For the GHF Parties, Mr Andrew Farnum provided a witness statement (*Farnum I*) and was cross-examined. Mr Farnum was Director, Strategic Investment Fund at the Bill & Melinda Gates Foundation (*BMGF*). BMGF had invested in the AGHF in 2015 and Mr Farnum was the representative for BMGF in respect of the AGHF since April 2016. He gave evidence as to his understanding as to how the AGHF was managed and as to his involvement in the request for the return of uninvested funds in November and December 2017.
39. For the Fund Parties, Mr Joel Cohen gave expert evidence as to the valuation of the Settlement Assets. He provided two reports and was cross-examined.

- 40 Mr Simon Conway, one of the AH JOLs also provided two witness statements (*Conway 1* and *Conway 2*) and was cross-examined. Mr Conway originally gave evidence on behalf of the JOLs both in respect of the JOLs' claims in FSD 150 of 2020 and of Mr Jafar's claims in FSD 203 of 2020 but after the claims by and against the JOLs were settled it was agreed that Mr Conway's evidence would continue to stand as evidence in FSD 203 of 2020 which could be relied on by any of the parties.
41. Three expert witnesses also gave evidence as to UAE law. I deal with their evidence below in my discussion of Mr Jafar's claims based on UAE law.

The deceit claim – the core parts of the RRASOC relating to the nature and types of misrepresentation alleged to have been made by Mr Naqvi

42. [19]-[29] of the RRASOC set out Mr Jafar's pleaded case as to what Mr Naqvi said to him and what express and implied representations Mr Naqvi is to be taken to have made as a result of those statements. Various schedules are attached to the RRASOC including schedules setting out the terms of the Loans which it is averred were agreed. The drafting of the pleading and the formulation of Mr Jafar's case is complex because there are various steps in the argument and reasoning.
43. Mr Jafar refers to what Mr Naqvi said to him (or at least the meaning of what he recalls Mr Naqvi actually said without being able to aver the exact words he used), what he understood Mr Naqvi to be expressly representing by his statements, what further representations he understood to be implicit in the representations made by Mr Naqvi, what a reasonable person would have inferred as being expressly and implicitly represented by Mr Naqvi's statements and why the express and implied representations made were false.
44. Because of this complexity it is worth setting out the relevant parts of the pleading in full as follows (underlining added):

“THE OVERARCHING MESSAGE

19. *On 20 December 2017, Mr. Naqvi approached Mr. Jafar with the intention of borrowing money for the benefit of the Abraaj Group and in particular the*

Healthcare Fund and APEF IV. In the context pleaded in paragraphs 12A-18D above and for the reasons pleaded below at paragraph 32, Mr. Naqvi made this approach with the authority and/or agreement and/or knowledge of AH, the Former Healthcare GP, AHG and GP8.

20. *In the course of a meeting between them on 20 December 2017, which took place in the late morning, at or after 11am UAE time, at Mr Jafar's offices in Sharjah, UAE and lasted about 30-45 minutes, Mr. Naqvi asked to borrow money urgently from Mr. Jafar. Mr. Naqvi stated that, or used words to the same effect:*
- (1) *Certain investors in the Healthcare Fund ("the Healthcare Investors") had demanded the return of uninvested capital ("the Uninvested Capital");*
 - (2) *There was no contractual or other legal basis for this demand as (according to Mr. Naqvi) the placing by Abraaj of the Uninvested Capital in its treasury and use for general business purposes was permissible;*
 - (3) *A legal opinion from Freshfields Bruckhaus Deringer LLP had confirmed there was no contractual or other legal basis for the investors' demand. Mr. Naqvi did not provide Mr. Jafar with a copy of that opinion;*
 - (4) *The Healthcare Investors had threatened to escalate their unjustified demands for the return of the Uninvested Capital and, thereby, generate unjustified adverse publicity for the Abraaj Group, which would be reputationally damaging, particularly coming from high profile investors such as the Gates Foundation and the International Finance Corporation ("IFC");*
 - (5) *Mr Naqvi feared that such unjustified adverse publicity would cause irreparable reputational and consequential damage to the Abraaj Group;*
 - (6) *The Abraaj Group needed to borrow US\$290 million before the end of December 2017, of which US\$250 million was to pay the Uninvested Capital to the Healthcare Investors and (Mr. Naqvi implied) the balance was required to meet urgent liquidity needs of other Abraaj Group entities;*
 - (7) *This loan was only needed on a short-term basis;*
 - (8) *Senior representatives of the Healthcare Investors and the IFC had assured Mr Naqvi that funds returned to investors would be re-invested before the end of January 2018 [the **Reinvestment Representation**]; and*
 - (9) *The Abraaj Group was financially sound, but was simply facing short-term cash/liquidity issues over the year end to address in particular the Healthcare Fund's problem with its investors.*

21. *Mr Naqvi requested that Mr Jafar urgently lend US\$90 million and explained that he (Mr Naqvi) was in discussions with Emirates National Bank of Dubai ("Emirates NBD") to raise an additional US\$200 million.*
22. *At that same meeting, Mr. Jafar told Mr. Naqvi that he wished to discuss matters with his banker, Mr. Varouj Nerguizian ("Mr Nerguizian"), CEO of the Bank of Sharjah ("BoS").*
23. *Thereafter, further conversations and/or meetings took place in relation to the First Loan, Second Loan and Third Loan, during which Mr. Naqvi did not correct any of the statements pleaded in paragraph 20 above:*

The First Loan

- (1) *A telephone call took place in the afternoon of 20 December 2017, between Mr. Naqvi, Mr. Jafar and Mr. Nerguizian, Mr. Jafar's banker and the CEO of BoS, which took place at around 2pm UAE time and lasted about 10 minutes ("the 20 December 2017 Telephone Call").*

PARTICULARS

In the course of the 20 December 2017 Telephone Call, Mr. Naqvi:

- (a) *Stated that the unencumbered assets of the Abraaj Group would be available to meet repayments to Mr Jafar and identified alternative sources of funds which could be used to meet such repayments;*
 - (b) *Stated that he was on the verge of finalising other funding, including selling down equity in AH, which would generate significant liquidity;*
 - (c) *Requested that the proposed loan be US\$100 million and the date for repayment be extended to 28 February 2018 to provide an additional buffer of time; and*
 - (d) *Requested that the loan be made to AIML, since, unlike AH which did not have a chequing account, AIML could, at the time that the loan was to be made, issue a cheque (in the amount of the principal, plus fees and interest) to Mr Jafar post-dated to 28 February 2018.*
- (2) *A meeting took place between Mr. Naqvi, Mr. Jafar and Mr. Nerguizian in the early evening of 20 December 2017 at the Royal Mirage Hotel, Dubai, for which Mr. Jafar was present for around 30-45 minutes. Mr. Jafar and Mr. Naqvi discussed certain practicalities relating to the First Loan; Mr. Jafar and Mr. Naqvi reiterated and confirmed their agreement to the matters that had been discussed in the telephone calls that had taken place*

earlier that same day: namely, the amount of the loan (US\$100 million); the conditions on which the loan was to be provided; the applicable interest rate; and the time for repayment. Mr Jafar and Mr Naqvi agreed that Mr Nerguizian and Mr Naqvi would take care of the necessary arrangements and documentation in respect of the First Loan Agreement.

The Second Loan

- (3) *A telephone call took place on 26 December 2017, between Mr. Naqvi and Mr. Jafar, whilst Mr. Jafar was in Switzerland, during which Mr. Naqvi requested a further loan of US\$200 million, on the terms set out in the Schedule of Loan Terms annexed hereto.*

PARTICULARS

- (a) *Mr. Naqvi stated that:*
- (i) *The proposed terms from Emirates NBD, referred to at paragraph 21 above, were draconian and this deal was unlikely to close. Mr Naqvi stated that he was not happy with the way that ENBD were approaching negotiations, and indicated that certain of ENBD's stated requirements were overly draconian, unreasonable and/or intrusive; for example, requiring itemisation and valuation of art works.*
 - (ii) *He was requesting Mr Jafar supply funding on the same terms as the First Loan Agreement;*
 - (iii) *He was prepared to offer security in the same form as Emirates NBD had requested, namely over the Abraaj Group's unencumbered assets and his own personal assets; and*
 - (iv) *Mr Jafar would have to proceed on his word that the security would be documented in the new year, as there was insufficient time to do so before making the loan.*
- (b) *Mr. Jafar told Mr. Naqvi that he wished to discuss matters with Mr Nerguizian. Later on that day, Mr. Jafar asked Mr. Nerguizian to meet Mr Naqvi personally to verify his account with regard to Emirates NBD. Mr. Nerguizian agreed to meet Mr. Naqvi the next day.*
- (4) *At a meeting in the late morning of 27 December 2017, between Mr. Naqvi and Mr. Nerguizian at the offices of Bank of Sharjah, Mr. Naqvi requested a further loan of US\$200 million, on the terms set out in the Schedule of Loan Terms annexed hereto. Further, Mr. Naqvi:*

- (a) *Produced the terms purportedly demanded by Emirates NBD, including a pledge of over shares in AH held by AE2L, though did not provide Mr. Nerguizian with a copy of the same;*
- (b) *Reiterated that security would be provided on these terms, to be documented in the new year; and*
- (c) *Reiterated that the funding was required on a short-term basis, since senior representatives of the Healthcare Investors had assured Mr Naqvi that Uninvested Capital returned to investors would be re-invested in the Healthcare Fund before the end of January 2018.*

The Third Loan

- (5) *At [sic] a telephone call on 26 December 2017, between Mr. Naqvi and Mr. Jafar, which took place whilst Mr. Jafar was in Switzerland, Mr. Naqvi requested a further loan. Mr. Naqvi stated this was required to cover very short-term, year-end liquidity issues.*
- 24. *From 20 December 2017 to 26 December 2017, there was no material change in what Mr. Naqvi was saying to Mr. Jafar and/or Mr. Nerguizian or what Mr. Jafar and/or Mr. Nerguizian was understanding Mr. Naqvi to be telling him with regard to the affairs of the Abraaj Group and the enterprises within it and managed by it.*
- 25. *By the statements pleaded at paragraph 20 above, which were not corrected in the course of the events pleaded at paragraph 23 above, Mr. Naqvi **expressly represented** to Mr Jafar that:*
 - (1) *The Abraaj Group was not in any underlying financial trouble, it was simply facing short-term liquidity issues over the year end (the **First Express Representation**);*
 - (2) *It was intended that approximately US\$250 million of the loan monies would be used for the purpose of returning Uninvested Capital to the Healthcare Investors (the **Second Express Representation**); and*
 - (3) *Mr. Naqvi believed, and had a reasonable basis for his belief, that the borrower would be able to repay the money to Mr. Jafar before the end of January 2018 or shortly thereafter (the **Third Express Representation**).*
- 26. ***In making** those representations pleaded at paragraph 25 above to Mr. Jafar, Mr. Naqvi made the following implied representations and thereby conveyed the following overarching message (“the Overarching Message”):*

- (1) *That the finances and management or governance of the entities for the benefit of which he was seeking to raise monies were essentially sound and proper, and any liquidity issues which they were experiencing were short term (the **First Implied Representation**);*
 - (2) *The Healthcare Fund was one of those entities (the **Second Implied Representation**); and*
 - (3) *There was, or were, one or more other such entities which he did not identify by name (the **Third Implied Representation**).*
27. ***The Overarching Message is a matter of implied representation(s) derived from what was said and/or not said.***
28. *APEF IV was the entity, or was one of the entities, that Mr. Naqvi referred to without identifying it or them by name....*

FALSITY

29. *What Mr. Naqvi told Mr. Jafar or gave Mr. Jafar to understand, by way of the Overarching Message, was untrue."*
45. Mr Jafar referred again to the assurances he had been given by Mr Naqvi at [96] of the RRASOC as follows:

"96. As explained above, during our discussions in December 2017, Mr Naqvi assured me that:

- (1) *The Uninvested Capital had been placed in the Abraaj treasury;*
- (2) *That Abraaj's use of the Healthcare Fund Investors' (and other investors') Uninvested Capital was in contractual conformity with the partnership documents of the relevant investment funds;*
- (3) *That this had been confirmed by Freshfields;*
- (4) *That the Abraaj group was financially sound;*
- (5) *That the Abraaj group had clean, audited financial statements;*
- (6) *That the Uninvested Capital was temporarily unavailable;*
- (7) *That the Abraaj group needed to borrow money on a short-term basis only to cover the shortfall; and*

(8) *That my Loans would be repaid by the end of February 2018, and that the Abraaj group had access to the funds that would enable it to do that."*

46. As can be seen from [20]-[28] of the RRASOC the case is made in various stages (and layers):

- (a). Mr Jafar asserts (in [20]) that at the First 20 December 2017 Meeting (on 20 December 2017 at or after 11am UAE time) Mr Naqvi made certain statements (the **Statements**) – there are **nine** of them – and he sets these out although he says that Mr Naqvi may have used different words but if and to the extent he did so the different words were to the same effect.
- (b). Mr Jafar then asserts (in [25]) that by making the Statements Mr Naqvi intended to make and made certain express representations (the **Express Representations**) – there are **three** of these.
- (c). Mr Jafar also asserts (in [29A] of the RRASOC which was introduced by amendment) that one of the Statements, that is the one set out at [20(8)], was itself also an express representation even though it was not one of the three Express Representations said to have resulted from the nine Statements (it is what I have defined as the Reinvestment Representation).
- (d). Mr Jafar then asserts (at [26]) that by (or as a result of) making the three Express Representations, Mr Naqvi also made **three** implied representations which together he refers to as the Overarching Message. These implied representations are said (at [27]) to be derived both from what was said and not said. Mr Jafar's case is that these three representations were implicit in the Express Representations and that he (Mr Jafar) understood (and that a reasonable person would have understood) that the three implied representations were implicit in and implicitly represented by the Express Representations.

- (e). Mr Jafar asserts (in [29] and [29A]) that the three implied representations comprising the Overarching Message and separately that the Reinvestment Representation were false.
 - (f). Mr Jafar further asserts that the three implied representations comprising the Overarching Message and the Reinvestment Representation were not corrected (or modified) by further statements made by Mr Naqvi relating to the First Loan, the Second Loan and/or the Third Loan in conversations and meetings that took place after the First 20 December Meeting in the period 20 December to 26 December 2017.
 - (g). Accordingly, the foundation of Mr Jafar's case is the (uncorrected) Statements made *at the First 20 December Meeting*. From these he deduces the Express Representations and from the Express Representations he deduces the three implied representations constituting the Overarching Message. The Reinvestment Representation (which is one of the Statements) is then treated separately as an express representation.
47. Mr Jafar, as I have said, refers in his pleaded case generically to other “*conversations and meetings*” that took place after the First 20 December 2017 Meeting. The following are the calls and meetings that he mentions in his evidence or are otherwise referred to in the evidence:
- (a). Mr Jafar called Mr Nerguizian while Mr Naqvi was still with him at the First 20 December Meeting but Mr Nerguizian did not answer.
 - (b). Mr Jafar then called Mr Nerguizian on the afternoon of 20 December 2017 (the **20 December Jafar - Nerguizian Call**) after the First 20 December 2017 Meeting.
 - (c). Mr Nerguizian met with Mr Jafar at the latter's office on 20 December 2017.
 - (d). Mr Jafar and Mr Nerguizian then called Badr from Mr Jafar's office (Badr was by then in Switzerland) also on 20 December 2017 (the **20 December First Badr Call**).

- (e) Then Mr Jafar and Mr Nerguizian called Mr Naqvi and had a short telephone call at approximately 2pm UAE time on 20 December 2017 (the **20 December Naqvi Call**).
 - (f) Mr Jafar and Badr spoke again by telephone at around 17.42 (UAE time) on 20 December (for nearly three minutes) (the **20 December Second Badr Call**).
 - (g) There was then a further meeting on 20 December 2017 (the **Royal Mirage Meeting**) between Mr Naqvi, Mr Jafar, and Mr Nerguizian in the early evening at the Royal Mirage Hotel, Dubai for which Mr Jafar was present for around 30-45 minutes (which was followed by an exchange of emails between Mr Nerguizian, Mr Jafar, Badr and Mr Naqvi).
 - (h) On the morning of 21 December 2017 there were a number of calls between Mr Nerguizian, Mr Jafar, Badr, and Mr Naqvi.
 - (i) On 21 December 2017 Badr and Mr Naqvi exchanged a number of WhatsApp messages.
 - (j) There was a telephone call on 26 December 2017 between Mr Naqvi and Mr Jafar (while Mr Jafar was in Switzerland) when Mr Naqvi requested the Second Loan and the Third Loan (the **26 December Telephone Call**).
 - (k) There was a meeting in the late morning on 27 December 2017 (the **27 December Meeting**) between Mr Naqvi and Mr Nerguizian at the offices of BOS to discuss the Second Loan.
48. What is alleged to have been said by Mr Naqvi after the First 20 December 2017 Meeting is only relied on for the purpose of showing that there was no change in the substance of what had previously been said and no correction of the deliberate falsity of the Statements made at the First 20 December 2017 Meeting (and the express and implied representations said to be derived from them).

49. As I have noted, the RRASOC avers that the First Loan was advanced on 21 December 2017; the Second Loan was advanced on 27 December 2017 and the Third Loan was advanced on 28 December 2017. There is attached to the RRASOC a schedule of the payments made by Mr Jafar in relation to the Loans:

- (a). As regards the First Loan, on 21 December 2017 AIML provided to BOS two cheques (post-dated to 28 February 2018) payable to Mr Jafar and drawn on AIML's account with the Commercial Bank of Dubai (**CBD**). The cheques were signed by Mr Naqvi and Mr Lakhani. In parallel, steps were taken at BOS to prepare the paperwork to record the arrangements between it and Mr Jafar. This included an application for further banking facilities in the name of Mr Jafar, a pledge agreement relating to a pledge to be given by Mr Jafar to BOS over his deposits with BOS to secure an amount equal to Mr Jafar's US\$55 million risk exposure and a cheque discounting form. A memorandum of understanding (the **21 December BOS MOU**) was also signed between Mr Jafar and BOS recording the essential terms of the arrangements between them in respect of the First Loan including the parties' respective exposures (the 21 December BOS MOU states that Mr Jafar had introduced AIML to BOS and requested BOS to "*organise the loan under its [presumably Mr Jafar's] guarantee up to 55% of the exposure from time to time*" and that the remaining 45% exposure was to be assumed by BOS). In preparation for the transfer of funds, Mr Naqvi sent an email to Badr (copying Mr Nerguizian, Mr Jafar, and Mr Lakhani) saying that "*The cheques are on the way to Mr Fadi Ghosn with our account details for transfer to AIML account at CBD. Please mention "investment" in purpose of remittance, this is important...*" The funds were wired in United Arab Emirates Dirhams (**AED**) from Mr Jafar's account at BOS to AIML's account at the CBD and at 10:29 UTC (11:29 Central European Time (**CET**), 14:29 GST), Mr Nerguizian circulated a SWIFT confirmation to Mr Naqvi, Badr and Mr Jafar which stated *"/REF/INVESTMENT."* On the same day AIML transferred US\$100 million on behalf of the AGHF.

- (b). As regards the Second Loan, during the course of 26 December 2017 and into the early morning of 27 December 2017 steps were taken to prepare the relevant paperwork. This included (among other things) pledges in favour of BOS over deposits at BOS held by Mr Jafar (and Mr Jafar's wife, Mrs Sawsan Jafar), a share pledge letter agreement (the **AE2L Pledge Letter**) between Abraaj Employees 2 SPC Limited (**AE2L**), AH and Mr Jafar pursuant to which AE2L agreed to pledge "210,000,000 ordinary shares it owns in the share capital of [AH] in favour of [Mr Jafar] as security for [the Second Loan]," and a memorandum of agreement (the **27 December MOA**) between BOS, AIML and Mr Jafar recording the basis on which the Second Loan would be made available. It noted that Mr Jafar had requested BOS to assist AIML "with some financing arrangements on an urgent basis" and that BOS had agreed to assist AIML "based on certain agreements with [Mr Jafar]." It provided that BOS would transfer the funds at the request of Mr Jafar and in line with arrangements agreed between BOS and Mr Jafar. AIML agreed to issue a cheque dated 28 February 2018 to the order of Mr Jafar and remit the cheque to BOS and that the AE2L Pledge Letter would be granted as security for repayment of the Second Loan ("with the express understanding that a proper and legal binding document will be elaborated" within 14 days). The Second Loan was advanced in the mid-morning (UTC, late morning CET and early afternoon GST) on 27 December 2017. In preparation for the advance at 13:06 UTC (14:06 CET, 17:06 GST) on 26 December 2017, Mr Naqvi had sent Mr Nerguizian an email containing details of USD bank accounts for AH stating, "Purpose of remittance is the same, 'Investment.'" It appears that a decision was subsequently taken to advance the Second Loan in AED. Accordingly, at 20:39 UTC Mr Naqvi sent Mr Nerguizian details of AED bank accounts for AH stating: "Please find enclosed AED bank details for transfer mentioning 'investment'." Early in the morning of 27 December, Mr Nerguizian forwarded AH's AED bank account details to Mr Berj Toussounian at BOS, stating "having these two transfers ready in swift format, order hj... Object investments." Mr Jafar provided a signed letter of instruction to BOS (the **27 December Letter of Instruction**) requesting it to transfer the equivalent of US\$200 million in AED to AH with the "Object of the transfer" specified as "Investments." AIML issued and delivered a cheque in the sum of AED798,928,000 and the funds

were wired in AED to Mr Jafar's account at BOS and then from that account to two AH accounts (for AED), one at CBD and one at First Abu Dhabi Bank (**FADB**). The remittance information contained in each of the SWIFT confirmations provided: *"/REF/INVESTMENT."*

- (c). As regards the Third Loan, it was advanced on the morning of 28 December 2017 in AED from Mr Jafar's account at BOS to AH's AED account at CBD. AIML issued a post-dated cheque dated 4 January 2018. Once again, the remittance information contained in the SWIFT confirmation provided *"REF/INVESTMENTS."* Mr Jafar had on 27 December 2017 signed an instruction to BOS requesting that BOS remit the AED equivalent of US\$50 million to AH stating that the object of the advance/transfer was *"Investments."* Since Mr Jafar did not hold sufficient deposits with BOS to secure a further cheque discounting facility Crescent Petroleum agreed to enter into a pledge (the **Crescent Petroleum Pledge**) over its deposits with BOS as security for the provision of a US\$50 million cheque discounting facility by BOS to Mr Jafar (which was used to fund the Third Loan). The Crescent Petroleum Pledge was executed by Mr Jafar on behalf of Crescent Petroleum. On 4 January 2018, the Third Loan was repaid from an AIML bank account (notwithstanding that the loan had been advanced to AH).
50. Shortly after the advances under the First Loan and the Second Loan were paid and received in this way, AIML and AH paid them away. The relevant payments were summarised at [335] of Mr Jafar's written closing submissions (the **Written Closing Submissions**) as follows:

"335. *It is important to note the speed with which money was transferred from Mr Jafar's Loan Transfer Account to an account of AH/AIML and then onto the Fund Parties' accounts. The money was in the accounts of AH/AIML only fleetingly: they were conduits.*

The First Loan

- 335.1 *At or before 14:22 (UAE) on 21 December 2017, the transfer of Mr Jafar's First Loan of 367,300,000 AED was made from Mr Jafars [sic] Loan Transfer Account.*
- 335.2 *Between 14:22 (UAE) and 15:19 (UAE) on 21 December 2017, 67,300,000 AED was received in the account of AIML with Commercial Bank Of Dubai (AED Account).*
- 335.3 *At, or shortly after 15:19 (UAE) (11:19 UTC) on 21 December 2017, AIML instructed the transfer of 367,400,000 AED to Abraaj Healthcare Group Limited (AHG [GHF]), and also instructed an immediate onward transfer from AHG [GHF] to Abraaj Growth Markets Health Fund Borrower LP (AGMHF B LP).*
- 335.4 *Before 16:25 (UAE) on the 21st December 2017, AHG [GHF] received 367,300,000 AED into its Account (as the previously instructed onward transfer to AGMHF B LP was effected then)*

The Second & Third Loans

- 335.5 *At 12:30 UAE (08:30 UTC) on 27 December 2017, Mr Jafar instructed two transfers of 367,300,000 AED each from his Loan Transfer Account.*
- 335.6 *Later than 12:30 (UAE) on 27 December 2017, 367,300,000 AED was received in the account of AH with Commercial Bank of Dubai (AED Account).*
- 335.7 *Later than 12:30 (UAE) on 27 December 2017, 367,300,000 AED was received in the account of AH with First Abu Dhabi Bank (AED Account).*
- 335.8 *At 21:51 (UAE) on 27 December 2017, the payment instruction was created on the CBD banking platform for a transfer of 29,392,000 AED from AH's CBD AED account to Abraaj Healthcare Group Limited (AHG [GHF]) - now The GHF Group Limited, which was approved at 02:58 (UAE) on 28 December 2017 (22:58 on 27/12/17 UTC).*
- 335.9 *On 28 December 2017, AHG received US\$8,000,000, being 29,392,000 AED into its account.*
- 335.10 *At or before 12:40 (UAE time) on 28 December 2017, the transfer of the Third Loan of 183,650,000 AED was made from Mr Jafar's Loan Transfer Account.*
- 335.11 *Later than 12:40 (UAE) on 28 December 2017, 183,650,000 AED was received in the account of AH with Commercial Bank Of Dubai (AED Account)*

- 335.12 *After receiving the Third Loan, also on 28 December 2017, AH instructed the transfer of 363,173,797.80 AED, being US\$98,849,700 USD (99% of the tranche of the Second Loan sent to CBD) from the AH AED account with CBD to Abraaj General Partner VIII (GP8).*
- 335.13 *On 28 December 2017, AH instructed the transfer of 91,653,825 AED, being US\$24,950,000 (25% of the tranche of Mr Jafars Second Loan sent to FAB) from the AH AED account with First Abu Dhabi Bank to Abraaj General Partner VIII (GP8).*
- 335.14 *Following both the transfers to GP8 on 28 December 2017, AGP8 received US\$98,849,700 and US\$24,950,000 by close of business on 28 December 2017.”*

The Cayman Islands law deceit claim – the Fund Parties’ defences in outline

51. The Fund Parties’ position in relation to the deceit claim (recognising that there are some, but ignoring for the purpose of this general summary, differences between the cases of the GHF Parties and GP8) can be outlined as follows:

- (a). As a preliminary point, the Fund Parties submitted that they were not required to address the question of whether Mr Jafar had been misled in some general way by Mr Naqvi into making the Loans. The issue of whether there was some element of deception practised on Mr Jafar was not the question before the Court. The question was not whether Mr Naqvi had said something which may have persuaded Mr Jafar to lend but rather whether Mr Naqvi had impliedly (or in the case of the Reinvestment Representation expressly) communicated the things that Mr Jafar alleged him to have communicated and whether Mr Naqvi had set out to deceive Mr Jafar and did deceive him *in the manner pleaded*. Allegations of deceit, being allegations of dishonesty, must be distinctly alleged and distinctly proved. In cases concerning misrepresentations, the only allegations which the Court can consider are those which have been pleaded and the Fund Parties argued that Mr Jafar had failed to prove these to the requisite standard.
- (b). Mr Naqvi was not acting for (and did not approach Mr Jafar) with the knowledge, agreement, or authority of the Fund Parties (or the AGHF or Fund IV) when seeking

the Loans from Mr Jafar. It was not alleged by Mr Jafar that Mr Naqvi had made any statements mentioning GP8 or Fund IV at the First 20 December Meeting.

- (c). Since no representative of the Fund Parties had attended or participated in the First 20 December Meeting or the subsequent meetings or discussions, they were unable to say or adduce evidence as to what Mr Naqvi actually said and Mr Jafar was put to proof in relation to his assertions as to what Mr Naqvi said to him (and generally with respect to the representations relied on).
- (d). The Fund Parties challenged Mr Jafar's account of what he was told by Mr Naqvi on various grounds including that Mr Jafar's evidence was inconsistent with the contemporaneous (or near contemporaneous) documents and the accounts he gave in evidence adduced or filings made in previous related proceedings and also improbable in light of the context and circumstances established by the other evidence.
- (e). The Fund Parties also invited the Court to draw various significant inferences as to Badr's knowledge which were adverse to Mr Jafar's case, as a result of Mr Jafar's failure to produce Badr as a witness. These inferences they submitted undermined Mr Jafar's account of what he was told by Mr Naqvi and what he knew and understood. The Fund Parties said that Badr's knowledge was to be imputed to Mr Jafar. They also claimed that the Third Loan was agreed between Badr and Mr Naqvi and that Badr was aware that the Third Loan was for the purpose of misleading third parties as to the true financial position of one or more of the Abraaj entities (they relied on what I refer to below as the Year End Deposit Message) and submitted that it was to be inferred that Mr Jafar and/or Mr Nerguizian were informed and aware of this (despite Mr Jafar's denials). Badr (and Mr Jafar's) awareness of Mr Naqvi's desire to raise funds for window dressing transactions, which they had before the drawdown of the First Loan, was inconsistent with any representation that the finances, management and governance of the Abraaj entities was essentially sound and proper.
- (f). Even if Mr Jafar could show that Mr Naqvi made the statements he alleged, Mr Jafar would have known, and did know, or alternatively it was to be inferred that Mr Jafar

would have known, and did know, that (i) the placing by Abraaj of the Uninvested Capital in its treasury and using the Uninvested Capital for general business purposes was not permissible; (ii) the need for the Abraaj entities to borrow US\$290 million before the end of December 2017 (of which US\$250 million was to re-pay the Uninvested Capital to the Healthcare Investors and US\$40 million was required to meet the urgent liquidity needs of other Abraaj entities) was not indicative of financial soundness or just short-term cash/liquidity issues over the year end; (iii) the fact that Mr Naqvi had said that the Loans were sought only on a short-term basis (since senior representatives of the Healthcare Investors including the International Financial Corporation had assured Mr Naqvi that funds returned to these investors would be re-invested before the end of January 2018) meant that Mr Naqvi was proposing to repay the Loans by using the further funds to be invested in the AGHF, which use would not have been appropriate and (iv) Mr Naqvi's request that Mr Jafar urgently lend US\$90 million was inconsistent with the statement that the Abraaj entities were financially sound. Furthermore, if Mr Naqvi had, as Mr Jafar alleges, said that the terms proposed by Emirates NBD (*ENBD*) in relation to the US\$200 million loan that Mr Naqvi was seeking from them, were overly draconian, unreasonable and/or intrusive, Mr Jafar would have known that these terms were inconsistent with any statement made by Mr Naqvi that the Abraaj entities were financially sound.

- (g). No reasonable person would have inferred from Mr Naqvi's (alleged) words and conduct, from the Statements and/or the Express Representations and/or from Mr Naqvi's (alleged) conduct in requesting, and/or at the (alleged) First 20 December Meeting more generally that the finances and management or governance of the entities for the benefit of which Mr Naqvi was seeking to raise monies were essentially sound and proper and that any liquidity issues which they were experiencing were only short term. A reasonable person would not have inferred from Mr Naqvi's statement that the Abraaj entities needed to borrow US\$290 million before the end of December 2017, Mr Naqvi's request that Mr Jafar urgently lend US\$90 million or the fact that Mr Naqvi was proposing to repay the Loans by using Healthcare Investor funds, that the finances and management or governance of the entities for the benefit of which Mr

Naqvi was seeking to raise monies were essentially sound and proper and that any liquidity issues which they were experiencing were short term.

- (h). No reasonable person would have inferred anything regarding the finances and management or governance of the AGHF or Fund IV from the Statements and/or the Express Representation about the “*Abraaj Group*.”
- (i). No reasonable person would have inferred from the Express Representations that the AGHF or Fund IV was one of the entities referred to by Mr Naqvi.
- (j). The RRASOC failed to plead that Mr Naqvi understood that he was making the Implied Representations and/or conveying the Overarching Message and that they and/or it had the misleading sense it was alleged that they or it had.
- (k). The Overarching Message would not have been objectively understood to have arisen or been conveyed by reason of the alleged words or conduct of Mr Naqvi. The Overarching Message was vague, uncertain, and ambiguous and its ambit was wide, specifically in so far as it referred to the “*finances and management or governance*” of the “*entities for the benefit of which [Mr Naqvi] was seeking to raise monies*” which entities included the AGHF, Fund IV and perhaps other unnamed entities and to the finances and management or governance of those identified and unnamed entities being, “*essentially sound and proper*” and to the, “*liquidity issues*” experienced by those identified and unnamed entities, and to the, “*short term*” nature of those liquidity issues.
- (l). Mr Jafar was put to proof on his assertion that the Overarching Message was false. Furthermore, if the First Implied Representation was actually made, its falsity depended on which entities were being referred to. It was not admitted that the finances and management of the AGHF or Fund IV were not sound and proper between March and December 2017. Although monies had been paid by AHG innocently and in breach of trust to AH and AIML between December 2016 and April 2018 they were the result

of a fraud perpetrated on the AGHF and AHG and not the result of mismanagement or misgovernance by the AGHF. The fact that money had been misappropriated did not mean that the finances of the AGHF were not materially sound or proper.

- (m). Mr Jafar was put to proof on his assertion that the Reinvestment Representation was false. In particular, it was not admitted that it was axiomatic from the facts as established by the evidence that “*senior representatives*” had not in fact provided Mr Naqvi with assurances (at least conditional assurances) that funds returned to Investors would be re-invested before the end of January 2018. Furthermore, Mr Jafar’s delay (six years) in asserting that the Reinvestment Representation had been made and that he had relied on it was indicative of the fact that it had not been made or relied on.
- (n). Mr Jafar was put to proof on his assertion that Mr Naqvi knew that what he told Mr Jafar was untrue. The Fund Parties accepted though that Mr Naqvi knew (i) the financial position of the Abraaj entities in general terms, (ii) that there had been failure to segregate Investors’ funds and that there had been misappropriation of assets, at least in respect of Fund IV, (iii) of the instructions which he had given in respect of the loans from Air Arabia and (iv) the information he received concerning the financial affairs and governance of the Abraaj entities. It was accepted that in October 2016, KES Power Limited (**KES**), a holding company partially owned by several Abraaj entities, had agreed to sell its majority stake in K-Electric to Shanghai Electric Power for the sum of around US\$1.8 billion of which US\$450 million would have been due to Abraaj entities, that the sale of K-Electric had been repeatedly delayed but would have addressed (in whole or part) the unsound financial position of the Abraaj entities and that (as was known by Badr) Mr Naqvi intended to sell shares in AH if necessary to make repayments. It was not admitted that either AH or AIML was insolvent by 1 December 2017.
- (o). It was denied that Mr Jafar relied on the Overarching Message in entering the Loans. At the time when the First Loan and the Second Loan were entered into Mr Jafar would have known and did know that that the Overarching Message was false. Mr Jafar knew

that the financial affairs of AIML and AH and/or the entities for the benefit of which Mr Naqvi was seeking to raise monies were not sound and proper. This could be seen or inferred from various facts and matters including his prior involvement in the management and as an investor or limited partner in Abraaj entities and Mr Jafar's letter to the AH board dated on or about 13 May 2018 and the draft resolution which was submitted to the AH board on 26 May 2018 which acknowledged that Mr Jafar had been aware at the time of the Loans that AH, AIML and the other Abraaj entities were on the verge of financial collapse.

- (p). Mr Jafar would have made the Loans even if the Overarching Message had not been conveyed. He made and would in any event have advanced the Loans in order to (i) enable Mr Naqvi to ensure the repayment of the Healthcare Investors and to avoid the escalation of the Healthcare Investors' (allegedly) unjust demands, and to avoid the resulting adverse publicity for the Abraaj entities; (ii) protect his shareholdings in Abraaj entities; (iii) earn the fees alleged to have been payable in respect of the First Loan and the Second Loan, totalling approximately US\$6 million and US\$15 million and (iv) earn the interest alleged to have been payable as at 28 February 2018, at a rate of 6 per cent per annum on the principal amounts due in respect of the First Loan and the Second Loan.
- (q). Under Cayman Islands law, Mr Jafar must show that he was aware of the Overarching Message and/or that he understood it in the sense in which he now asserts and that it was actively present to his mind. The Fund Parties denied that Mr Jafar could do so. They denied that Mr Jafar was aware of the Overarching Message and/or that he understood it in the sense in which he now asserts and that it was actively present to his mind. The fact that the Overarching Message was only formulated for the first time in the Amended Statement of Claim dated 7 January 2022 (ASOC) some four years after it was allegedly conveyed to Mr Jafar; indicated that it was only an *ex post facto* rationalisation.

- (r). it was denied that Mr Jafar had been the sole lender or had assumed 100 percent of the exposure under the First Loan and not admitted that Mr Jafar had advanced any of the First Loan, the Second Loan and/or the Third Loan.

The key factual issues arising in relation to the deceit claim

52. In his closing submissions, Lord Falconer on behalf of Mr Jafar invited the Court to make the following fifteen findings of fact:

- (a). *The references made by Mr Naqvi and others to the Abraaj Group were intended to include AH, AIML and the Funds:* references made by Mr Naqvi in his discussions with Mr Jafar, and references by others within the Abraaj entities, to the “*Abraaj Group*” was generally understood by Mr Naqvi, the directors and management of AH, AIML and the Funds, as including the various private equity funds using the Abraaj name including the exempted limited partnerships that comprised the Funds and their general partners.
- (b). *Mr Naqvi controlled all of the entities in the Abraaj Group:* Mr Naqvi controlled the management and core decision making of all the entities covered by the term “the Abraaj Group” which were operated as a single unit, including the AGHF. Mr Naqvi exercised his control, inter alia, via his control of AIML, the management company for each Fund. The constitutional documents for AIML and for the Funds themselves expressly permitted Mr Naqvi to exercise control over the Fund’s general partners and thereby over the Funds and the boards of both AIML and these general partners were populated by Mr Naqvi’s associates who acted in accordance with his directions.
- (c). *The Abraaj Group as a whole was balance sheet insolvent in December 2017:* the entities in the Abraaj Group as so understood were, when their assets and liabilities were aggregated, insolvent in December 2017 in the sense (at least) that the amount of their liabilities exceeded the value of their assets. AH and AIML were balance sheet insolvent in this sense at that time. However, some entities including the general

partners of the Funds, were solvent in the sense that the value of their own assets exceeded the amount of their own liabilities. Nonetheless, the net asset value of these entities was insufficient to offset the huge liabilities of AH and AIML.

- (d). *At the First 20 December 2017 Meeting Mr Naqvi made the statements attributed to him by Mr Jafar:* Mr Naqvi made the statements described at [20] of the RRASOC and referred to at [22]-[58] of Jafar 1 (or words to that effect), which statements were not amended or corrected (by and in light of the subsequent statements made by Mr Naqvi as described at [70]-[88] of Jafar 1) before the First Loan was advanced to AIML on 21 December 2017 or the Second Loan was advanced to AH on 27 December 2017, or the Third Loan was advanced to AH on 28 December 2017.
- (e). *The meaning that Mr Naqvi intended to convey to Mr Jafar (and the meaning he understood was to be given to his statements) was as described by the Overarching Message:* Mr Naqvi intended to convey the meaning as described in the Overarching Message and the Reinvestment Representation.
- (f). *What meaning is objectively to be attributed to what Mr Naqvi said?* The Overarching Message and Reinvestment Representation were not only what Mr Naqvi intended to convey but also the objective meaning of what he said.
- (g). *The Overarching Message and Reinvestment Representation were false.* There was a gaping schism between what Mr Naqvi represented (that the Abraaj entities were all financially sound and properly managed, and governed, just experiencing short term liquidity issues) and the truth (these entities constituted and were recklessly and dishonestly operated as a Ponzi scheme that was irredeemably insolvent having suffered longstanding liquidity issues).
- (h). *Mr Naqvi knew that the Overarching Message and Reinvestment Representation were false.* This was because Mr Naqvi was the controller of the Abraaj entities and the mastermind and instigator of the Ponzi scheme and intimately aware of the immense

financial problems and insolvency that resulted from it. Mr Naqvi deceived Mr Jafar precisely to cover up that state of affairs and in furtherance of his criminal acts. Telling Mr Jafar (or anyone) the truth would not allow him to obtain the monies he wanted for and needed to inject into the Funds and would have exposed the fraud. It was therefore necessary to misrepresent the position of the Abraaj entities including of AH, AIML and the Funds, to Mr Jafar.

- (i). *Mr Naqvi intended that Mr Jafar act in reliance on the Overarching Message and Reinvestment Representation.* It was necessary that Mr Jafar do so in order for Mr Naqvi to be able to obtain the monies for the Funds, which were desperately and urgently needed at the time that Mr Naqvi met with Mr Jafar. Mr Naqvi knew that if he did not misrepresent the position to Mr Jafar, Mr Jafar would never agree to part with the required funds.
- (j). *Mr Jafar did rely and act on the Overarching Message and Re-Investment:* A powerful presumption of inducement arises in this case and nothing rebuts it. Had Mr Jafar not believed and relied on what he was told, he would not have paid over the US\$350m in Loans. He had no idea of the falsity of the representations, nor did he have any inkling of either the financial unsoundness or the mismanagement or misgovernance of the entities for which Mr Naqvi was raising monies.
- (k). *Mr Jafar made the payments (the Loans) to AH and AIML:* The bank account records show that the funds advanced were paid out of Mr Jafar's account with BOS. There was a risk-sharing agreement between Mr Jafar and BOS in respect of the First Loan but that does not affect Mr Jafar's right to make the claims set out in the RRASOC. There is also no evidence that Badr advanced any of the funds paid to AH and AIML.
- (l). *Mr Naqvi had authority to act on behalf of the Fund Parties:* This was because (i) Mr Naqvi had express authority to act on behalf of the Funds: as the functioning CEO of AIML he was contractually permitted to run, *inter alia*, the general partner of the Funds and thereby the partnerships which the Funds comprised - the Funds'

constitutions, as set out in the limited partnership agreements and the investment management agreements, expressly conferred on Mr Naqvi as AIML's CEO the power to manage and operate the Funds; (ii) alternatively, Mr Naqvi had implied authority to act for the Funds: because he was consistently deferred to by the Funds' management, permitted to make management and other decisions on behalf of the Funds and otherwise treated as having absolute authority to make decisions for, inter alia, the Funds; (iii) alternatively, Mr Naqvi had ostensible authority because he was held out to the outside world, the investor community, and to Mr Jafar as being the key man and the head of each of the Funds and there were provisions in the Funds' constitutions, summarised in their private placement memoranda, that if Mr Naqvi did not devote sufficient time to the management and operation of the Funds a mechanism would be triggered to alter the management/operational structure of the Funds; (iv) alternatively Mr Naqvi was a *de facto* or a shadow, director of each of the Funds' General Partners; (v) Mr Naqvi was in any event the *de jure* and *de facto* controlling mind and will of all of the Abraaj entities including the general partners of each of the Funds at all times and specifically for the purpose of the Loans made by Mr Jafar; (vi) alternatively, if and insofar as Mr Naqvi did not have prior authority, his deception of Mr Jafar was ratified by the directors of the Funds' general partners, being largely his associates who acted as he directed or instructed and who were fully aware that he had deceived Mr Jafar.

- (m). *Mr Naqvi acted in his capacity as the controller of all the Abraaj entities and in particular as the agent/director/controlling mind and will of each of the Funds:* That was obvious from an assessment of all the circumstances. Mr Naqvi was acting as a fund manager, raising monies for the Funds; he was acting to solve a problem that the Funds had created while under his control and the control of his associates; he was acting in response to explicit requests for help by the Funds' *de jure* directors and he arranged for the monies procured by deceit to be immediately transferred to the Funds.
- (n). *US\$231, 799,700 of the funds advanced by Mr Jafar went to the Funds:* A total of US\$108,000,000 derived from the Loans advanced by Mr Jafar was paid to accounts

held by the AGHF or entities controlled by it and a total of US\$123,799,700 was paid to accounts held by GP8.

(o). *Mr Jafar's loss amounts to US\$196,477,811.*

What did Mr Naqvi say to Mr Jafar at the First 20 December 2017 Meeting (and during their subsequent conversations insofar as they are relevant to Mr Jafar's deceit claims) and what representations were made by him?

The issues

53. In my view, it is necessary to start by considering the issue of and the disputes as to (a) what Mr Naqvi actually said to Mr Jafar at the First 20 December 2017 Meeting (and in the subsequent meetings and calls in so far as they are relevant to and evidence what was said by Mr Naqvi at the First 20 December 2017 Meeting) and (b) what representations can properly be said to have been made by and as a result of those statements.
54. I set out and discuss the relevant law below but it is helpful to have and bear in mind, when considering the evidence and disputes as to what was said by Mr Naqvi and how what was said should be interpreted for the purpose of Mr Jafar's Cayman Islands law deceit claim, the basic legal principles to be applied when deciding whether a statement giving rise to an actionable representation has been made and how statements are to be interpreted for this purpose.
55. A representation is a statement of fact made by the representor to the representee on which the representee *is intended and entitled to rely as a positive assertion that the fact is true*. Determining whether any and if so what representation was made by a statement requires the Court to (1) *construe the statement in the context* in which it was made and (2) *interpret the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee*. It is essential in any case of fraud for the dishonest representation to be clearly

identified (see *Vald Nielsen Holdings A/S and another v Baldorino and others* [2019] EWHC 1926 (Comm) (*Vald Nielsen*) per Jacobs J at [132]).

Who gave evidence?

56. The only evidence before the Court from participants in the crucial First 20 December 2017 Meeting was, as I have already noted, from Mr Jafar. Mr Nerguizian also gave evidence as to what he was told and heard in the meetings he attended and conversations in which he participated and as to what Mr Jafar told him about Mr Jafar's bilateral conversations with Mr Naqvi (and Badr). Mr Naqvi did not give evidence. The precise reason for not calling him was never clearly explained but I assume that none of the parties regarded him as a truthful witness whose evidence could be relied on or given much weight and that there would have been difficulties in requiring him to give evidence and obtaining evidence from him since he is currently on remand in the UK awaiting extradition to the United States. Badr, as I have noted, also chose not, and declined his father's request, to give evidence. I shall have more to say about this shortly.

The nature and extent of contemporary records of what was said

57. There is no contemporary written record of what Mr Naqvi said to Mr Jafar at the First 20 December 2017 Meeting. During his cross-examination by Mr Ayres, Mr Jafar confirmed that he did not take any notes of that meeting (he said that was not atypical since his general practice was not to take notes of meetings). Mr Jafar was unable to recall when he had first written down a record of what happened at the First 20 December Meeting (see the transcript for Day 5, page 86) and said that he had only reviewed the relevant loan documents, emails and telephone records for the purpose of preparing Jafar 1 (see Day 5, pages 93-94). Nor did Mr Jafar email (or write to) Mr Naqvi to confirm what had been said or to confirm what he took Mr Naqvi to be stating, confirming and representing. Nor did Mr Jafar email Mr Nerguizian (or anyone else) setting out what Mr Naqvi had said or that he was relying on certain assurances and confirmations from Mr Naqvi.

58. In addition to the recollections of Mr Jafar and Mr Nerguizian recorded in their witness statements and oral evidence there were, as I have noted, some contemporaneous or near contemporaneous emails, texts, messages, agreements and other documents to which the parties referred (and included in the trial bundle). I say contemporaneous because some emails and messages (particularly between Badr and Mr Naqvi) were sent and some documents were produced (particularly with respect to the relationship between Mr Jafar and BOS) during December 2017. I say near contemporaneous because emails, messages and documents were prepared and sent by Mr Jafar and his legal adviser and by Mr Naqvi and his legal advisers and by members of the AH board in February-May 2018, in the period leading up to the date for repayment of the First Loan and the Second Loan (28 February 2018) and thereafter. It is said that these documents record and evidence Mr Jafar's own understanding of what he was told by Mr Naqvi, Mr Naqvi's understanding of the arrangements and the understanding and position of the non-executive directors of AH, and are relevant and of assistance for that reason (particularly in a case such as this where Mr Jafar and Mr Naqvi did not make any notes or record their discussions and agreement in writing in December 2017). In addition, Mr Jafar had previously given an account in other proceedings (civil and criminal) of what he had been told by Mr Naqvi and the basis for making and the arrangements surrounding the Loans. There was affidavit evidence sworn by Mr Jafar in previous proceedings in this jurisdiction (the winding up proceedings in May 2018 relating to AH and AIML) and affidavit evidence sworn by Mr Nerguizian and documents filed on behalf of Mr Jafar in criminal proceedings in Sharjah in November 2022. These documents were relied on by the Fund Parties for the purpose of testing and challenging Mr Jafar's and Mr Nerguizian's evidence as to what Mr Naqvi had said at the First 20 December 2017 Meeting and as to Mr Jafar's (and Badr's) knowledge and understanding of the position of the Abraaj entities.

The Fund Parties' challenge to the evidence of Mr Jafar and Mr Nerguizian

59. It is also helpful in my view, before moving on to review the written and oral evidence of Mr Jafar and Mr Nerguizian, to outline and be aware of the nature and focus of the Fund Parties' challenge to that evidence.

60. As I have noted, the only participant in the First 20 December Meeting who gave evidence was Mr Jafar. The Fund Parties have not adduced (and say that they were unable to adduce) direct evidence as to what was said at the First 20 December 2017 Meeting to counter Mr Jafar's account, but they have challenged it on various other grounds.
61. As I have also noted above and further explain below, the Fund Parties argued that Mr Jafar's evidence and account had to be tested against the objective factors of documents (including his previous written evidence in other proceedings), admitted or incontrovertible facts and motive. They submitted that when this was done, the Court should conclude, on the balance of probabilities, that Mr Jafar's account was not credible and misrepresented (either deliberately in order to establish the grounds for claims that could be brought against the Fund Parties or by way of wishful recollection of discussions that had taken place many years ago) what he was told by Mr Naqvi, what he had understood Mr Naqvi to be saying, what assumptions he had made and the extent to as to he had relied on what Mr Naqvi had said.
62. The Fund Parties focussed in particular on eight issues:
- (a). What explanation did Mr Naqvi give Mr Jafar as to the unavailability of the Uninvested Capital and thus the reason for needing a loan? The Fund Parties submitted that the Court should find that Mr Naqvi had told Mr Jafar that the Uninvested Capital had been used for the general business purposes of Abraaj entities and spent, and that Mr Jafar appreciated that this was or could not be permissible under the terms on which the Healthcare Investors were likely to have made their investments.
 - (b). What did Mr Naqvi say about, and how did Mr Jafar understand, the sources of and the likely means by which the Loans would be repaid? The Fund Parties submitted that the Court should find that Mr Naqvi had told Mr Jafar that the likely and therefore the principal source of repayment would be the funds to be reinvested by the Healthcare Fund Investors and that since Mr Jafar appreciated that in the circumstances this was

or was likely to be impermissible (and not permitted under the terms on which the Healthcare Investors were likely to have made their investments) he knew that the finances and corporate governance of the Abraaj entities were not essentially sound and proper.

- (c). Did Mr Naqvi tell Mr Jafar that the reason for his request for funding above the amount of the Healthcare Investors' Uninvested Capital was the need to be able to meet further demands for the return of uninvested capital from other investors? The Fund Parties submitted that the Court should find that Mr Naqvi had not said this but rather had only said that the reason for the additional funds was the need to meet unspecified short-term liquidity demands.
- (d). What was Mr Jafar told about and what was his understanding as to the need for the Third Loan? The Fund Parties submitted that the Court should find that Mr Jafar was made aware, at least by Badr, that this was very short-term lending of only a few days duration (over year-end) and that the funds advanced would be returned unused, and that he knew (or suspected and turned a blind eye to the fact) that there was no legitimate business need for the Third Loan and that it was to be used merely as a window dressing device.
- (e). What was Mr Jafar told about and what was his understanding as to Mr Naqvi's request that the documents to be produced by BOS (or Mr Jafar) to record the purpose and reason for each of the Loans refer to their purpose as being "*Investments*"? The Fund Parties submitted that the Court should find that Mr Jafar was aware of this request and that Mr Naqvi wished that the payment records give a false account of why the funds were to be advanced.
- (f). What did Mr Naqvi say about the future intentions of the Healthcare Investors? Did he tell Mr Jafar that the Healthcare Investors had given him an unconditional assurance that if the Uninvested Capital was repaid to them before the end of 2017 the Healthcare Investors would reinvest them with the AGHF before the end of January 2018? The Fund Parties submitted that the Court should find (consistently with Mr Jafar's

evidence in footnote 7 to Jafar 1) that Mr Naqvi had only been given, and referred in his discussions with Mr Jafar to, a conditional confirmation by the Healthcare Investors that they would reinvest such funds if and when all the delays to the relevant projects had been resolved (so that the reinvested funds could be immediately used for those projects).

- (g). What did Mr Naqvi say about which Abraaj entities needed to receive, and as to who was to borrow, the funds to be advanced by Mr Jafar? The Fund Parties submitted that the Court should find that Mr Naqvi said and indicated that funds were to be borrowed by AH and AIML and that (and it was understood by Mr Jafar that) AH and AIML were the only Abraaj entities on whose behalf Mr Naqvi was negotiating the requisite funding (and that the funds advanced by Mr Jafar would be used and dispersed by AH or AIML as they considered to be appropriate and necessary). The Court should find that Mr Naqvi had in the early stages of his discussions with Mr Jafar talked in general terms about “*Abraaj*” but before and by the time that the First Loan was agreed and advanced it was clear that AH and AIML were the only Abraaj entities to which Mr Jafar would advance funds and therefore with whom he would have a legal relationship. The Court should further find that Mr Naqvi had referred to the need for the AGHF to return Uninvested Capital but had never said or indicated that funds were to be advanced by Mr Jafar to the AGHF and had never said or indicated that he was negotiating with Mr Jafar on behalf of the AGHF or Fund IV (and Mr Naqvi had never referred to Fund IV).
- (h). What did Mr Naqvi say about (and what documents did Mr Naqvi refer to or show Mr Jafar relating to) the financial condition (solvency) of and the extent of the liquidity crisis being faced by the Abraaj entities, and which Abraaj entities did he refer to? The Fund Parties submitted that the Court should find that Mr Naqvi was desperate to obtain the required loans, had told Mr Jafar (and that Mr Jafar was aware) that AH (and the other Abraaj entities) were facing an immediate and potentially fatal liquidity crisis of enormous proportions caused primarily but not exclusively by the demands of the Healthcare Investors, that there were no other sources of funding that would

save AH (and the other Abraaj entities) and that unless all the funds requested by Mr Naqvi were advanced (almost) immediately AH (and the other Abraaj entities) would collapse. The Court should also find that Mr Jafar therefore knew that AH (and the other Abraaj entities) were suffering from huge and very serious financial difficulties that would not be resolved by the making of the Loans (or at least that it was clear to Mr Jafar that it could not be certain and guaranteed that the Loans would resolve these serious financial problems) and at least that Mr Naqvi in his desperation to raise the requisite funds and with almost no time within which to do so was acting outside the usual course of business and taking and prepared to take unusual action (and any steps that were needed) to save AH (and the other Abraaj entities).

63. The Fund Parties submitted that if the Court made these findings of fact (as to what Mr Naqvi had said and did and what Mr Jafar knew at the time the Loans were made), Mr Jafar's claim based on the Overarching Message must fail. He had been told and was aware, in effect, that the governance and finances of the Abraaj entities were not essentially sound and proper (so that the Court must conclude either that the Overarching Message was not in fact made as a representation or that Mr Jafar knew it to be untrue and did not rely on it). Mr Jafar's claim based on the Reinvestment Representation must also fail because that representation, as pleaded and formulated, was inconsistent with what Mr Naqvi had said so that no such representation was actually made.
64. The Fund Parties submitted that they did not need to show that Mr Jafar was aware of Mr Naqvi's wider fraudulent scheme in relation to the Abraaj entities. They only needed to show that Mr Jafar knew enough to appreciate that a representation that the governance and finances of the Abraaj entities were essentially sound and proper was not being made or was untrue and so was incapable of being relied on.
65. The Fund Parties said that they had not cross-examined Mr Jafar on the basis that he knew about all the widespread misconduct within the Abraaj entities. Indeed, the Fund Parties said, since the burden of proof was on Mr Jafar to prove his case, it was for him to prove as a matter of evidence what Mr Naqvi had said so that any lack of clarity in the evidence about what was actually said at the First 20 December Meeting (and subsequently insofar as

relevant to what was said at that meeting) meant that Mr Jafar would not have proved his case on the balance of probabilities. In order for Mr Jafar to succeed, the Court would need to be completely satisfied that Mr Jafar had given a clear, coherent and in all material respects an accurate account of the First 20 December Meeting (and the other meetings and conversations). If the Court was in any doubt such that it could not be satisfied on the balance of probabilities that the statements had been made as claimed by Mr Jafar then the Court should dismiss the claim on the basis of unsatisfactory evidence.

Mr Jafar's written evidence in relation to the negotiation and advance of the Loans

66. In Jafar 1, Mr Jafar gave an account of his relationship with Mr Naqvi and of the meetings, calls and messages leading up to the advance of the Loans.
67. At [22] he set out the basis of his recollection of his discussions with Mr Naqvi (my underlining):

"In this section, I describe my agreements with AH, AIML and Mr Naqvi in December 2017, and the statements that Mr Naqvi made that induced me to enter into these agreements and to provide the USD 350 million that I subsequently loaned to AH and AIML. Although I do not recall precisely some of the details of my discussions with Mr Naqvi and the other activity surrounding my making of the Loans, I recall very clearly the essence of what Mr Naqvi told me and the general flow of what happened during the relevant short period of a few days (which is, in fact, quite simple). In preparing this account I also considered the contemporaneous documents, including my telephone records from the time, in order to refresh my memory of what happened."

68. Mr Jafar said that he had been introduced to Mr Naqvi in 2002 when the Abraaj entities were being formed and been asked to become a founder investor. He had agreed to invest US\$5 million in return for what was at the time approximately a 5% shareholding in the company now called AH and to join its board. Mr Jafar said that the other founder investors included highly reputable, well-known businessmen from Dubai, Abu Dhabi, Sharjah and Saudi Arabia, international financial institutions and, early on, the Dubai Government. Mr Jafar explained that he did not join or participate in any board committees, and his board attendance and attention was purely from meeting to meeting. He stepped down from the

AH board in 2010. Thereafter, he said, he only saw Mr Naqvi occasionally, once or twice a year mainly at social events.

69. He noted that Mr Naqvi had been the founder and CEO of AH and the other Abraaj entities and that throughout his time as an AH board member Mr Naqvi had acted as such without challenge.
70. On 20 March 2013 Badr was asked by Mr Naqvi and agreed to become a non-executive director of AH and had remained a member of the AH board until June 2018, shortly after provisional liquidators had been appointed in respect of AH by this Court.
71. Mr Jafar said that he was aware that the Abraaj entities were seen as a regional and progressively even international success story and of the extremely high regard in which Abraaj and Mr Naqvi were held in the regional and international financial community.
72. As I have noted, at [22] of Jafar 1, Mr Jafar had explained the basis and strength of his recollection of his discussions with Mr Naqvi and the documents he had examined when preparing his written evidence. He also commented that he had been unaware of the numerous WhatsApp messages exchanged between Badr and Mr Naqvi during the time that the Loans were being sought and negotiated, which messages had been put in evidence at the trial. He said that he considered that a number of the messages sent by Badr had been written in a way which intentionally or otherwise made Badr appear to have played a more significant role than was the case.
73. Mr Jafar said (at [27] of Jafar 1) that in the morning of 20 December 2017, sometime before 11am, Mr Naqvi had called him from Dubai and asked if he could have a meeting at Mr Jafar's Sharjah office but had not explained the purpose of the meeting and Mr Jafar had not asked about its purpose. Mr Naqvi had not previously made such a request and Mr Jafar readily agreed to the meeting which took place in that office around 11:20am on that day.

74. The meeting took place before Mr Jafar had been able to consult and take advice from Mr Nerguizian so that at the end of the meeting Mr Jafar told Mr Naqvi that he wished to consult with Mr Nerguizian and called Mr Nerguizian before Mr Naqvi left in order to see whether he was available to join the meeting. However, Mr Nerguizian could not be reached.
75. The following are the key parts of Jafar 1 that deal with what Mr Jafar says that he was told by and discussed with Mr Naqvi at the First 20 December 2017 Meeting (my underlining):

- “28. Mr Naqvi explained that capital had been drawn down from investors in the Healthcare Fund [the AGHF] over time in the ordinary course of business to fund particular investments but that some of this capital (the "Uninvested Capital") had not yet been deployed as a result of regulatory and political delays in the target projects, which was not unusual for the countries in which Abraaj invested.
29. Mr Naqvi said that certain of the principal fund investors, including the Bill & Melinda Gates Foundation, the IFC, the CDC Group, and the Proparco Group (the "Healthcare Fund Investors") had suddenly and unexpectedly demanded the return of their Uninvested Capital before year-end. He explained that the Healthcare Fund Investors, including a particular bureaucratic "bean counter" in the Gates Foundation, did not understand that regulatory and unforeseen political processes in emerging markets can create unforeseen project implementation delays. (I clearly remember him using the term "bean counter", which struck me at the time as an idiosyncratic thing for Mr Naqvi to say.) I asked Mr Naqvi what had happened to the money in the meantime, and he told me that the Uninvested Capital had been placed in Abraaj's treasury and was unavailable immediately to be cashed within the timescale in which the Healthcare Fund Investors were suddenly demanding that the Uninvested Capital be returned to them.
30. I asked Mr. Naqvi if the Healthcare Fund Investors had any legal or contractual right to demand the return of the Uninvested Capital. Mr. Naqvi said no; definitely not. He explained that, whereas it was becoming increasingly common, particularly in the West, for private equity limited partnership agreements to prohibit the placing of investors' uninvested funds in treasury, the limited partnership agreements of the Healthcare Fund did not include any such prohibition; he said that there was no such prohibition in the limited partnership agreements for any of the Abraaj funds. He said that he had obtained an independent legal opinion from Freshfields Bruckhaus Deringer ("Freshfields") to that effect only a few days before.
31. Mr Naqvi stated that the Healthcare Fund Investors had nonetheless started to make noise (he mentioned that this had started with the Gates Foundation, but

that the other Healthcare Fund Investors, who seemed increasingly coordinated, were also becoming vocal in concert). He said that he had argued to try and knock sense into them to no avail. He said that, in the circumstances, he did not want the matter to escalate and get out of hand, and worried that an open/public dispute with these globally high-profile institutional investors could be very damaging to Abraaj's reputation, notwithstanding the contractual correctness of Abraaj's position. In particular, he said he was concerned that any negative publicity would affect the otherwise smooth progress and closing of the very important global USD 6 billion APEF VI fund launched by Abraaj, for which he said he had already obtained commitments from investors for over half.

32. *Mr Naqvi said that the Healthcare Fund Investors had demanded the return of their Uninvested Capital by the end of the year, which meant within just over a week. He said this was clearly unanticipated and, whereas Abraaj had a reasonable amount of ready cash available, he needed to borrow around USD 290 million, of which (as I recall) approximately USD 250 million was needed to repay the Healthcare Fund Investors, with the balance to be used to meet other urgent needs: he explained that he expected that similar demands from other investors and/or in relation to other funds would follow once word got around (and because many investors had invested in, and were therefore common to, multiple funds) and which he wanted to be in a position to pay without delay.*
33. *He asked that I lend USD 90 million to the Abraaj Group with the loan being made available immediately before year-end, on the basis it would be repaid by 31 January 2018. He explained that he had secured the balance of USD200 million from Emirates NBD ("ENBD", one of the leading banking groups in the Middle East).*
34. *I asked Mr Naqvi how the loan would be repaid. Mr Naqvi said that the funds were needed on a short-term basis only. He said that the Abraaj Group was financially sound (or words to that effect) and certainly able to realise the necessary cash to repay the loan. I asked him if Abraaj had audited financial statements and he confirmed that it did; that its accounts were audited by KPMG and that it had a clean audit as of October 2017. He also explained to me that J.P. Morgan had recently valued Abraaj at \$1.2billion and remarked that that clearly illustrated the Group's value and financial soundness.*
35. *Mr Naqvi said that Abraaj's business was now very dynamic, with many moving parts, and said that there are many sources of other cash revenues that Abraaj expected to realize over the next month and which Abraaj could use to repay the loans, including proceeds from the sale of a significant shareholding in Karachi Electric Company, which (he said) had been delayed by regulatory issues and change of government in Pakistan, but which he expected to complete imminently, as well as the imminent sale of treasury shares in AH.*

36. Mr Naqvi said that he had very recently agreed sales of blocks of shares in AH at a price pursuant to the J.P. Morgan valuation to:
- (1) *Mr Thomas Schnidheiny, a billionaire Swiss businessman and former chairman of Holcim, one of the world's largest cement manufacturers, and then-current board member of AH, and*
 - (2) *an existing shareholder in AH. Mr Naqvi did not name the shareholder at the time, but I now know this to have been Mr Sri Prakash Lohia, who is the founder and Chairman of the Indorama Group. Indorama is one of the world's leading chemical companies.*
37. I asked Mr Naqvi if the Board of Abraaj knew about all this and he said 'no', because it had all happened very recently. He said that he would obviously inform the Board in good time and would call Badr and inform him after our meeting.
38. I trusted Mr Naqvi and believed what Mr Naqvi told me about the unforeseen circumstances in which the Healthcare Fund Investors had demanded the urgent return of the Uninvested Capital and his explanation that the Uninvested Capital had been placed legitimately in the Abraaj treasury and could not immediately be turned into cash.
39. I also believed his repeated assurances to me that: (i) the Abraaj group was financially sound (and, in that context, that Abraaj had audited financial statements and had been highly valued by J.P. Morgan); (ii) the funds were needed on a short-term basis only; and (iii) Abraaj would, and would be able to, repay me promptly in the new year.
40. *I was reinforced in that belief because, as I understood from Mr Naqvi (and had in mind) at the time:*
- (1) *the Abraaj Group was advised by reputable lawyers, including Freshfields;*
 - (2) *the Abraaj Group was advised, and its accounts audited, by reputable accountants, KPMG;*
 - (3) *investors in the Abraaj Group included sophisticated and reputable individuals, global institutional investors and state entities, who would continue to invest in Abraaj going forward.*
41. I am aware from my own experience that reputable financial institutions (like any company) can suffer from urgent liquidity issues as a result of an unanticipated need to make payments and therefore borrow funds to cover the shortfall. The Abraaj Group had a formidable global reputation as a successful, legitimate enterprise. Mr Naqvi's explanation of the circumstances in which the shortfall had arisen was plausible and I had no reason to doubt his summary of

Freshfields' advice. Mr Naqvi was the Founder and CEO and, as far as I was concerned, he represented the entire Abraaj Group. I was content with the account provided by Mr. Naqvi and his answers to my questions, not knowing, of course, his concealment of the fact that Abraaj was financially mismanaged, engaged in fraudulent activities and even insolvent at the time.

42. Also, although this was a significant loan, on the basis of what I had been told by Mr Naqvi I believed that given the reputation and size of the Abraaj Group it was a safe transaction that, given the described, short-term, circumstances (which I believed), gave me an opportunity to make a reasonable, short-term, return on my money. The loan was, for me, and relying on Mr Naqvi's assurances about Abraaj's financial health, a purely commercial opportunity; nothing else. Had I known the true (and, as I now know, dire) financial state of the Abraaj Group, or that there was (again, as I now know) financial mismanagement and fraud within the Group, of course I would not have even considered advancing the Loans and nor would my banker, Mr Nerguizian; nor any lender for that matter.
43. Relying on what Mr Naqvi had told me during our meeting, I told him that although lending money is not my business, I was willing to consider facilitating a loan for the Abraaj Group. I had in mind that Bank of Sharjah would be the conduit to lend the money to Abraaj, with me standing behind the loan. I told Mr Naqvi that I wanted to get advice from Mr Nerguizian before giving my definitive response.
44. I telephoned Mr Nerguizian while Mr Naqvi was with me with a view to inviting him to join me and Mr Naqvi. Mr Nerguizian did not answer the telephone and so I told Mr Naqvi that Mr Nerguizian must be busy, that Mr Naqvi could leave and that I would revert to him asap after consulting with Mr Nerguizian.
45. My PA telephoned Mr Nerguizian again soon afterwards. This time he answered. I explained briefly why I wanted to speak to him and asked him to visit my office as soon as he was able to do so, which he agreed to do. Mr Nerguizian works in Sharjah close to my office so he arrived soon afterwards. When Mr. Nerguizian arrived at my office, I explained in detail my conversation with Mr. Naqvi, and we discussed the terms that I had in mind for the loan, namely: the loan was to be US\$ 90 million; I suggested an up-front fee to be charged of 6% of the loan value; interest to be charged at 6% p.a.; all of this was to be payable on maturity on 31 January 2018. I told Mr Nerguizian that I had in mind that the loan would be from Bank of Sharjah to Abraaj, with a guarantee backed by me (the "Initial Structure"). I proposed to Mr Nerguizian that Bank of Sharjah and I might share the risk (and reward) 50:50, and he agreed.
46. Mr. Nerguizian and I then called Badr, since he was an Abraaj board member, to enquire about the financial state of Abraaj and what he thought. We called Badr, together, from my mobile phone and put him on speaker. I told Badr about

Mr Naqvi's approach that morning and Badr said he had just had a long call from Mr Naqvi. I described to Badr in detail Mr Naqvi's approach to me and the ensuing conversation that Mr Naqvi and I had had, earlier in the day. Badr said that Mr Naqvi had just telephoned him and relayed the same story about the sudden Healthcare Fund Investor demands, and now need to return the Uninvested Capital, as the reason why Abraaj needed urgently to borrow money to meet this unexpected cash requirement. I told Badr that Bank of Sharjah and I were inclined to make the loan and the terms that Mr Nerguizian and I had discussed. Mr Nerguizian asked Badr if he thought there was anything untoward that we should be concerned about. Badr said that although he had not been aware of the Healthcare Fund Investors' demands before Mr Naqvi had telephoned him shortly before our call, he was not aware of anything untoward and mentioned as an example - as Mr Naqvi had already told me - that KPMG had recently completed a clean audit of Abraaj.

47. After the call with Badr, and relying on what Mr Naqvi had told me in our meeting (which I had relayed to Mr Nerguizian), Mr Nerguizian and I called Mr Naqvi and told him that Bank of Sharjah and I were minded to make the requested US\$ 90 million loan and the proposed terms. These terms reflected the fact that I considered the loan to be low risk but that, given the very short-term nature of the loan, the return needed to be sufficient to make it worth our while to lend the money."

76. Mr Jafar said that during the call that he and Mr Nerguizian had had with Mr Naqvi there had been some negotiation, and that Mr Naqvi had asked for an increase in the amount of the loan to US\$100 million with repayment at the end of February 2018 to allow for some leeway. Mr Jafar and Mr Nerguizian had agreed to this. Mr Jafar said that in response to a question from Mr Nerguizian, Mr Naqvi had re-iterated that Abraaj had several sources of funds which could be used to repay the loan given a few weeks' breathing space, including the sale of shares, the proceeds of sale of Abraaj's stake in Karachi Electric, and other exits from investments in the normal course of business. They all then arranged to meet in person at the Royal Mirage Hotel in Dubai to map out the detailed terms and the mechanics to be used for making the loan. After that call, Mr Nerguizian had told Mr Jafar that since his lending authority was limited to US\$45 million BOS would only be able to participate to that extent.

77. Mr Jafar said that prior to the Royal Mirage Meeting (he cannot recall precisely when) he had explained to Badr that Mr Naqvi had asked to increase the loan to US\$100 million and

that the BOS's participation would be limited to US\$45 million and Badr had volunteered to advance the additional US\$10 million himself (but Mr Jafar had not asked him to do so and did not intend that Badr would participate in the loan).

78. Mr Jafar said that he was at the Royal Mirage Meeting for approximately 30-45 minutes during which he, Mr Nerguizian and Mr Naqvi discussed the practicalities relating to the First Loan and Mr Naqvi and he reiterated and confirmed their agreement to the matters discussed by telephone earlier that day. Mr Nerguizian had said that the First Loan needed to be secured and Mr Naqvi had offered to pledge by way of security 210 million treasury shares in AH that he controlled personally. Mr Jafar said that he has become aware from documents subsequently shown to him that Mr Naqvi appears to have believed that this requirement had been waived by Badr and that instead a parent company guarantee would be provided. However, according to Mr Jafar he had never waived this condition and had expected that the relevant security would be properly documented in the days following the making of the First Loan (early in the New Year of 2018) because he recognised that there was insufficient time to complete the security documentation and arrangements before the funds needed to be advanced. Mr Jafar said that it was agreed that Mr Nerguizian and Mr Naqvi would make the necessary arrangements to document the agreement for the First Loan before he left the Royal Mirage Meeting for a dinner engagement.
79. Mr Jafar referred to his email exchanges with Mr Nerguizian after the Royal Mirage Meeting concerning the email which was to be sent by Mr Nerguizian to Mr Naqvi to record the proposed structure and terms of the First Loan (which I discuss in detail and quote from below). Mr Jafar said that it had quickly become apparent that the structure which had been discussed with Mr Naqvi (which Mr Jafar referred to as the Initial Structure) would not work. This was because, since none of the Abraaj entities were BOS customers (although Mr Jafar just referred to "*Abraaj*" not being a customer) BOS could not lend to them. The procedures for making the relevant Abraaj entities customers (and for opening accounts with BOS) would have to be gone through. However, there was insufficient time to complete the necessary arrangements. Accordingly, Mr Nerguizian had suggested an alternative structure (which Mr Jafar referred to as the New Structure) under which BOS would grant Mr Jafar a

cheque discounting facility. Cheques would be issued by the relevant Abraaj entity to Mr Jafar and these would be negotiated to BOS. BOS would then pay over to Mr Jafar (or to the relevant Abraaj entity if Mr Jafar so instructed) the face value of the cheques less an amount (discount) in respect of fees and interest. Mr Jafar would grant BOS security in the form of a pledge over fixed deposits he held with BOS to secure the facility (to the extent of his risk exposure, namely 55% of the loan of US\$90 million).

80. Mr Jafar said that he had reviewed his telephone records for this period and could see that there were a number of calls that he had had with Mr Naqvi, Badr and Mr Nerguizian early in the morning of 21 December 2017 but he did not recall precisely what had been said in these calls, although he said that he clearly remembered discussing the problem with the Initial Structure and making the decision that the parties should adopt Mr Nerguizian's New Structure, which was subsequently agreed.
81. Mr Jafar explained the documentation that had been provided to him by Mr Nerguizian for the purpose of recording the terms of the cheque discounting facility and the pledges. Mr Jafar said that Mr Nerguizian had sent an email Mr Naqvi early on 21 December 2017 to ask for two cheques to be made out to Mr Jafar's order and that two cheques had subsequently been provided to BOS, signed by Mr Naqvi and Mr Lakhani and drawn on AIML's account at the Commercial Bank of Dubai.
82. Mr Jafar also said, as I have already noted, that he was now aware from documents he had subsequently been shown that at this time (when the parties were finalising the practical arrangements for the First Loan) Mr Naqvi and Badr had exchanged a number of WhatsApp messages on 21 December 2017. These included a message in which Mr Naqvi had said to Badr that *"as a totally separate matter, having healthy cash through the system as deposits shows the firm in a healthy light at end year and as the various reports go out, it is good to show cash, so if you want to place deposits over year end, and have them returned, unused immediately thereafter, that would be nice and amazing, but not mission critical ..."* and a response from Badr in which he had said *"sure can consider, \$30-50. Will need to break some personal 3 month deposits"* (the **Year End Deposit Message**). Mr Jafar said that

he had been unaware of the Year End Deposit Message at the time (or at any time before it was drawn to his attention after it was referred to by the Defendants in these proceedings) and that Badr had not mentioned to him at the time that Mr Naqvi had made the proposal in the Year End Deposit Message to him. He said that as far as he was aware Badr had never made any such deposit. Mr Jafar said that even if he had been told about the Year End Deposit Message it would not have caused him to believe that there was financial mismanagement in the Abraaj entities or that the assurances he said had been given to him by Mr Naqvi were untrue.

83. Mr Jafar then explained the circumstances surrounding Mr Naqvi's further request for the Second Loan and the Third Loan. He said that he had spoken again to Mr Naqvi shortly after the First Loan had been advanced (he believed this to have been on 24 December 2017) at which time Mr Naqvi had complained that he was having trouble finalising the proposed US\$200 million loan facility with ENBD that he had previously mentioned. Mr Naqvi had said that he was upset and insulted by the way that ENBD was approaching the negotiations, in particular regarding security. Mr Jafar said that Mr Naqvi had offered to pledge his art collection as security for the loan but ENBD was insisting on having people come into his home to value the individual pieces that he kept there. Mr Naqvi had then asked Mr Jafar if he would consider making a further loan on the same terms as the First Loan to cover the funding that he had hoped would be provided by ENBD. Mr Naqvi had, according to Mr Jafar, reiterated what he had already said about the Abraaj Group only needing the funds for a short period, over the end of the calendar year, and that had it not been for the sudden unexpected demand by the Healthcare Investors which had created the immediate liquidity crisis, Abraaj would not need these short-term loans as it was otherwise in a very healthy financial position. Mr Naqvi had offered to give Mr Jafar first priority on all available cash and a pledge over a block of shares in AH owned by a company he owned and controlled (AE2L) and had repeated that he was offering security over all his own personal assets as a pledge of sincerity and good faith, and that these assets had a minimum value of US\$600 million.

84. Mr Jafar said that he felt some sympathy for Mr Naqvi in view of the draconian way that ENBD were approaching the issue of security. He considered that the opportunity to lend further funds represented another good investment opportunity (he considered that lending money to Abraaj in the circumstances that Mr Naqvi had described was a low-risk proposition). He said that he had not concluded from Mr Naqvi's reference to ENBD's approach that the Abraaj group was not essentially financially sound or that the Second Loan was unlikely to be repaid in time or at all. It did not occur to him that ENBD would offer to make a loan for US\$200 million to an entity which it did not expect to repay it (let alone one that was mismanaged financially and was engaged in fraud).
85. Mr Jafar said that he told Mr Naqvi that he would consider making the requested further loan essentially on the same terms as the First Loan but that he wanted him to discuss this with Mr Nerguizian first. Mr Jafar said that he had then spoken with Mr Nerguizian (on the evening of 25 December 2017 he believed) and told him what Mr Naqvi had said about ENBD. He asked Mr Nerguizian to meet Mr Naqvi and discuss the proposed new loan and in particular to verify the existence of the ENBD term sheet. Mr Nerguizian met Mr Naqvi the following day, 26 December, and after the meeting Mr Nerguizian had emailed Mr Jafar to confirm that he thought that as far as the position with the ENBD term sheet was concerned Mr Naqvi's account was genuine. I discuss Mr Nerguizian's evidence regarding this meeting and this email below.
86. Mr Jafar said that later on 26 December (but he was unsure as to precisely when) Badr had informed him that Mr Naqvi had asked Badr if he (Mr Jafar) would be willing to provide a further very short term (for up to one week) loan of US\$50million in order to provide further liquidity over year-end. He said that in light of what Mr Naqvi had told him at the First 20 December 2017 Meeting he had inferred that the need for this further loan had been created by further investor demands for the return of uninvested capital and recalled that Badr had suggested that he (Mr Jafar) might make the loan on the same terms as the First Loan. However, since this was going to be a very short-term loan, Mr Jafar did not feel it appropriate to charge fees or interest in view of the fees and interest earned on the First Loan

and the Second Loan and he told Badr that, as a gesture of good faith, he would make this very short-term advance at no cost to Abraaj.

87. Mr Jafar said that Mr Nerguizian had suggested that once again the Second Loan should be structured as a cheque discounting facility. Mr Nerguizian had prepared drafts of the relevant documentation which included a memorandum of agreement between Mr Jafar, BOS and (this time included) AIML. Mr Jafar had reviewed these drafts and sent Mr Nerguizian detailed comments in the early morning of 27 December (discussed below). Mr Nerguizian had emailed to Mr Jafar later that morning the amended transaction documents and the signed amended pledge letter and Mr Jafar had then signed and returned the necessary documents to him.
88. Mr Jafar said that subsequently he had emailed Mr Nerguizian to say that Badr had spoken to Mr Naqvi and agreed that the Third Loan would be repaid within a week (on either 3 or 4 January depending on when the Third Loan was made). The Third Loan was made using the same cheque discounting arrangement and once again Mr Nerguizian had prepared the relevant transaction documents. Since Mr Jafar (and Crescent Petroleum) had decided to absorb the costs of the Third Loan he directed that Mr Naqvi should send Mr Nerguizian a cheque for only the principal amount of US\$50 million. Mr Jafar said that he alone was the lender of the Third Loan and that Badr had not been.
89. Mr Jafar also discussed the repayment of the Third Loan and the failure to repay the First Loan and the Second Loan. He said that the Third Loan had been repaid by AIML on 4 January 2018 but that AH and AIML had failed to repay the First Loan and the Second Loan on their due dates in February 2018 (with the exception of repayments totalling AED 121,000,000 that were made by Mr Naqvi on 21 and 22 March 2018 the First Loan and the Second Loan remained unpaid).
90. Mr Jafar also said that Mr Naqvi, AH and AE2L had also failed to put in place the security that they had promised in respect of the Second Loan. He said that there had been several months of unsuccessful attempts to get Mr Naqvi, AH and AIML to repay the First Loan and

the Second Loan. I discuss further below the key emails sent and documents produced by or on behalf of Mr Jafar and Mr Naqvi during the negotiations between Mr Jafar and Mr Naqvi in the period between February and May 2018.

91. Mr Jafar said that on 30 May 2018 he had entered into a loan assignment agreement (the ***Auctus Assignment***) with Auctus Fund Ltd (***Auctus***) (governed by English law) and transferred legal title to the Loans to Auctus (I discuss the effect of the Auctus Assignment further below). Pursuant to that agreement Auctus as assignee agreed to pay to Mr Jafar as consideration for the transfer (but only upon receipt of funds from AH and AIML) the value of the Loans. Clause 3(b) of that agreement stated as follows:

“[Mr Jafar] agrees that [Auctus] shall settle the Consideration by way of the payment to [Mr Jafar] promptly following its receipt of any Remittance, of an amount equal to each and every such Remittance. [Mr Jafar] agrees that, on the Termination Date, any amount of the Consideration that remains outstanding shall automatically be reduced to zero.”

92. Mr Jafar noted that on 31 May 2018, Auctus had presented a winding-up petition in respect of AH and AIML (the ***AH Winding Up Proceedings*** and the ***AIML Winding Up Proceedings*** respectively and together the ***Winding Up Proceedings***) and that he had sworn (also on 31 May 2018) one affidavit in support of both petitions (the ***Winding Up Affidavit***).
93. Mr Jafar said that subsequently the negotiations had continued with Mr Naqvi and that he and his advisers had continued to put pressure on Mr Naqvi to pay or procure repayment of the Loans and that in August 2018 Mr Naqvi and Mr Jafar had entered into a settlement deed (the ***Settlement Deed***) pursuant to which Mr Naqvi had agreed to transfer certain assets to Mr Jafar in partial satisfaction of the losses he had suffered as a result of the failure by AH and AIML to repay the First Loan and the Second Loan. Mr Jafar pointed out that he gives credit in these proceedings for the value of those assets. I discuss below the disputes and issues arising out of the Settlement Deed and the value of these assets.
94. Mr Jafar in [96] and [97] of Jafar 1 summarised (and set out) the eight assurances that he said he had been given by Mr Naqvi and his state of mind as follows:

“96. *As explained above, during our discussions in December 2017, Mr Naqvi assured me that:*

- (1) The Uninvested Capital had been placed in the Abraaj treasury;*
- (2) That Abraaj's use of the Healthcare Fund Investors' (and other investors') Uninvested Capital was in contractual conformity with the partnership documents of the relevant investment funds;*
- (3) That this had been confirmed by Freshfields;*
- (4) That the Abraaj group was financially sound;*
- (5) That the Abraaj group had clean, audited financial statements;*
- (6) That the Uninvested Capital was temporarily unavailable;*
- (7) That the Abraaj group needed to borrow money on a short-term basis only to cover the shortfall; and*
- (8) That my Loans would be repaid by the end of February 2018, and that the Abraaj group had access to the funds that would enable it to do that.*

97. *I trusted Mr Naqvi and believed, and relied on, those assurances when agreeing to make each of my Loans to AH and AIML. I understood - and genuinely believed - that the Loans that I was being asked to make were to assist in ameliorating and bridging the wholly unexpected and unplanned short term liquidity issues occasioned by the sudden, unexpected and unjustified demands by the Healthcare Fund Investors for the return of their Uninvested Capital (and Mr Naqvi's expectation that other like demands would be made).”*

95. In Jafar 1 Mr Jafar also responded briefly and set out his own evidence in relation to the facts and matters of which he had, he said, become aware after the Loans had been advanced and in relation to the challenges raised by the Fund Parties (see [98]-[101] and [102]-[135]). These parts of Jafar 1 summarise his evidence and position on many of the key issues in dispute and are worth highlighting. The following are the key passages (my underlining):

“98. *I am now aware from facts and matters that have come to light since I made my Loans (including in the context of this litigation) that these assurances were untrue and fraudulently misleading. In particular, I am aware that:*

- (1) The Uninvested Capital had not been placed in the Abraaj treasury but had been used to meet obligations of other companies and funds in the*

Abraaj group, and to fund operating and other expenses incurred by AH and AIML and personal withdrawals by Mr Naqvi;

- (2) *Abraaj's use of investor (and Healthcare Fund Investor) funds was not in accordance with the funds' partnership documents;*
 - (3) *the Abraaj group was not financially sound (and, indeed, AH and AIML may have been insolvent at the time that my Loans were made);*
 - (4) *although the Abraaj group did have audited financial statements, those financial statements did not properly reflect the financial position of the group, including because information was deliberately withheld from Abraaj's auditors; and*
 - (5) *my Loans were not simply needed to overcome an unexpected short term liquidity issue, but to cover-up cash shortfalls caused by Abraaj's habitual, fraudulent, misuse of investor funds.*
99. *Mr Naqvi did not explain any of this to me, indeed obviously withheld these critical facts from me, despite the fact that they were (or must have been) known to him. Had I known that Mr Naqvi's assurances were untrue, indeed misleading, had he not made those assurances, or had I known that the situation was in fact as set out above, I would obviously not have made the Loans. Nobody would have.*
100. *I also note that Mr Naqvi also assured me that my Second Loan would be properly registered within 2 weeks (i.e., by 10 January 2018) and that AE2L would provide a pledge of shares in AH as security for that Loan. In fact, Mr Naqvi never concluded the formal "proper and legally binding document" as the parties had agreed (paragraph 82 above) and I understand, from documents I have been shown, that Mr Naqvi may have also pledged those shares to a third party. I would not have made my Second Loan if I had known that Mr Naqvi was not going to provide the security that he undertook to provide to me.*
- 101 *Furthermore, the combined effect of Mr Naqvi's purposely misleading assurances led me to believe that the finances and management of the Healthcare Fund (and the other funds and entities in the Abraaj Group from whom Mr Naqvi expected similar requests for the return of uninvested capital), and of the Group more generally, were essentially sound and proper. In particular, that there had been no improper or dishonest use of investors' funds. Mr Naqvi's failure to tell me that there had, in fact, been such (mis)use was utterly and deliberately misleading. Had I known that the finances and management of those entities - or the wider Abraaj Group - were not essentially sound and proper, I would obviously not have made any of the Loans. To suggest otherwise is absurd.*
-

103. *In my view the Defendants' suggestion that I made my Loans despite knowing that there was financial mismanagement in the Abraaj group is absurd. It would have made no sense at all for me (or anyone else for that matter) to lend USD 350 million (or any sum) to the Abraaj group if I had known that the group had been financially mismanaged and involved in fraud or that there was a serious risk of my Loans not being repaid (and, indeed, that Abraaj was insolvent or on the brink of insolvency). The only sensible explanation for why I made the Loans is that I was deceived. That is precisely what happened. What the Defendants seem to be saying is that I knowingly plunged a large amount of money into a black hole, so that I would never get that money back. I find that offensive and perverse.*

.....

104. *The Defendants say that I knew, prior to agreeing to make my Loans, of financial unsoundness, misgovernance or impropriety within Abraaj because of the non-executive directorship that I previously held seven years earlier in certain Abraaj entities.*

105. *As cited above, I was a director and board member of AH from 11 November 2006 to 5 October 2010. During that time, I was given no indication of financial unsoundness, misgovernance or impropriety and fraud within Abraaj (and certainly not of the sort which subsequently emerged).*

.....

106. *The Defendants say that Mr. Naqvi did not have in mind, or intend to convey, the representations referred to in paragraphs 96, 100 and 101.*

107. *I do not agree. I have no doubt that Mr Naqvi intended to, and did, convey those representations to me in order to induce me to make the Loans. Indeed there is no other plausible explanation for the fact that the assurances that Mr Naqvi gave me are so profoundly inconsistent with what I now know to be the true position.*

....

108. *The Defendants say that I knew, prior to agreeing to make my Loans, that the funds and entities for which Mr. Naqvi was seeking to raise monies were the subject of misconduct.*

109. *I confirm that I had no idea that the Abraaj Group - or the funds and entities in question were the subject of financial impropriety and fraud.*

.....

110. *The Defendants say that I knew, prior to agreeing to make my Loans, that the finances and management or governance of the relevant Abraaj entities were not essentially sound or proper, and that the Group's liquidity issues were not short term, because of the circumstances in which Mr. Naqvi asked me to make the Loans.*
111. *That is not true.*
112. *The fact that Mr. Naqvi was seeking the Loans for a short period of time did not cause me to believe that the entities for which Mr. Naqvi was seeking to raise monies were mismanaged or not essentially financially sound.*
113. *As explained above, I am aware that any company or financial institution can suffer a liquidity crunch when they suddenly have to make unanticipated payments. This was precisely what Mr Naqvi told me had happened: the Healthcare Fund Investors had made an unexpected, non-contractual, demand for the immediate return of the Uninvested Capital which Mr Naqvi had no choice but to comply with to avoid reputational damage generally and specifically because he was at a delicate stage in raising his latest important investment fund. I trusted Mr Naqvi and believed the explanation he had given me, and did not believe or think that he was withholding critical information from me.*
114. *Mr Naqvi rationalized that he only needed the Loans for a short period of time because (i) Abraaj needed time to realise cash and was expecting shortly to receive significant cash proceeds, including from the sale of Karachi Electric; (ii) Mr Naqvi was in the process of imminently raising funds by selling treasury equity in the Abraaj Group (having agreed two such sales already); and (iii) Abraaj expected to continue to realise cash from exiting investments in the ordinary course of business. In short, Mr Naqvi told me (and I believed him) that he was simply facing an unexpected, sudden, short-term liquidity crunch and that tallied with the short-term nature of the loans he was seeking.*
-
115. *The Defendants contend that I knew, prior to agreeing to make my Loans, that the finances and management or governance of the relevant Abraaj entities were not essentially sound or proper because the terms of my Loans indicated that AH, AIML or the Abraaj Group represented a significant credit risk.*
116. *Again, that is not true.*
117. *The terms I proposed did not suggest that AH, AIML or the Abraaj Group represented a significant credit risk at all, and this was certainly not my view when I (together with Mr Nerguizian, who was the CEO of the Bank of Sharjah*

at the time) proposed the terms or when I made the Loans. To the contrary, I thought that lending the money to Abraaj represented a safe short-term investment. I would not have lent money (let alone substantial sums of money) to an insolvent and financially mismanaged entity. If I had thought AH, AIML or Abraaj would or could not repay the Loans, I would obviously not have made the Loans on any terms in the first place.

.....

123. The Defendants say that I was motivated to obtain commercial benefit(s) from the terms of the Jafar Loans.

124. It is, of course, correct that I was motivated to obtain a commercial benefit from the Loans. Like any lender, I would not have made them if that were not the case, nor would Mr Nerguizian on behalf of Bank of Sharjah. However, the terms on which I and Bank of Sharjah were prepared to make the Loans - and the commercial benefits that I expected to get from them - were premised on my belief that the Loans would be repaid, which in turn depended entirely on the assurances that Mr Naqvi had conveyed to me (and on what I understood from those assurances about the healthy financial situation at Abraaj). I would clearly not have made the Loans (on any terms) if I had thought or known that I might not be repaid. Any contention to the contrary is plainly perverse.

.....

125. The Defendants contend that I knew that Mr. Naqvi asked for the Jafar Loans to be recorded, on remittance slips, as "investment[s]" in order to deceive external parties.

126. I am aware from emails I have been shown that Mr Naqvi asked to record the purpose of my First and Second Loans as "investment" in the relevant remittance slip and that the remittance information for those Loans is recorded as "REF/INVESTMENT".

127. I have been shown copies of the written instructions I signed in respect of the Loans, and I see that those instructions state that the "[o]bject of transfer" was "investments". I am aware that Mr Nerguizian recalls mentioning this point to me, although I do not frankly recall him doing so. I do not recall reading any request or communication from Mr Naqvi in relation to the designation of the loan advances as "investments". To my knowledge, a reason/description has to be provided on all transfers in the UAE; this is simply a mechanical issue that I am not ordinarily concerned with and nor would I have turned my mind to this point at the time. I did not at any time have in my mind Mr Naqvi's request to designate the Loan advances as "investments" and, even if I had, I do not believe it would have caused me to believe or suspect that there was anything untoward about the Loans, that the assurances that Mr Naqvi had given me were not true,

or that Mr Naqvi was trying to deceive anyone as to the purpose of the funds. Had I thought so (which I did not), I would obviously not have made the Loans. I certainly never had any intention of deceiving anyone as to such purpose.

.....

128. *The Defendants contend that I was motivated to protect my investment in Abraaj entities and agreed to make the Jafar Loans without any reliance on the Overarching Message.*

129. *Again, this allegation is not true. My investments in Abraaj, which had in fact long been transferred to Crescent Enterprises, did not even cross my mind at the time.*

130. *Those investments had a total book value of USD 56 million (and had, in any event, returned a similar amount such that Crescent's net investment was around zero). It would have made no sense for me to risk USD 350 million in order to protect an investment of USD 56 million, more so if I had known that there was financial mismanagement and fraud within the Abraaj Group such that I would not be repaid.*

.....

131. *The Defendants contend that I did not have Mr Naqvi's representations in mind, and did not rely on them, when I agreed to make the Loans.*

132. *This is absolutely not the case.*

133. *Had Mr. Naqvi not made those representations and assurances to me, I would obviously not have agreed to make my Loans. Mr Naqvi caused me to believe that the finances and financial management of the Abraaj Group were essentially sound as a result of the representations that he made to me when he solicited the Loans in December 2017.*

.....”

Mr Jafar's cross-examination in relation to the negotiation and advance of the Loans

96. Mr Jafar was extensively cross-examined both by Mr Ayres and Mr Atherton. I will deal in detail with his answers (and demeanour) when I come to discuss and consider my findings on the factual issues that fall to be decided. It is, however, convenient at this point to identify the main areas and issues explored during Mr Jafar's cross-examination. Mr Jafar was cross-examined in particular as to:

- (a). His recollections of when Mr Naqvi had first contacted him and what precisely had been said at the First 20 December Meeting.
- (b). Mr Jafar's failure to make any notes or keep any records of his meetings and calls with Mr Naqvi and the basis for his recollection of what was said by Mr Naqvi at and during the First 20 December Meeting and the subsequent meetings and calls.
- (c). The date on which Mr Naqvi first contacted Mr Jafar and requested a meeting.
- (d). What Mr Naqvi had said in relation to Fund IV or GP8 at the First 20 December Meeting.
- (e). What precisely Mr Naqvi had said when he used and what Mr Jafar understood by the term "*Abraaj*."
- (f). What precisely Mr Naqvi had said regarding what the Abraaj entities had done with the Uninvested Capital (did he refer to the Abraaj treasury and say that the Uninvested Capital had been used for general business purposes).
- (g). What documents was Mr Jafar shown at the First 20 December 2017 Meeting?
- (h). What precisely Mr Naqvi had said about the source or sources of repayment of the Loans?
- (i). What was the involvement and role of Badr in the negotiations of and discussions concerning the Loans and what was his relationship with and what had he been told by Badr? What had Badr told him about and what was his understanding of the meaning and significance of the Year End Deposit Message?
- (j). What Mr Naqvi had said were the reasons for his request for an increase in the liquidity buffer component of the Loans (that is the sum to be advanced in excess of the amounts

needed to repay the Healthcare Investors their Uninvested Capital which they were demanding be repaid).

- (k). What was the role of BOS and why had BOS not been prepared to be a joint lender with Mr Jafar?
- (l). Why did Mr Jafar not insist on obtaining some (and to the extent he was promised security, follow up, or otherwise obtain, in January 2018) asset-based security, particularly in light of the security package that ENBD had required (the implication of the ENBD term sheet clearly being that lending to Abraaj entities was considered to be high risk)? In particular, if, as he said he had been told, the Uninvested Capital was held in the form of securities and other short term investments, why did Mr Jafar not at least ask for a security interest over that, the Uninvested Capital?
- (m). Why and how could Mr Naqvi's demands for such large sums at such short notice, and the rapidly increasing amount of the sums required including substantial amounts above the funds required to repay the Healthcare Investors, not have alerted Mr Jafar to the wide-ranging nature and seriousness of the financial problems facing the Abraaj entities? How could Mr Jafar say, in light of the multiple red flags which the account he says Mr Naqvi gave him, that he was satisfied that the loans he was being asked to make were low risk (when they were plainly subject to uncertainties and issues regarding the Abraaj entities' ability to repay and high-risk), particularly when he had taken all he said that he was told at face value and had conducted no due diligence? Why had Mr Jafar failed to conduct any proper due diligence?
- (n). Whether and why there were material inconsistencies between Mr Jafar's evidence and account in these proceedings of what he had been told by Mr Naqvi and the evidence he (and Mr Nerguizian) had given and the documents filed on his behalf in the other related proceedings in this and other jurisdictions, in particular, the Winding Up Affidavit, the letter before action dated 16 January 2020 sent by his solicitors Jones Day to Debevoise & Plimpton (the *Letter Before Action*) and the criminal complaint

that Mr Jafar had filed with the authorities in Sharjah on 30 November 2022 (the *Sharjah Criminal Complaint*).

- (o). What significance did he attach to his investment in the Abraaj entities when deciding to make the Loans?
- (p). What did he understand to be the reason why Mr Naqvi had insisted on the purpose of the Loans being described as for investment?
- (q). Why had Mr Jafar failed to follow up immediately after the Loans had been advanced (in January 2018) to verify what he had been told and to ensure that Mr Naqvi took the steps that Mr Jafar said he had promised to take? Why after he became aware that the First Loan and the Second Loan would not be repaid on time had he failed to refer to the assurances which he now said were so important in his decision to make the Loans and to protest at the way in which he had been misled?

Mr Nerguizian's written evidence in relation to the negotiation and advance of the Loans

- 97. Mr Nerguizian said that he had been Group CEO of BOS from 1992 until 2023 and Chairman and General Manager of Emirates Lebanon Bank (which is part of the BOS group) since 2008. He confirmed that he had known Mr Jafar personally for many years. Mr Jafar, his family and the Crescent Group of companies had been longstanding clients of BOS. He also sits with Mr Jafar on the board of Dana Gas PJSC.
- 98. Mr Nerguizian said that he knew of the Abraaj entities (which he referred to as the Abraaj Group) by reputation and that they were seen (by him and widely in the region) as a great success. But he did not have a detailed awareness of their business as they had no banking relationship with BOS. However, he knew Mr Naqvi personally as they had sat together on the Board of Governors of the Pearl Initiative, a non-profit private sector programme to promote corporate transparency, accountability and sustainability, established and operating

in co-operation with the United Nations Office for Partnerships. Mr Naqvi also gave the impression of being very wealthy and successful.

99. Mr Nerguizian said that he had been telephoned by Mr Jafar on the afternoon of 20 December 2017 and asked to see him at the Crescent Group's offices in Sharjah as soon as possible. Mr Jafar had explained during that call that Mr Naqvi had approached him for an urgent short-term loan of US\$90 million. Mr Jafar had said he proposed that he and BOS share in the loan and outlined possible terms (namely that the loan would be for around a month and would benefit from a 6% upfront fee and 6% per annum interest).
100. At the meeting with Mr Jafar, Mr Jafar had described his meeting with Mr Naqvi. He said that Mr Naqvi had told him that a number of investors in Abraaj's emerging markets healthcare fund had demanded the return of cash which had been drawn down from them but had not yet been deployed in the target projects because of regulatory delays and that the money had therefore been placed in Abraaj's treasury in the meantime. Mr Jafar said that Mr Naqvi had told him that the healthcare fund's documentation permitted Abraaj to deal with investors' cash in this way and that Mr Naqvi had obtained an opinion from Abraaj's lawyers, Freshfields Bruckhaus Deringer LLP, confirming this. Mr Jafar said that Mr Naqvi had explained that despite the fact that the investors had no contractual right to have the money returned to them, they were nevertheless insistent and so Mr Naqvi was keen to avoid a fight with them and negative publicity for fear of damaging Abraaj's on-going negotiations and fundraising drive for its latest investment fund. Mr Jafar said that Mr Naqvi had told him that the investors had demanded the return of their money by the end of the year but had confirmed that they would continue to meet cash calls in the New Year. Mr Naqvi had said that he therefore needed a short-term loan to cover the unexpected and urgent cash shortfall in the interim. Mr Jafar's concept was that BOS and he would lend money to Abraaj to cover this brief cash shortfall, and that the money would be repaid by the end of January 2018, giving Abraaj breathing room to generate the necessary cash. Mr Jafar explained that the loan would be repaid on or before 31 January 2018. The terms that Mr Jafar had in mind included a fee equal to 6% of the total loan value and interest to be charged at a rate of 6% per annum during its term. Mr Nerguizian said that although the upfront fee and the interest

rate were, together, relatively attractive to the lenders, given the short-term, urgent, nature of the loan the actual cost to Abraaj would be appropriate. He thought the terms were justified for such a short-term transaction. Mr Nerguizian confirmed to Mr Jafar that subject to BOS' Chairman's approval, BOS would be interested in participating in the transaction as to 50% of the loans.

101. Mr Nerguizian confirmed that he and Mr Jafar had then called Badr using Mr Jafar's mobile phone (who he knew to be a member of the board of AH). Mr Jafar had during the call explained to Badr what Mr Naqvi had said to him and Badr had told him that he had just had a call from Mr Naqvi with a report to the same effect. Mr Nerguizian had asked Badr if he (Badr) was aware of anything that he and Mr Jafar should be concerned about at Abraaj. Badr had said that *"he was not; as far as he knew the situation of Abraaj needing to return uninvested funds, which until his call with Mr Naqvi he had been unaware of, was as Mr Naqvi had explained it to Mr Jafar"* (the quotation is from [18] of Nerguizian 1).
102. Mr Nerguizian also confirmed that he and Mr Jafar had then called Mr Naqvi (again, from Mr Jafar's mobile phone). He says that Mr Naqvi had explained for his benefit that the Abraaj Group needed a total of US\$ 290 million on a short-term basis before year end. Mr Naqvi had said that he (Mr Naqvi) had arranged a US\$200 million loan from ENBD, a large local bank, and was requesting a US\$90 million loan from Mr Jafar. He recalled that Mr Naqvi had explained that Abraaj needed US\$250 million to satisfy commitments it had made to repay the undeployed capital to its investors and that the remaining US\$40 million would be required for short term liquidity needs. Mr Naqvi had expressed his frustration that some fund investors had unjustifiably and suddenly demanded the return of their undeployed capital. His view was that the investors did not understand that investments in projects in emerging markets took time and could be subject to unexpected governmental decisions and regulatory and political delays. Mr Naqvi had emphasised that the loans were necessary only to cover a short-term funding gap. He had assured Mr Jafar and Mr Nerguizian that while the money had to be repaid to investors before the end of December 2017, Abraaj was financially healthy and easily capable of generating the necessary funds to repay the loans by the end of January 2018. Mr Naqvi cited examples of potential sources of funds including

the sale of Abraaj's stake in Karachi Electric, and the sale of AH shares. Mr Jafar had confirmed that he was willing to go ahead with the loan and told Mr Naqvi the terms that he proposed (as had been discussed with Mr Nerguizian). Mr Naqvi had then asked whether the loan could be increased to US\$100 million and the term extended to 28 February 2018, which Mr Jafar agreed. Mr Nerguizian said that he believed that he had explained to Mr Jafar during the call – when the call was on mute – that BOS would not increase its participation beyond US\$45million since that was the limit of his authority. At the end of the call, Mr Jafar, Mr Naqvi and Mr Nerguizian had agreed to meet later that afternoon at the Royal Mirage Hotel to discuss the details of the loan further. Mr Nerguizian said that he trusted Mr Naqvi and believed what he had said about Abraaj being financially healthy, the circumstances in which he was asking for the loan, and that Abraaj would have access to cash in the very near future to enable it to repay.

103. Mr Nerguizian described what took place at the Royal Mirage Meeting. He said that practical details, including how the loan would be structured, were discussed. He said that given the short period of time in which Mr Naqvi wanted the money, it was agreed that the loan would be provided under a cheque discounting facility between BOS and Abraaj. Mr Nerguizian noted that this would require that Abraaj first became a customer of BOS and that because there was some doubt in his mind as to whether this could be done in the short time available he had mentioned as a possible alternative that BOS could provide a cheque discounting facility to Mr Jafar (who was already a customer), the proceeds of which could then be transferred to Abraaj as a loan from Mr Jafar.
104. In the evening on 20 December, after the Royal Mirage Meeting, Mr Nerguizian had emailed Mr Jafar (copied to Badr) (the ***Post-Mirage Meeting Email***) a draft of an email that he would send to Mr Naqvi summarising the agreement reached. His draft email had said that the loan "*will be availed by [BOS] up to 45 pct, Hamid Jafar...Up to 45 pct Badr Jafar up to 10 pct of total*" with corresponding cheques to be issued in favour of each of BOS, Mr Jafar and Badr: "*BOS will discount these checks and give you the net proceeds of USD 100 million.*" The draft email went on to say that "*if Badr participates directly it might be disclosed by the auditor as a related party transaction. So maybe it should be in the name of one party from*

Jafar group to be specified. The rest would be internal between you thereafter." Mr Nerguizian said that his email reflected the fact that he was aware – although he was now unable to recall if Mr Jafar had told him or if he had discussed the point directly with Badr – that Badr had offered to provide the additional US\$10 million that Mr Naqvi had requested. Mr Nerguizian said that Mr Jafar had called him shortly afterwards to discuss the email and told him that Badr would not participate in the loan and that Mr Jafar had never intended that he would. Mr Nerguizian said that as far as he was aware Badr had played no part in funding any of the Loans and that certainly the related liabilities to BOS had been assumed by Mr Jafar alone.

105. Mr Nerguizian said that he had amended his draft email in light of his discussion with Mr Jafar and sent it to Mr Naqvi (still on 20 December). The email (the ***Loan Terms Email***) was in the following terms (my underlining):

"I refer to our meeting this afternoon in the presence of Mr Hamid Jafar at the Royal Mirage hotel Dubai and wish to outline my understanding of the transaction that you need us to avail urgently.

Abraaj Capital (I need the exact legal name and I need you to complete a KYC form that I will send you first thing in the morning)

Give the legal address

Is seeking a short term loan equivalent to US\$100M (net and after deducting interest and fees) for a period ending 28 February 2018

Abraaj will raise to Bank of Sharjah a letter application for the facility stating the rationale of the transaction and the source of the repayment confirming that this is a pure commercial or investment transaction. 3-year audited financials must be attached to the letter.

The loan will be availed by BoS subject to certain arrangements with Hamid Jafar

The applicable rate is 6 pct per annum and a flat non-refundable fee of 6 pct payable in advance. Minimum interest period will be up to 28 February 2018.

If at maturity the loan is not repaid interest at 12 pct per annum will be charged till full and final settlement.

The lender and or Hamid Jafar will have the option to acquire treasury shares of

*Abraaj in case of non-repayment by 28 February 2018. Abraaj will arrange for the transfer of the Treasury shares as soon as possible upon receipt of a written request from any of the above parties [the **Treasury Shares Option**]*

Abraaj will endeavor to complete the account opening documentation with BOS asap.

In view of the fact that account opening process is not yet complete transmission the transaction will be mobilised by a check as follows;

AED 393,653,775 favor Bank of Sharjah dated 28 February 2018 on a bank operating in UAE.

BOS will discount this check and give you the net proceeds of US\$100 million

Applicable laws and jurisdiction, Sharjah UAE.”

106. While Nerguizian 1 did not mention Mr Naqvi’s response, it is worth noting how he responded, Mr Nerguizian’s comments on his response and Mr Naqvi’s further response (all sent rapidly one after the other on 20 December). Within half an hour of receipt of the Loan Terms Email Mr Naqvi replied in the following terms (and Mr Nerguizian’s responses sent subsequently are in bold after the ++ symbols) (my underlining):

“Varouj, thank you so much for this email. I am delighted that we can progress this transaction and execute the transfer tomorrow morning. However, just a few points to clarify:

1. *If we are issuing Cheques that will be discounted, why are we also applying for a facility?*

++

A discount is a facility. We need a request for a discount for us to initiate a facility.

++

2. *Can we have any forms for opening accounts? If we can't open the account tomorrow in time, your idea of issuing the Cheques in your clients name and we get a cash transfer; is that something you are still exploring?*

++

Tomorrow I need the KYC completed. The account opening forms will be made available tomorrow as well but we are confident it will take more than a few days.

3. The terms are fine, and we confirm that we will receive \$100 million net.

4. The treasury shares to be potentially acquired in the event of repayment was a condition that was waived in conversation with Badr, copied here.

++

Ok with me. But what if our share remains unpaid. We need some form of security.

++

5. I have copied Mr Rafique Lakhani to this email to get the process expedited and prepare any documentation you may need. Mr. Lakhani will also send you the exact legal name of the entity issuing the Cheques and undertaking the repayment and terms.

Hopefully we can finalise tomorrow

You also need to instruct us with the transfer details.

Ideally visit bankofsharjah.com

"Applications "

Use the standard form for the facility application

Specifying

Discount of PDC check for AED (the value I gave you earlier)

And Attach 3-year audited balance sheet.

107. Mr Naqvi's response to Mr Nerguizian's comments was as follows (once again, my underlining):

"Varouj, I am fine with your responses and clarifications, for which, thank you. Just for clarification, in your response on account opening, I am sure it is a typo, but you said you are confident it will take more than a few days. We would like to avail a drawdown tomorrow to avoid the holiday banking shutdowns.

As for security, we would prefer you to accept our Holding Company guarantee rather than securitizing shares.

We will download the forms and account opening details thank you.”

108. It is also worth recording at this point that on seeing this email from Mr Naqvi and Mr Naqvi’s comments about security, Mr Jafar had sent an email to Mr Naqvi copied to Mr Nerguizian as follows (my underlining):

“my understanding is that there would be an option for the lender (or any component of it) to convert the debt or any part of it that remains unpaid at maturity on 28/2/18, into Abraaj treasury shares held by Abraaj at original cost. I suppose that a simple letter undertaking tomorrow would suffice, which would subsequently asap be developed into a fuller legal document.”

109. In Nerguizian 1 (at [29]), Mr Nerguizian noted that the Loans Terms Email had indicated that the intended structure of the First Loan at that stage was that BOS would lend directly to Abraaj, with the loan backed by Mr Jafar. Mr Nerguizian said that however it quickly became clear that this structure would not work since when Mr Naqvi’s team presented the relevant paperwork to the BOS’ Dubai branch the branch officials and he had learned that the Abraaj Group had a complicated corporate structure, including a number of Cayman Islands entities. This structure meant that the Bank needed to carry out more extensive KYC checks which would be a time consuming task and, as he explained to Mr Naqvi later that day, would certainly have taken more than a few days. The funds could not then be made available to meet Mr Naqvi’s request for a drawdown the next day *“in order to avoid the holiday banking shutdowns.”* Mr Nerguizian said that following a series of telephone calls the parties had agreed that rather than advancing the funds to Abraaj BOS would provide a cheque discounting facility to its customer, Mr Jafar, and Mr Jafar would then lend the proceeds of that facility to Abraaj. In turn, Mr Jafar would secure his liability to BOS under the facility by granting a pledge over fixed deposits that he held with BOS.

110. Mr Nerguizian said that the next morning (21 December 2017) he asked Mr Naqvi to provide two cheques to the order of Mr Jafar. These cheques would then be discounted by BOS with the net sum after interest and fees being made available to Mr Jafar under the (cheque discounting) credit facility between him and BOS for him to on-lend to Abraaj. Later that day (21 December) Mr Nerguizian received a letter from Mr Lakhani on the letterhead of AIML (the ***Lakhani Investment Letter***) enclosing two cheques dated 28 February 2018, each

drawn on the account of AIML at the CBD. The signatories on the cheques were Mr Lakhani and Mr Naqvi. Mr Lakhani asked Mr Nerguizian to “*mention "Investment" as purpose of remittance.*” Also on 21 December 2017, Mr Nerguizian had received an email from Mr Naqvi (the ***Naqvi First Loan Investment Email***) in which he had confirmed that the “*cheques are on the way... with our account details for transfer to AIML account at CBD*” and said, “*Please mention "investment" in purpose of remittance, this is important.*” Mr Nerguizian also noted that the remittance information for the First Loan on the remittance slip was recorded as “*REF/INVESTMENT.*” Mr Nerguizian said he recalled this request and believed that he had mentioned it to Mr Jafar but Mr Jafar had not commented and it seemed to him (Mr Nerguizian) to be an inconsequential detail to which he did not give much thought.

111. Mr Nerguizian said that in parallel with the process for obtaining the cheques, BOS had prepared the paperwork to record the arrangement between BOS and Mr Jafar which included an application for banking facilities in the name of Mr Jafar, a pledge agreement relating to BOS’ collateral over Mr Jafar's deposits in an amount in AED equal to Mr Jafar's US\$55 million risk exposure, a cheque discounting form, a form directing payment to be made to AIML and the 21 December BOS MOU.
112. Mr Nerguizian said that the 21 December BOS MOU recorded the agreement between BOS and Mr Jafar and which was to be (and was) executed by both parties. The 21 December BOS MOU was exhibited to Nerguizian 1 and was in the following terms (my underlining and commentary):

“*Abraj [sic] Investment Management Limited has requested a short term loan of USD One Hundred Million,*

And whereas [Mr Jafar] has introduced Abraj Investment Management Limited to [BOS] and requested [presumably BOS should be added here] to organize the loan under its [sic – his?] guarantee up to 55% of the exposure from time to time

And whereas the parties have also agreed that the remaining 45% exposure will be assumed by [BOS]

[Mr Jafar] has requested a Cheque Discounting Facility of AED 393,653, 775 (AED Three Hundred Ninety Three Million Six Hundred Fifty Three Thousand Seven

Hundred and Seventy Five Only) to fund the above said loan as per the Application for Banking Facilities dated 21 December 2017.

The Discounting Facility will carry a discounting interest rate of month EIBOR + 2% per annum with a minimum of 6% per annum.

Moreover, a special arrangement fee of 6% flat on the USD100 Million will be paid by [Mr Jafar] to [BOS]

[BOS] approved to extend such facility, subject to the following conditions.

1. Personal Guarantee of [Mr Jafar] up to 55% of the total exposure, i.e AED 216,509,577, plus an interest rate of 12% p.a. on the said exposure percentage applicable, if any, from 28 February 2018 until final settlement,

2. Collateral Fixed Deposit secured by [Mr Jafar] under account number 20246 for 55% of the total exposure, i.e. AED 216,509,577.”

113. The cheque discounting form, which was also exhibited to Nerguizian 1, stated that Mr Jafar requested BOS to discount the cheques “*under [his] full guarantee and responsibility*” and to credit the payments made by BOS pursuant to the discounting of the cheques to Mr Jafar’s BOS account.
114. Mr Nerguizian said that the arrangement with Mr Jafar was that BOS would take a 45% risk exposure in respect of the First Loan so that “*45% of the value of the [First] Loan would remain unsecured... The remaining 55% of the value of the [First] Loan was to be secured by way of a pledge of Mr Jafar’s fixed deposits held*” by BOS. The funds were transferred from Mr Jafar’s BOS account to AIML’s account with CBD and BOS consolidated a number of Mr Jafar’s fixed deposits into a new account in the sum of AED 216,550,875 (the AED equivalent of US\$55 million). Mr Nerguizian said that this fixed deposit account was then held as security for Mr Jafar’s liability to BOS under the cheque discounting facility.
115. Mr Nerguizian said that he was not concerned by the circumstances in which Mr Naqvi had come to request the First Loan. He believed that Mr Naqvi had provided a plausible explanation of why the funds were needed and had confirmed that Abraaj was in good financial health, which he (and Mr Jafar) believed to be true. BOS (and Mr Jafar) were being asked to enter into a short-term transaction which was justified by the unexpected circumstances that Mr Naqvi had described. Mr Nerguizian said that given what Mr Naqvi

had said about the circumstances in which the need for the First Loan had arisen and about the sources of funds that would be shortly available to repay it and given Abraaj's reputation and financial health, as Mr Naqvi had confirmed, it did not occur to him that BOS would not be repaid. He said that he saw the First Loan as a good opportunity for BOS to share in the return that Mr Jafar had negotiated with Mr Naqvi. He said that had he believed that Abraaj was unlikely to be able to repay the First Loan or that there had been financial mismanagement (and, as he now knew fraud) within the Abraaj Group he obviously would not have committed BOS to participation in the First Loan.

116. In relation to the Second Loan, Mr Nerguizian said that on the evening of 25 December 2017 he had received another call from Mr Jafar, who was by this time in Switzerland on holiday with his family. Mr Jafar had explained that Mr Naqvi had been in touch again and had reported that his loan arrangements with ENBD were moving too slowly to meet his year-end deadline. Mr Jafar had said that Mr Naqvi had asked him if he would consider making a further loan of US\$200 million in place of ENBD. Mr Jafar had explained that he was interested in pursuing this opportunity. Mr Nerguizian told him that BOS would be able to arrange this for him but that since BOS had already taken a relatively significant risk exposure in relation to the First Loan it would be unable to participate on its own account in this further loan. Mr Jafar asked Mr Nerguizian to meet with Mr Naqvi at Mr Nerguizian's offices in Sharjah the next morning so that he could review the ENBD term sheet and check whether or not Mr Naqvi's complaints about ENBD were justified. Mr Nerguizian did so on the morning of 26 December and reviewed a copy of the ENBD term sheet. He said that he recalled that it was marked "*draft*" but he trusted Mr Naqvi and assumed it to be a genuine document. He considered that ENBD's proposal was reasonable but very detailed, with many conditions and it was clear that Mr Naqvi would not be able to meet those conditions in the time in which he needed the funds. Mr Nerguizian was reassured that there was no unacceptable risk by the fact that a respectable institution like ENBD was willing to loan that amount of money to Abraaj. He said that Mr Naqvi had said that he did not want Mr Jafar to lose a penny and for that reason he and the Abraaj Group would willingly provide to Mr Jafar all of the security promised to ENBD and security over all of Mr Naqvi's personal assets. Mr Naqvi assured him that the assets to be provided as security for the Second Loan

had a minimum aggregate value of US\$600 million. Mr Nerguizian said that he assumed that the Second Loan would be on the same basis as the First Loan and discussed those terms with Mr Naqvi. He also explained that BOS would need to charge an additional 1.5% fee on the transaction (on top of the 6% fee that had been charged on the First Loan) to account for the provision that the Bank would have to make for opening another cheque discounting facility and Mr Naqvi was happy with the figures presented to him.

117. On 26 December 2017 Mr Nerguizian emailed Mr Jafar and Badr as follows (the email was exhibited to Nerguizian 1) (my underlining):

“Met today with Arif and I fully understand his reaction to ENBD offer

There is I understand some old blood and I fully agree that he should not accept their conditions

This said I also do not recommend individuals to become lenders (they would put us out of business)

The request is for 200 USD value tomorrow or latest value 28 Dec 2017

You need to secure yourself and I would recommend the check mechanism again

Did you agree on terms or should I assume the same conditions apply

BOS would charge 1.5% percent in order to execute this - I guess he will have to pay

Please let me know how to proceed, if we take into account charges some fund transfer must take place between accounts”

118. Mr Nerguizian had several telephone calls with Mr Jafar during the course of 26 December and said that he recalled that Mr Jafar had asked him if he thought that Mr Naqvi was accurately describing his interactions with ENBD and that he had confirmed that he did. Mr Jafar told Mr Nerguizian that he was content to go ahead with the Second Loan. Mr Nerguizian also recalled that during one of those calls Mr Jafar had told him that Mr Naqvi had asked him if he would make a further, very short term, loan of US\$50m in order to provide urgently needed liquidity over the year-end.

119. Mr Nerguizian said that BOS had then once again prepared the necessary transaction documentation, comprising an application for the cheque discounting banking facility; two collateral deposit letters and a letter of instructions in respect of the funds transfers (Mr Naqvi had asked for the Second Loan to be made by way of two transfers of US\$100 million each). Mr Nerguizian sent these by email to Mr Jafar and Badr on 26 December (in which he also said that he would “*think about the 50M remaining tonight in order to find the best way*”).
120. Mr Nerguizian said that he had reviewed his phone records for 26 and 27 December 2017 and now recalled that he had had numerous calls with Mr Jafar, Mr Naqvi and Badr during this time although he did not recall precisely what was said in those calls (they took place during the Christmas vacation when he was with his family and trying to balance the need to spend time with them and deal with the time pressure imposed by the need to complete the arrangements with Mr Naqvi). However, he was able to recall, he said, that nothing in any of those calls had made him think that anything that Mr Naqvi had said about Abraaj and the reasons why it needed the loans was not genuine or that there was anything untoward about the transactions or what Mr Naqvi had said about the financial health of Abraaj.
121. On 26 December 2017 Mr Nerguizian sent in an email to Mr Jafar (copied to Badr) a draft memorandum of understanding (the final signed version of which I have referred to as the **27 December MOA**) to be signed by Mr Jafar, BOS and AIML reflecting the understanding between BOS, Mr Jafar and AIML. The draft of this memorandum of understanding was in the following terms (and once again was exhibited to Nerguizian 1) (my underlining):

“Whereas Mr AbdulHamid Dhia Jafar and members of his family - hereinafter called the first party - are prime customers of [BOS],

And Whereas Abraj Investment Management Limited Dubai - hereinafter called the second party - does not maintain as at the date of this letter accounts with [BOS].

Whereas [Mr Jafar and his family] has requested from [BOS] - herein called the third party - to assist [AIML] with some financing arrangements on an urgent basis.

And Whereas [BOS] has accepted to assist [AIML] with its financial requirements based on certain agreements with [Mr Jafar and his family],

Therefor [sic] [corrected in the final version]

It is hereby agreed between the parties that an amount equivalent to USD200 Million or its AED equivalent will be transferred by [BOS] at the request of [Mr Jafar and his family] and in line [with] specific arrangements between [Mr Jafar and his family and BOS] to the accounts of [AIML] with [CBD and [FADB] on equal basis value 27 December 2017.

[AIML] shall issue a check for AED 798,928,000 dated 28 February in cover of the said transfer plus associated charges in interest and other charges in favor of [Mr Jafar and his family] and remit the same to [BOS].

It is hereby agreed that the financing of USD 200 Million will be subject to the following conditions payable by [AIML]:

Flat fee of 6% payable immediately to [BOS]

Flat fee of 1.5% payable immediately to [BOS]

Interest rate of 6% up to 28 February 2018 payable as per special arrangement between [Mr Jafar and his family] and [BOS].

Interest rate of 12% thereafter till full and final settlement payable as per special arrangement between [Mr Jafar and his family] and [BOS].

As security, [AIML] has arranged for the issuance in favor of [Mr Jafar and his family] [of] a letter dated 26 December 2017 by Abraaj Employees 2 SPC Limited pledging 210,000,000 ordinary shares it holds in [AH] as per specific terms and conditions acceptable to [Mr Jafar and his family] and with the express understanding that a proper and legally binding document will be elaborated within 7 days of this MOU.

122. The draft letter of pledge for Mr Jafar to sign was in the following terms (my underlining):

“In consideration of your granting to myself banking facilities, under account No 020246 in the form of discounting a check for AED 798,928,000.00 (Say seven hundred eighty eight million nine hundred twenty-eight thousand UAE dirhams) due 28 February 2018 issued by Abraj Investment Management Limited Dubai; I hereby irrevocably and unconditionally lien and pledge in your favor the balances in my account No 020246 ...”

123. Mr Nerguizian said that Mr Naqvi's team produced a draft of the AE2L Pledge Letter which he also sent to Mr Jafar. This referred to AH as the borrower (AH having “sought a short-term borrowing of US\$200 million .. from [Mr Jafar]”), that Mr Naqvi was the owner of the sole ordinary share in AE2L and that AE2L pledged its shares in AH to Mr Jafar as security for that borrowing.

124. In addition, Mr Nerguizian exhibited to Nerguizian 1 Mr Jafar's immediate email response in which he said that he would discuss the documents with Badr and revert.
125. On 26 December Mr Naqvi emailed Mr Nerguizian (the ***26 December Naqvi Investment Email***) providing him with details of the two AH bank accounts to which the two payments in the amount of the AED equivalent of US\$100 million were to be made and once again requested that the transfer should mention "*investment.*" Mr Nerguizian said that he was also aware that the remittance information for the Second Loan on the remittance slip was once again recorded as "*REF/INVESTMENT*" and that Mr Jafar's letter of instruction in relation to the Second Loan (which had been prepared by BOS) stated that the "*[o]bject of transfer*" was "*investments.*"
126. On 27 December Mr Jafar sent Mr Nerguizian a number of manuscript comments on the draft documents. He asked Mr Nerguizian to arrange for Mr Naqvi to re-issue the AE2L pledge agreement and to execute the MOA.
127. Mr Jafar's comments were not exhibited to Nerguizian 1 but were filed in evidence. They covered the following points:
- (a). Mr Jafar asked Mr Nerguizian to finalise arrangements for the further US\$50 million loan during the day on 27 December.
 - (b). Under the heading "*Important*" he said that it was necessary to finalise an agreement (three-way?) regarding interest including default interest of 12% in the event of any default on 28 February 2018 and in relation to the fees.
 - (c). He made a number of comments on and drafting amendments to the draft memorandum of agreement. He changed "*understanding*" to "*agreement,*" made it clear that interest was payable per annum and included a statement that default interest was payable *by AIML* and after non-payment on 28 February 2018.

- (d). He made a number of comments on and drafting amendments to the draft letter of pledge to be signed by Mr Jafar. This stated that:

“In consideration of your granting to myself banking facilities ... in the form of discounting a check for Aed 798,928,000.00 ...due 28 February 2018 issued by [AIML] I hereby irrevocably and unconditionally pledge in your favour the balances in my account”

Mr Jafar added “by Abraaj” after “a check” and added wording at the end of this paragraph to make it clear that the pledge only secured the sums outstanding under the banking facilities said to be granted to him. He also added wording in the final paragraph of the draft letter to make it clear that his pledge only remained in force until the banking facilities were fully settled rather than until BOS granted a release. He also corrected a number of typos.

- (e). He made a note on the draft letter of pledge to be given by Mr Jafar and his wife that the same changes as had been made to his own letter of pledge would need to be incorporated (this referred to BOS granting facilities to Mr Jafar).
- (f). He corrected the date on his letter of instruction to BOS requesting that BOS debit his account and transfer funds to AH.
- (g). He also raised a number of questions on and made a number of clarifying amendments to his instruction letter to BOS to transfer the proceeds of the discounting of AIML’s cheque to various accounts of his and for the payment of fees to BOS (including the payment of the 3.5% fee due to be paid in respect of the First Loan which had by an oversight not previously been paid).
- (h). He noted that he had no comments on the application for banking facilities (which was for facilities to Mr Jafar as customer).

- (i). He also noted that the draft letter which confirmed to him and his wife that their “*collateral undertakings*” (presumably their joint pledge) would never exceed AED798,928,000 plus interest from 28 February 2018.
 - (j). Mr Jafar made a number of drafting amendments to the signed form of the AE2L Pledge Letter including by including an obligation that AE2L obtained his consent before selling any of the pledged shares and that the pledge was granted as security for the borrowing of AH “*or any part thereof.*”
128. Mr Nerguizian said that he had arranged to have the documents amended to reflect these comments. He said that he had then sent the amended AE2L Pledge Letter to Mr Naqvi and that Mr Naqvi had (on 27 December) arranged to have that signed. Thereafter Mr Nerguizian sent the updated documentation and the signed amended AE2L Pledge Letter to Mr Jafar who then signed and returned them to Mr Nerguizian.
129. Once he had received the documents from Mr Jafar, and the two post-dated cheques from Mr Naqvi, Mr Nerguizian arranged for two payments, each of AED367,300,000 (the AED equivalent of US\$100m plus fees and interest) to be made from Mr Jafar's account to AH's accounts at the CBD and FADB on 27 December 2017.
130. As regards the Third Loan, in his email to Mr Nerguizian on 27 December Mr Jafar had said that Mr Naqvi was “*frantic about receiving the 50m short term transfer today*” (my underlining). In response, Mr Nerguizian spoke to Mr Jafar and explained that Mr Jafar would need to provide further collateral in order to secure the Third Loan. Mr Jafar said that he would arrange for Crescent Petroleum to pledge its fixed deposits with BOS in order to secure the Third Loan. Mr Jafar subsequently emailed Mr Nerguizian to let him know that Badr had agreed a one-week duration for the Third Loan with the loan to be repaid on 3 or 4 January 2018. Mr Nerguizian then emailed Mr Naqvi and asked him to provide a further cheque in an amount of AED 184,184,000 (being the AED equivalent of US\$50m, plus fees and interest on the same terms as the First Loan and the Second Loan for one week) due on 4 January 2018. He exchanged a series of emails with Mr Naqvi about the arrangements for

providing the cheque and for repaying the loan. He then prepared and emailed to Mr Jafar the draft transaction documents. These were an instruction letter from Mr Jafar to BOS to debit his account and transfer the AED equivalent of US\$50 million to AH and a letter of pledge from Crescent Petroleum pledging its credit balances with BOS in consideration of BOS granting banking facilities to Mr Jafar.

131. Mr Jafar then (still on 27 December 2017) emailed the signed transaction documents to Mr Nerguizian and noted that he had just spoken to Mr Naqvi and agreed to absorb the costs of the Third Loan. Mr Jafar had therefore asked Mr Naqvi to send Mr Nerguizian a new cheque in place of the one he had previously sent to Mr Nerguizian. Mr Nerguizian said that he was unable to recall if Mr Naqvi had in fact sent a cheque for AED184,184,000 by the time he received Mr Jafar's email but noted that from documents he had seen he had emailed Mr Naqvi and asked him to send a cheque for the revised amount. Once he had received the signed transaction documentation from Mr Jafar, and the post-dated cheque from Mr Naqvi (once again drawn by and signed on behalf of AIML), he arranged for a payment of AED183,650,000 (the AED equivalent of USD50m) to be made on 28 December 2017 from Mr Jafar's account to AH's account with CBD. The Third Loan was subsequently repaid on 4 January 2018, the funds credited to Mr Jafar's account and the post-dated cheque was returned. It appears from the documents adduced in evidence that the 4 January 2018 cheque had been issued by AIML.
132. Mr Nerguizian said that he had been told by Mr Naqvi that the Third Loan had been needed to provide short term liquidity to the Abraaj group and he did not think that Mr Jafar (or Badr) believed that it was intended *"to disguise the true financial state of one or more Abraaj entities."* He also confirmed that he understood that Mr Jafar and not Badr was the lender.
133. As regards Mr Naqvi's requests that the purpose of the Loans be recorded as *"investment"* Mr Nerguizian said that he had been aware from the Lakhani Investment Letter and the First Naqvi Investment Email (and was now aware from other documents he had been shown) that Mr Naqvi had requested that the purpose of the Loans was recorded as investment. He said that he believed that he had mentioned this request to Mr Jafar but that Mr Jafar had not

requested nor commented on the designation. He said that this seemed to be an inconsequential detail, and he had not been troubled by it.

Mr Nerguizian's cross-examination in relation to the negotiation and advance of the Loans

134. Mr Nerguizian was also extensively cross-examined both by Mr Ayres and Mr Atherton. Once again, I will deal in detail with his answers (and demeanour) when I come to discuss and consider my findings on the factual issues that fall to be decided. I will however, at this stage identify the main areas and issues explored during Mr Nerguizian's cross-examination. He was cross-examined as to:

- (a). The process generally followed by BOS when considering whether to grant banking facilities.
- (b). The process followed by BOS when considering whether to grant banking facilities in relation to the Loans.
- (c). Whether Mr Nerguizian made and retained any manuscript notes of his meetings or calls in relation to the Loans.
- (d). Whether Mr Nerguizian had read the Letter Before Action, the ASOC in draft, the Winding-Up Affidavit or Jafar 1 and the basis of his recollections as to the relevant facts.
- (e). Mr Nerguizian's account of what he was told by Mr Jafar about what Mr Naqvi had said to Mr Jafar and what documents if any had been produced to Mr Jafar at the First 20 December Meeting.
- (f). Mr Jafar's account in the Winding-Up Affidavit and the account in the Letter Before Action of the First 20 December Meeting and the references therein to Mr Jafar having been told by Mr Naqvi that the unutilised investors' capital had been placed in the

Abraaj Group's treasury and used for *general business purposes*, and whether Mr Jafar had reported to Mr Nerguizian that Mr Naqvi had used that phrase, and what Mr Nerguizian understood by the reference to deployed in Abraaj's treasury. In particular did Mr Nerguizian understand that Mr Jafar had been told that the unutilised investors' capital had been spent?

- (g). What Mr Jafar told him about what Mr Naqvi had said at the First 20 December Meeting about how and out of what funds and sources the Loans were to be repaid.
- (h). What was discussed if anything at Mr Nerguizian's first meeting with Mr Jafar about what Mr Naqvi had said concerning what Mr Naqvi had told the AH board about the urgent need for further funds.
- (i). The extent to which Mr Nerguizian was, or considered that a reasonable banker in his position would have been, concerned as to the financial stability of Abraaj in light of, and as to the true reasons for, Mr Naqvi's request for loans totalling US\$290 million to be advanced within eleven days of the first request and concerned at BOS's position as having an unsecured exposure of US\$45 million.
- (j). Whether Mr Nerguizian agreed that the arrangements for making and documenting the First Loan were rushed and the context unusual and odd.
- (k). What matters Mr Nerguizian had relied on when deciding to assume an exposure in relation to the First Loan and Mr Nerguizian's understanding of what Mr Jafar relied on.
- (l). Who decided to call Badr on 20 December 2017 and what was discussed.
- (m). What Mr Naqvi said during the 20 December Telephone Call regarding how and from what sources the First Loan would be repaid and whether Mr Nerguizian was told or believed that the unutilised investors' capital had been spent. Did Mr Nerguizian

accept that if the unutilised investors' capital had been intact and invested via the Abraaj Group's treasury function it would have been the obvious source of repayment for the First Loan (indeed all the Loans)?

- (n). The calls made between Mr Nerguizian and Mr Jafar that were revealed by the phone records but not referred to in Mr Nerguizian's witness statement.
- (o). The start time and duration and what was discussed at the Royal Mirage Meeting including the discussions regarding the structuring of the First Loan and the significance and impact of KYC and AML (anti-money laundering) regulations and requirements.
- (p). What was Mr Nerguizian told, and by whom, about Badr's willingness to participate in the lending to Abraaj up to US\$10 million? How did Mr Nerguizian come to include Badr as a potential lender in his Post-Mirage Meeting Email?
- (q). Did Mr Nerguizian contact Badr to see whether, as Mr Naqvi had said, the condition relating to the Treasury Shares Option had been waived by him and what was discussed between Mr Jafar, Badr and Mr Nerguizian and agreed by Mr Jafar regarding the provision of security by AH, AIML or others?
- (r). What was Mr Nerguizian's understanding of the meaning of and justification for Mr Naqvi's request that "*investment*" be mentioned as the purpose of the payments and did he realise and now accept that this was a request by Mr Naqvi for an improper mislabelling of the payment? Was the Loan Terms Email relevant to understanding why Mr Naqvi had made this request or did it make it reasonable for Mr Nerguizian (and Mr Jafar) to assume, and did they assume, that Mr Naqvi when requesting that the purpose of payments be stated to be "*investment*" was responding to the reference in the Loan Terms Email to Abraaj being required in its loan application to state "*the rationale of the transaction and the source of the repayment confirming that this is a pure commercial or investment transaction.....*", Mr Atherton (Day 13, pages 148-

149) showed Mr Nerguizian (a) an email sent (just after midnight) on 21 December 2017 from Mr Lakhani to Mr Naqvi (sent after Mr Naqvi had told Mr Nerguizian, in an email copied to Mr Lakhani, that he and his team would download BOS' loan application forms) in which he informed Mr Naqvi that he had (underlining added) *"filled up forms for both AIML and AH. Some items such as purpose of loan etc require your input. We also need to discuss which form to provide as only AIML has the cheque book and we always share AH financial statement for Bank financing purposes"* and (b) an email response from Mr Naqvi to Mr Lakhani stating (again, underlining added) *"Purpose is general working capital needs."* Mr Atherton put it to Mr Nerguizian that this showed how Mr Naqvi had (and would, if the Initial Structure for the First Loan had been used, have) answered the request in Mr Nerguizian's Loan Terms Email for the letter application to state the rationale of the transaction and confirm that it was *"a pure commercial or investment transaction"* so that Mr Naqvi's repeated requests to Mr Nerguizian and Mr Jafar to designate payments to AH and AIML as being for the purpose of *"investment"* were not made in order to answer Mr Nerguizian's question but must have been for another purpose related to how the documents sent to AIML/AH referred to and recorded and characterised the Loans. Mr Nerguizian was unable to say that this could not have been the case.

- (s). What was Badr's involvement in the Third Loan? Was Badr on the call between Mr Jafar and Mr Nerguizian that took place at 10pm UAE time on 25 December 2017 that lasted for 11 minutes 43 seconds?
- (t). What was his understanding of the purpose of and source of repayment of the Third Loan?
- (u). Why were statements he made in a witness statement he provided on 15 December 2022 in the Sharjah criminal proceedings incorrect and did he know at the time that they were incorrect?

- (v). What conclusions had Mr Nerguizian reached regarding the risks of lending to Abraaj entities at the time and how such risks could and should be mitigated, and what questions should he have raised with and what information should he have requested from Mr Naqvi and Abraaj employees, based on his review of the proposed terms of ENBD loan?
- (w). Did he accept that the Dubai Financial Service Authority's (**DFSA**) Decision Notice dated 29 July 2019 was correct to say that the terms of the proposed loan, as recorded in ENBD's term sheet, showed that ENBD regarded any loan as representing high risk or very high-risk lending? In light of ENBD's requirement for security, had Mr Nerguizian recommended to Mr Jafar that he take and obtain adequate security?

The parties' submissions regarding what was said at the First 20 December 2017 Meeting

The factual disputes identified by GP8 and the GHF Parties in respect of the First 20 December 2017 Meeting

135. GP8 said, as I have noted, that there were six principal areas of factual dispute between the parties as to what was discussed and understood at the First 20 December 2017 Meeting:
- (a). What explanation did Mr Naqvi give Mr Jafar as to the unavailability of the Uninvested Capital and thus the reason for needing a loan?
 - (b). How did Mr Jafar understand he was going to be repaid?
 - (c). Did Mr Naqvi tell Mr Jafar that he anticipated further demands from other investors (i.e., additional investors in the AGHF or other funds)?
 - (d). How and when did Mr Jafar find out about Mr Naqvi's request for the Third Loan and what did he understand it was for (GP8 claims that Mr Jafar knew that the Third Loan was to be used as a window dressing device)?

- (e). Whether Mr Jafar appreciated the significance of Mr Naqvi's request that the remittances for each of the loans record their purpose as "*Investments*" (GP8 claims that Mr Naqvi was insisting that the payment records give a false account of why the funds were to be advanced)?
- (f). What was said in relation to the future intentions of the Healthcare Investors (was the Reinvestment Representation made in the terms pleaded)?

136. GP8 submitted that the Court should find that:

- (a). Mr Naqvi told Mr Jafar that the Uninvested Capital had been placed in the Abraaj treasury and used for the general business purposes of Abraaj (i.e. spent) and that Mr Jafar knew or suspected and turned a blind eye to the fact that the Uninvested Capital had been spent for purposes unconnected with the proper management of Fund IV (and the Funds generally) and knew that this was improper. Mr Jafar therefore knew that the finances and corporate governance of the Abraaj entities were not essentially sound and proper.
- (b). Mr Jafar also understood that Mr Naqvi intended to repay him through funds reinvested by the Healthcare Fund Investors because Mr Naqvi had told him so and identified this as the principal source of repayment. That understanding was also consistent with Mr Jafar's general understanding that Abraaj entities were using investor money for general business purposes or were at least likely to do so. Mr Jafar therefore appreciated that the finances and corporate governance of the Abraaj entities were not essentially sound and proper because he understood this was wrong.
- (c). Mr Naqvi did not say to Mr Jafar that the additional funds he requested above the sums required to repay the Healthcare Investors were required to meet anticipated further demands to be made by investors. Mr Jafar did not understand that to be the reason for the additional funds requested. To the extent Mr Naqvi gave any explanation for why

the additional funds were required, it was likely to have been given in highly generic terms, namely that they were needed to meet unspecified short-term liquidity needs.

- (d). Mr Jafar found out about the request for the Third Loan by no later than 24 December 2017 and probably before then. Mr Jafar understood that this was very short-term lending over year-end and knew, or suspected and turned a blind eye to the fact, that there was no legitimate business need for the loan. He also understood that the funds would be returned unused. This is an additional reason for concluding that Mr Jafar appreciated that the finances and corporate governance of the Abraaj entities were not essentially sound and proper.
- (e). Mr Jafar was aware of the request by Mr Naqvi to record the purpose of the loans as “*investments*” and appreciated that this would create a misleading and false record but acceded to the request. This is a further reason for concluding that Mr Jafar appreciated that the finances and corporate governance of the Abraaj entities were not essentially sound and proper.
- (f). The Reinvestment Representation as pleaded (and as introduced shortly before the start of the trial) was not made. Mr Jafar had confirmed in cross-examination that his evidence on what was said on this issue was as set out in footnote 7 of Jafar 1 (which I set out below). That was a different representation from the one pleaded in the RRASOC. Even if Mr Jafar’s account was accepted there was no evidence that the representation he describes was false or that Mr Naqvi made that representation with fraudulent intent.

137. The GHF Parties accepted that there was a meeting between Mr Naqvi and Mr Jafar on 20 December 2017 and that at that meeting Mr Naqvi asked to borrow money from Mr Jafar. However, they disputed Mr Jafar’s evidence as to what Mr Naqvi had said to him in asking to borrow that money. They submitted that the Court should find the following facts and reject the rest of Mr Jafar’s case to the extent inconsistent with these facts:

- (a). At the First 20 December 2017 Meeting Mr Naqvi most likely said to Mr Jafar that certain investors in the AGHF had demanded the return of uninvested capital but that there was no contractual or other legal basis for this demand and that the uninvested capital had been placed by “*Abraaj*” (being the word used by Mr Naqvi) in its treasury and that the use of the capital for general business purposes was permissible.
- (b). It was conceivable that Mr Naqvi had also expressed to Mr Jafar a concern that there could be an escalation of the situation if the investors were not repaid and that this might result in some adverse publicity for “*Abraaj*.”
- (c). Mr Naqvi explained that Abraaj needed to borrow US\$290 million before the end of December 2017 of which US\$250 million would be used to pay back investors with the balance serving as a cushion in case further investors demanded their uninvested capital back, thereby implying possible liquidity issues.
- (d). Mr Naqvi asked for a loan from Mr Jafar in the sum of US\$90 million (at that point in time he intended to borrow the balance of US\$200 million from ENBD) and said that this loan would only be required on a short-term basis since he had been assured that the investors who were seeking repayment would reinvest the monies returned once the issues as regards the uninvested capital had been satisfactorily resolved from which, he implied, Mr Jafar would be repaid.

Mr Jafar’s submissions as to what Mr Naqvi said at the First 20 December Meeting

Mr Jafar’s case in outline – the three key issues of fact and a further issue

138. In his closing submissions on behalf of Mr Jafar, Lord Falconer submitted that by the end of the trial it had become clear that a great deal of Mr Jafar's evidence about what Mr Naqvi had said had been accepted by the Fund Parties. The Fund Parties accepted that Mr Naqvi had told a story to Mr Jafar about the Healthcare Investors demanding uninvested capital. They both accepted that he was told that the money had been placed in the Abraaj treasury. They did not challenge Mr Jafar’s evidence that Mr Naqvi referred to the Freshfields opinion.

There was a dispute about whether Mr Naqvi had brought a copy of the relevant Freshfields opinion with him to the First 20 December Meeting but Mr Jafar had never suggested that he took in the contents of the Freshfields' advice and understood the *ipsissima verba* of that advice. The key thing about the Freshfields opinion was that Mr Jafar was being told it existed and it thereby legitimised both the non-return of the Uninvested Capital and the payment of that Uninvested Capital into the Abraaj treasury. The GHF Parties' case was that they accepted that Mr Naqvi had assured Mr Jafar that what was done was legitimate and Fund IV had accepted that Mr Naqvi might have done so. It was not their case that Mr Naqvi had truthfully explained what was happening at Abraaj. Lord Falconer submitted that the core questions for the Court on this issue was what message did Mr Naqvi intend to convey and did he convey it (as well as whether it was deliberately false and whether it induced Mr Jafar to enter into the Loans).

139. Lord Falconer submitted that in light of the Fund Parties' cases, there were three key issues of fact and one other issue not giving rise to a true factual dispute that the Court had to resolve. First, was the phrase "*general business purposes*" used and if it was used what was said about it (the context was important – even if the phrase had been used by Mr Naqvi but he had also given an explanation that the use of the Healthcare Investors' monies for general business purposes was legitimate then the finding that the phrase was used could not be fatal to Mr Jafar's case)? Secondly, was the Reinvestment Representation (as pleaded at [20(8)] of the RRASOC) made? This was now not a question of fact. The only issue was whether the description of what was said by Mr Naqvi given in footnote 7 to Jafar 1 fitted and was covered by the pleaded representation in [20(8)]. Thirdly, did Mr Naqvi say to Mr Jafar words to the effect that the cash problems were short term and that the Abraaj group was financially sound? Fourthly, did Mr Naqvi tell Mr Jafar that he anticipated further demands from other investors either in the AGHF or other funds?
140. As regards these four issues and summarising the submissions, Lord Falconer said that Mr Jafar's position was as follows:

- (a). The fact that Mr Jafar was told by Mr Naqvi that the placing of the Healthcare Investors' funds in the Abraaj treasury was legitimate was a complete answer to the Fund Parties' case. The question was not whether Mr Naqvi had said "*general business purposes*" but whether Mr Naqvi had said that the use of the funds to which he referred was legitimate. The payment of the Uninvested Capital out of sums held for the AGHF into bank accounts or investments held within the Abraaj treasury function on terms that provided for AH and AIML to give undertakings to repay the amounts so paid with preferential interest, was not self-evidently and inevitably wrongful such that it could be inferred that Mr Jafar must have spotted or did spot that despite what was said about the Freshfields opinion that the treatment of the Uninvested Capital had been wrongful.
- (b). The Fund Parties had relied on Mr Jafar's answers during his cross-examination by Mr Ayres (on Day 5 page 64-65) to Mr Ayres' questions about when, as a general rule, a fund manager could use and disburse investors' funds. The key part of the relevant exchange was as follows:

"MR AYRES let's take a different example. For example, if you hand over money to a fund manager or private equity manager, they can't obviously go and use that money to buy a yacht for the CEO, can they?

A. Hopefully not.

Q. Obviously not.....And similarly they can't use that money to go and buy a villa for the CEO?

A. Of course not. That's stealing.

Q. And they can't use that money to make donations to a charity of their choosing, can they?

A. Again, that's stealing.....

Q. And they can't use that money on the ordinary expenses of the business of the fund manager unless it has come through the route of fees that are lawfully due under the investment management agreement; correct?

A. Correct.”

- (c). Lord Falconer submitted that Mr Ayres' questions related not to general business purposes but general business expenses. There was a subtle but significant difference. Mr Jafar was bound to agree that a fund manager could not just be handing over investors' funds (and their use) to pay business expenses. But that was different from investors' funds being given to the Abraaj treasury under a formal arrangement (there had been a letter agreement in 2012 between AIML and AH regarding the use by AIML as the investment manager of various Abraaj Entities of surplus cash which permitted AH to borrow the surplus cash on certain terms that protected the return that the Abraaj Entities were entitled to on the funds invested with them) and then invested in some sort of temporary investment by the treasury. There was a difference between the "*purposes*" and "*expenses*." The business purposes of an investment manager could entail the making of investments. Making investments was a business purpose. Business expenses were different. Mr Jafar had been clear in his evidence that he understood that the Healthcare Investors' funds had been invested.
- (d). Mr Jafar's case was that the phrase "*general business purposes*" had probably not been used by Mr Naqvi but even if it had been used, the weight put on it by the Fund Parties was completely unjustified and it did not follow that Mr Jafar must have known that AIML and AH were acting improperly.
- (e). Lord Falconer argued that when considering whether his case and evidence were inconsistent with and undermined by the record of what Mr Naqvi had said to the AH board in February 2018 it was important to give weight to what Mr Naqvi was recorded as saying at the first meeting on 3 February 2018. This showed that initially Mr Naqvi had been saying that the Uninvested Capital had been put into temporary investments. The note of that meeting recorded Mr Naqvi as having said that:
- “So had \$200m in cash unutilised in the books of AGHF but were slowly using money where it was being used in construction and were waiting to get the approvals. In early 2017 we decided the cash was subject to 8% approval so we looked at LPA and external legal approval so we were told we could do*

temporary investments plus allows us to do what we like such as short term securities, we can't get a rate of return that puts Abraaj before the fund."

- (f). Lord Falconer argued that this statement reflected the Freshfields advice note dated 17 December 2017 (headed "*Advice note relating to the custody of fund assets*") (the ***Freshfields Fund Assets Note***). Under the sub-heading "*Conflicts of Interest*" Freshfields had said that:

"If the Manager was to use drawn funds awaiting deployment in accordance with the draw down notice, and was to deliver a preference return on those funds (either in a deposit account, or otherwise within the non-exhaustive scope of clause 6.5 of the LPA, even if it was with an affiliate of the Manager), then – if there was no collateral benefit to the Manager or its affiliates in doing so - we are of the view that there is [a] strong argument that there is no conflict of interest. Further, and more clearly, if providing [a] preference return to the benefit of the Fund, was to the detriment of the Manager's affiliate(s), then we are of the view that the argument that there is no conflict of interest would be strengthened further."

- (g). Lord Falconer submitted that the gist of this paragraph was that the Abraaj funds were permitted to give funds to the treasury, namely AH or AIML, and that if AH (or AIML) invested them and obtained a rate of return that was for the benefit of and paid over to the funds then there would be no improper collateral benefit to AH (and AIML). He noted that at this point Mr Naqvi had not referred to or used the phrase "*general business purposes*." Mr Naqvi's change of position came later, on 8 February 2018. At the AH board meeting that day Badr had told the board what Naqvi had told him earlier that day, namely that the funds might have been used for business expenses of the asset management business. The evidence showed, or it was to be inferred, that Badr was repeating and using the terminology used by Mr Naqvi at the pre-meeting on 8 February. The evidence did not show that Badr had known this in December 2017. What it did indicate was that that Mr Naqvi was gradually coming clean with Badr and the AH board because the net was closing around him as a result of the combination of the Wall Street Journal reporting (they were making inquiries in January 2018) and Ankura having been appointed by the AGHF's limited partners to investigate. Lord Falconer submitted that the evidence showed that by 5.00 UAE time on 8 February,

Mr Naqvi knew that Ankura was going to attend Abraaj's office in four days' time and that on the previous day he had seen that both the Healthcare Investors and the Wall Street Journal were getting close to finding out the truth. Mr Naqvi had on 6 February spoken to Badr and Mr Fadi Ghandour and had begun to indicate what the true position was.

- (h). Lord Falconer submitted that on the basis of this factual material the Court should reject the Fund Parties' speculation that Mr Naqvi's reference to "*general business purposes*" from 8 February 2018 onwards meant that the term must have been used in December 2017. A proper analysis of the facts suggested the reverse and that Mr Naqvi only began to refer to "*general business purposes*" once the game was up. This was consistent with Mr Jafar's oral evidence (see Day 5, page 127).
- (i). As regards the Reinvestment Representation, Mr Naqvi said what is recorded in footnote 7 of Jafar 1 and this clearly gave the impression that the problems with the Healthcare Investors were no more than a storm in a teacup and that the net amount of money that would be available to the Abraaj entities would not be affected by the row about the Uninvested Capital. Mr Jafar's case was consistent with his pleading in [20(8)] of the RRASOC and the Fund Parties were on notice and not taken by surprise by the way his case as now put. The effect of [20(8)] was that Mr Naqvi had represented that the Healthcare Investors were willing to reinvest the funds that would be repaid to them, which meant that the whole problem was capable of being easily and readily resolved. Of course that was not the case because the problems with the finances of the Abraaj businesses were not capable of being solved at all.
- (j). As regards the Fund Parties' challenge to Mr Jafar's evidence that Mr Naqvi had represented that the Abraaj group was financially sound and that the problems being faced by the group were short-term, the small difference in wording between the Letter Before Action and Mr Jafar's original Statement of Claim dated 10 September 2020 (the **OSOC**) (both referring to the Abraaj group being "*in underlying financial trouble*") was immaterial (the RRASOC referred to the representation being that the Abraaj group was "*financially sound*"). Mr

Jafar's pleading (and evidence) was based on Mr Naqvi having made particular statements or used words to the same effect. It was also clear from [34] of Jafar 1 that Mr Naqvi had stated that he was only dealing with a short term problem (*"I asked Mr Naqvi how the loan would be repaid. Mr Naqvi said that the funds were needed on a short-term basis only"*).

141. Lord Falconer submitted that even though Mr Naqvi had not given evidence and the Court had evidence only from one of the two parties to the relevant conversations, the Court should not start from the proposition that Mr Jafar's and Mr Nerguizian's evidence was dishonest or unreliable. It was only one side of the discussion through no fault of Mr Jafar or Mr Nerguizian.
142. Lord Falconer also submitted that in order for the Fund Parties to make out their serious allegations that Mr Jafar and Mr Nerguizian were not telling the truth (or the whole truth) and had in their evidence propagated inaccurate and untrue accounts, the Fund Parties had to adduce strong and convincing evidence. As Lord Nicholls had said in *Re H and Others (Minors)* [1996] AC 563 at 586: *"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability"*). The Fund Parties, he submitted, had failed to do so. The Fund Parties had sought to make good their case by identifying alleged inconsistencies in Mr Jafar's and Mr Nerguizian's evidence and accounts. But inconsistencies were insufficient. The question was whether the inconsistencies were material and whether the evidence showed that they were the result of deliberate lies. Lord Falconer submitted that the Fund Parties had not identified any material inconsistencies and in any event had not adduced evidence of deliberate inconsistency. They invited the Court to infer dishonesty by advancing a case theory that Mr Jafar had lied to make his account fit for purpose. But it was clear that Mr Jafar had not done so as, by way of an example, his evidence as to why Badr had not given evidence demonstrated (see Day 6 page 111). Mr Jafar's evidence had been candid and clear. A man

who made up his evidence to fit the purpose would no doubt have lied and said that he had insisted that Badr give evidence and that he had refused. That was not what Mr Jafar had done. Mr Jafar had certainly not admitted during his cross-examination to making things up so that his case was fit for purpose.

143. The Fund Parties' claim that Mr Jafar's case had materially changed between the OSOC and the RRASOC and that this inconsistency undermined the credibility of his evidence was unsustainable. In [177] of the OSOC it was averred that:

“At the [First 2 December 2017 Meeting], Mr Naqvi stated that:

- (1) Certain investors in the Healthcare Fund ('the Healthcare Investors') had demanded the return of their uninvested capital ('the Uninvested Capital');*
- (2) There was no contractual or legal basis for this demand, since the use of the Uninvested Capital for the Abraaj Group's general business purposes was permitted by the relevant contractual arrangements;*
- (3) A legal opinion from Freshfields Bruckhaus Deringer LLP had confirmed this;*
- (4) The Healthcare Investors had threatened to escalate their demands for the Uninvested Capital and, thereby, generate adverse publicity for the Abraaj Group;*
- (5) Mr Naqvi feared that such adverse publicity would cause irreparable reputational and consequential damage to the Abraaj Group;*
- (6) The Abraaj Group needed to borrow US\$290 million before the end of December 2017, of which US\$250 million was to pay the Uninvested Capital to the Healthcare Investors;*
- (7) This loan was needed on a short-term basis, since senior representatives of the Healthcare Investors had assured Mr Naqvi that funds returned to investors would be re-invested before the end of January 2018; and*
- (8) The Abraaj Group was not in any underlying financial trouble, but was simply facing short-term cash/liquidity issues over the year end.”*

144. Lord Falconer argued that [177] of the OSOC revealed some but only minor changes such as the substitution of “*financially sound*” in [20(9)] of the RRASOC for “*any underlying financial trouble*” in [177(8)]. These were not material changes or inconsistencies.
145. In response to the Fund Parties’ argument (their pleading points) that the Overarching Message was not reflected in or could not properly be drawn from the nine Statements or the three Express Representations, Lord Falconer submitted that (a) the first part of the message set out at [26(a)] of the RRASOC (“*That the finances and management or governance of the entities for the benefit of which he was seeking to raise monies were essentially sound and proper, and any liquidity issues which they were experiencing were short term*”) was made good and supported by the Statements set out at [20(1)-(9)] of the RRASOC. Each one of those Statements created the impression that there was a short-term problem and the very use of the phrase “*short-term problem*” carried with it the meaning and inference that once the short-term problem was solved there would be no further (and certainly no long-term) problems; (b) the second part of the message set out at [26(b)] of the RRASOC (“*The Healthcare Fund was one of those entities*”) was obvious because the AGHF had been and was the only fund referred to by Mr Naqvi and (c) the third part of the message set out at [26(c)] (“*There was, or were, one or more other such entities which he did not identify by name*”) was supported by and could be derived from [20(6)] of the RRASOC (“*The Abraaj Group needed to borrow US\$290 million before the end of December 2017, of which US\$250 million was to pay the Uninvested Capital to the Healthcare Investors and (Mr. Naqvi implied) the balance was required to meet urgent liquidity needs of other Abraaj Group entities*”) but even if it was not so covered it was covered by Mr Jafar’s clear evidence that Mr Naqvi had said that other investors might also make claims.
146. Lord Falconer submitted that the Fund Parties were wrong to say that Mr Jafar’s pleaded case and his claims regarding what he was told by Mr Naqvi were just an unbelievable lawyer’s construct. This failed to take account of the reality and context of the discussions between Mr Jafar and Mr Naqvi. The core of Mr Jafar’s case was that Mr Naqvi had conveyed the message that Abraaj was facing a short-term problem which it had to deal with urgently to avoid reputational difficulty, not because of any legal misgovernance, and that

was the only problem in the business that had to be dealt with as far as its finances and governance were concerned. This was a straightforward and uncomplicated message that reflected, and was completely credible in light of the context (and of course the evidence).

What was discussed before the First 20 December 2017 Meeting?

147. Lord Falconer submitted that there was no evidence to suggest that Mr Jafar and Mr Naqvi corresponded regularly (an exhaustive discovery exercise has yielded few examples of contact between them). The Consolidated Call Log showed that prior to 18 December 2017 there had been no phone contact between Mr Jafar and Mr Naqvi in December 2017. Lord Falconer invited the Court to find that, consistent with Mr Jafar's unchallenged written evidence (Jafar 1 [19]), Mr Jafar and Mr Naqvi were friendly but not close and that their relationship was not one in which Mr Naqvi would have shared with Mr Jafar details of the fraud he was committing.
148. At 18:32 on 18 December 2017 Mr Naqvi called Mr Jafar, probably unsuccessfully as it was only a one second call. Immediately afterwards Mr Naqvi had called Mr Jafar again. They spoke for fewer than three minutes. Lord Falconer submitted that there was no evidence that any request for a loan was discussed. A three-minute call was too short for Mr Naqvi to go into detail about what he was seeking and why. Lord Falconer accepted that it may be that Mr Naqvi asked to meet with Mr Jafar and that Mr Jafar had agreed to meet, although he said that it was highly likely that Mr Naqvi had made this request in such a way as to make it seem like a trivial or casual request.
149. Lord Falconer submitted that it was likely that the call dropped or ended without Mr Jafar mentioning Tarek Salam and therefore Mr Jafar had called Mr Naqvi back at 18:36 the same day and had another brief call of 3 minutes 48 seconds. Mr Jafar's evidence was that on 18 December 2017 he and Mr Naqvi had discussed Mr Salam, for whom Mr Jafar wanted Mr Naqvi to provide training/a job. Lord Falconer submitted that this was corroborated by the contemporaneous documents, in particular by Mr Jafar's email to Mr Naqvi on 26 December 2017 in which he had forwarded to Mr Naqvi Mr Salam's CV and details and said that he

had “initially asked” Mr Naqvi to meet Mr Salam with a view to finding him a position in Abraaj. Mr Jafar had given Mr Naqvi details of where Mr Salam could be contacted. Mr Naqvi had replied on the same day to say that he had met Mr Salam. Lord Falconer submitted that it was inherently unlikely that Mr Jafar would have made his request regarding Mr Salam during the meetings on 20 December 2017 and that it was therefore likely that Mr Salam was discussed during this phone call on 18 December 2017. Lord Falconer invited the Court to find that this was the case and in any event that there was no discussion of the Loans in this short call.

150. Lord Falconer also invited the Court to find that Mr Jafar and Badr had not spoken about Mr Naqvi or his request for loans prior to 20 December 2017. There was, he said, no evidence to suggest that they had done so and it was likely that Mr Jafar’s and Badr’s brief interactions before 20 December 2017 were about unrelated matters. They had plenty of other matters to discuss (Badr was CEO of Crescent Enterprises and on the board of Crescent Gas and he and Mr Jafar as father and son had many issues to discuss and were due to holiday together in St. Moritz – Badr having already flown out on 16 December 2017). There were no phone calls or SMS/text messages between Mr Jafar and Badr between Mr Jafar speaking to Mr Naqvi on 18 December and the meeting on 20 December.

When was the First 20 December Meeting arranged?

151. Lord Falconer submitted that on the balance of probabilities Mr Jafar’s witness statement was correct in stating that the First 20 December Meeting was arranged during the morning of 20 December or alternatively that Mr Jafar was only made aware of it that morning.
152. Lord Falconer submitted that it appeared from calendar entries that the First 20 December Meeting took place at around 11:20 (UAE time) (having originally been scheduled for 11:00am, UAE time). Lord Falconer said that it was obvious and that the Court was invited to find that prior to Mr Naqvi attending Crescent Tower at that time Mr Jafar and Mr Naqvi had had no material discussion about any loans. Mr Naqvi, widely hailed as a charismatic and charming figure, would have wished to make his requests for loans face-to-face (his

negotiating style was shown by the fact that Mr Naqvi seems to have commenced the negotiations which resulted in Indorama and SCI, Dr Schmidheiny's company, acquiring AH shares, in face-to-face meetings).

What did Mr Naqvi say to Mr Jafar at the First 20 December Meeting?

153. Lord Falconer invited the Court to find that Mr Naqvi had made the statements recited and set out in Jafar 1 at [28]-[36] (which I have quoted above).

154. He argued that substantial parts of this evidence were not disputed. In particular the Fund Parties had not disputed that:

- (a). Mr Naqvi had said that the Healthcare Investors *"had suddenly and unexpectedly demanded the return of their Uninvested Capital before year-end [and] explained that the Healthcare Fund Investors, including a particular bureaucratic "bean counter" ... did not understand that regulatory and unforeseen political processes in emerging markets can create unforeseen project implementation delays."*
- (b). Mr Jafar had *"asked Mr Naqvi if the Healthcare Fund Investors had any legal or contractual right to demand the return of the Uninvested Capital."*
- (c). In answer to that question, *"Mr Naqvi said no; definitely not. He explained that, whereas it was becoming increasingly common, particularly in the West, for private equity limited partnership agreements to prohibit the placing of investors' uninvested funds in treasury, the limited partnership agreements of the Healthcare Fund did not include any such prohibition; he said that there was no such prohibition in the limited partnership agreements for any of the Abraaj funds. He said that he had obtained an independent legal opinion from Freshfields Bruckhaus Deringer ("Freshfields") to that effect only a few days before."*

- (d). Mr Naqvi had said “*that the Healthcare Fund Investors had nonetheless started to make noise... (but that the other Healthcare Fund Investors, who seemed increasingly coordinated, were also becoming vocal in concert) [and] said that he had argued to try and knock sense into them to no avail [and] that, in the circumstances, he did not want the matter to escalate and get out of hand, and worried that an open/public dispute with these globally high-profile institutional investors could be very damaging to Abraaj's reputation, notwithstanding the contractual correctness of Abraaj's position. In particular, he said he was concerned that any negative publicity would affect the otherwise smooth progress and closing of the very important global USD6 billion APEF VI fund launched by Abraaj, for which he said he had already obtained commitments from investors for over half.*”
- (e). Mr Naqvi had said that “*the funds were needed on a short-term basis only. He said that the Abraaj Group was financially sound (or words to that effect) and certainly able to realise the necessary cash to repay the loan within the time [and that Mr Jafar had] asked him if Abraaj had audited financial statements and he confirmed that it did; that its accounts were audited by KPMG and that it had a clean audit as of October 2017 [and that Mr Naqvi] had explained to [Mr Jafar] that J.P. Morgan had recently valued Abraaj at \$1.2billion [corrected by Mr Jafar in his oral evidence to US\$3.19 billion] and remarked that that clearly illustrated the Group's value and financial soundness.*”
- (f). That Mr Naqvi had made the representations at [34]-[36] of his witness statement about the potential sources for repayment of the loan.

155. Lord Falconer also argued that there had been no real challenge to Mr Jafar’s evidence that Mr Naqvi had “*commented that the surprising thing was that Abraaj would anyway be making cash calls of the Investors in January 2018 to fund investments and that he had been assured by senior representatives of the Investors that they would continue to meet cash calls in a timely manner in the new year including to repay the returned Uninvested Capital once*

the delays to the relevant projects had been resolved. So the money that the Investors were demanding would very soon be returned to Abraaj anyway.”

156. Lord Falconer invited the Court to find that the Healthcare Investors had been named by Mr Naqvi. The absence of mention of their names in the Winding Up Affidavit and the Response to a Request for Further and Better Particulars number 310 did not undermine Mr Jafar’s clear evidence. The Winding Up Affidavit was a relatively short document prepared for the purpose of liquidation proceedings and it was unsurprising that it did not go into the level of detail required to prove a claim in fraud. It was also hopeless to suggest that there was an inconsistency in Mr Jafar’s evidence based on the slightly different formulations used in, on the one hand, one of a whole suite of Responses drafted by his lawyers; and, on the other hand, his evidence, which has been consistent that certain Healthcare Investors were named, including the Gates Foundation. It was also inherently plausible, and in keeping with what is known about Mr Naqvi, that he would take the opportunity to remind Mr Jafar of the high-profile investors that had placed their trust in Mr Naqvi and Abraaj, and the fact that those asking for their uninvested capital back were high profile provided Mr Naqvi with a plausible explanation as to why he needed to repay them to avoid a damaging public row.
157. Lord Falconer invited the Court to find that Mr Naqvi had told Mr Jafar that the AGHF’s investors uninvested capital had been placed in the “*Abraaj Treasury*.” This had been a consistent feature of Mr Jafar’s and Mr Nerguizian’s witness evidence and was corroborated by ample contemporaneous documents. The terminology was used in the Winding Up Affidavit and Mr Jafar had been consistent about the point in his oral evidence.
158. Lord Falconer argued that Mr Jafar had given clear and consistent oral evidence that he was not told that the Uninvested Capital was used for working capital. He had been told that it was invested in the Abraaj treasury and was unavailable immediately to be cashed (Jafar 1 [29]-[30]). He had assumed, quite naturally, precisely what he was told (as he trusted Mr Naqvi) and that the money was intact but only not immediately available. Lord Falconer referred to Mr Jafar’s answers in his cross-examination by Mr Ayres (Day 5, page 127):

“Q. So you have a man who is asking you for US\$90 million and why did you not think it fit to ask him questions about what was apparently stopping him from transferring cash out of the Abraaj treasury?”

A. Well, he gave a very valid explanation to me, that it was not immediately available to be turned into cash and I believed him.

Q. Let’s just go over that. What was the valid explanation? What did he say?

A. That the funds were in the Abraaj treasury, that means invested -- I took that to mean invested - and could not immediately be turned into cash. That’s why, hence the need for a short-term loan.”

159. Lord Falconer submitted that Mr Jafar’s position had been corroborated by Mr Nerguizian’s evidence in his cross-examination by Mr Atherton (Day 13, pages 54-55):

“Q. The most obvious question is “Why can’t you take the monies from treasury in order to pay investors?” wasn’t it?”

A. The way I assessed at that time, if I thought about it, was that the money was somehow deployed in treasury and that was not immediately available to be able to retransfer. That was the understanding that was being projected to me. They – even at that time, we were not considering the possibility of a fraud.”

160. Lord Falconer further submitted that Mr Jafar’s evidence was supported and corroborated by Mr Nerguizian’s evidence in cross-examination and by the documentary record.

161. Mr Nerguizian’s evidence in cross-examination was that when Mr Jafar had reported to him on his conversation with Mr Naqvi, Mr Jafar had said that Mr Naqvi had told him that the Uninvested Capital had been placed in the Abraaj treasury and that Mr Naqvi had an opinion from Freshfields confirming that Abraaj was permitted to do this (Day 12, page 36). Mr Nerguizian had said that Mr Naqvi had repeated the same thing to him over the telephone and again at the Royal Mirage Meeting (Day 12, pages 37-38).

162. The trial bundle included the email dated 21 May 2018 from Mr Ernest to Mr Naqvi in which he referred to the Freshfields’ opinion *“that related to the use of [AGHF’s] money by Abraaj Treasury.”* The trial bundle also included various other documents (prepared in February 2018) that demonstrated that Mr Naqvi (and others at his behest) had generally referred to

the Uninvested Capital being placed in the “*Abraaj Treasury*” in response to questions asked about the handling of the uninvested capital. These documents included the following:

- (a). On 4 February 2018, Kito de Boer (former Senior Director at McKinsey and former Head of Mission of the Global Quartet, and an associate of Mr Naqvi’s at Abraaj) emailed Dominic Barton (then the Global Managing Director at McKinsey and later the Canadian Ambassador to China). Mr de Boer forwarded to Mr Barton an email of the same date (the ***De Boer Email***) from Mr Naqvi to him (Mr de Boer) in which Mr Naqvi had said that:

“.... the funds went into a central treasury where it was [they were] used to supplement the overall cash pool of Abraaj. Abraaj could have placed this money into a ring-fenced account but it would have earned a low return. In the Abraaj treasury it earned a superior return for the fund holders.

I have sat with eminent lawyers who said that placing these funds was within the rights of Abraaj. It is important to understand that Abraaj has written legal opinion from a world class legal firm that Abraaj was within its legal rights to place unutilized funds into its treasury for short term management.”

- (b). On 8 February 2018, Murray Grant of CDC (a member of the Limited Partner Advisory Committee (***LPAC***)) emailed Mr Vettivetpillai referring to a letter sent by Abraaj dated 29 January 2018. Mr Grant said, “*Since this letter Abraaj has made us and the other investors aware that cash was deposited (and subsequently returned with interest) with ‘Abraaj Treasury.’ Investors will obviously want to understand use of proceeds.*” Evidently, Lord Falconer argued, the AGHF limited partners had been told that their money had been placed with the Abraaj treasury.
- (c). On 12 February 2018, Morgan Stanley asked Abraaj’s lawyers to explain “*Why was the investment in Abraaj treasury not disclosed in the financial statements of the fund?*” Lord Falconer argued that this was evidence that representatives of the Abraaj entities had been saying that the limited partners’ funds had been invested in the Abraaj treasury.

- (d). In an email dated 18 February 2018, Sean Cleary (then an AH board member) referred to the need to have “*clarity in the use of AGHF funds within the Abraaj Treasury.*”
- (e). On 26 February 2018, Mr Mann drafted an email to go to limited partners of the AGHF which he shared with Mr Naqvi, Mr Vettivetpillai and Mr Chvatal (Abraaj’s General Counsel) among others. It said, “*At the end of January, Abraaj Holdings made a payment of \$13.7 representing the interest payment for monies held during the year by Abraaj Treasury.*” The final version of this email was sent to those limited partners.
163. Lord Falconer invited the Court to find that Mr Naqvi had not said that the Uninvested Capital had been used “*for general business purposes.*” Mr Jafar had always been consistent that Mr Naqvi had referred to monies being placed in the Abraaj treasury accruing interest (Day 5, pages 132-133 and 135) and Mr Nerguizian had confirmed repeatedly in cross-examination that Mr Jafar had not used the phrase “*general business purposes*” when he was recounting to Mr Nerguizian his discussion with Mr Naqvi (Day 12, pages 48 and 54). In any event, the evidence demonstrated that Mr Jafar had believed that the use of the Uninvested Capital was legitimate and permitted because Mr Naqvi had used the Freshfields Opinion to assure him of the legitimacy of the arrangements (Day 5, page 123). Mr Jafar had understandably accepted during his cross-examination that he would not have made the Loans had Mr Naqvi said that the Uninvested Capital had been used for “*ordinary expenses of the business of the fund manager*” because the examples that Mr Ayres had given him were clearly examples of the stealing or misuse of funds. But such uses were qualitatively different from monies being used in a formal treasury structure, with interest accruing and where the funds would and were to be repaid.
164. In any event, Lord Falconer said, the contemporaneous documents suggested that Mr Naqvi probably did not use the term “*general business purposes*” in the First 20 December Meeting but that instead the phrase was erroneously included in the Winding Up Affidavit. The reason for this was that from February 2018 it had been widely used by others (so that in May 2018 at the time of that the Winding Up Affidavit was sworn the phrase was common currency). Lord Falconer submitted that ultimately what mattered was what Mr Naqvi had told Mr Jafar

in December 2017 and not what was said, or discovered, over a long period starting in early 2018. Lord Falconer relied on the following statements in the relevant documents:

- (a). At the AH board meeting on 12 February 2018, Mr Naqvi (according to the informal minutes) had told AH board members that for the last year and a half Abraaj had had cash difficulties and so he had taken the decision to use Uninvested Capital for “*general business purposes*” e.g. paying salaries. The informal minutes stated that “*Arif gave us a historical account of why money was taken out and what it was used for. For some time at least a year and half the company has been cash strapped and Arif took the decision with the knowledge of others including Sev and Mustafa was put in the treasury unit comingled and used for general business purposes including paying salaries, paying general business expenses used to plug gaps in other funds where they did not reach fundraising targets so funding LP commitments GP had made. Whether it was used for distribution to other LPs was not clear. Arif tried to give comfort that it was not used for illegitimate purposes but to start with that a statement from mgmt. on how the money was used would satisfy the investors and their auditors....*” But Lord Falconer argued, this was starkly at odds with what Mr Jafar had been told in December 2017.
- (b). In February/March 2018, the term appears to have been used by Abraaj executives when responding to queries by Ankura (instructed by the AGHF limited partners to investigate).
- (c). On 5 March 2018, an AH board update had noted that the Wall Street Journal had received a leak informing them that Mr Naqvi had admitted that AGHF partners’ money had been used for “*general corporate purposes.*”
- (d). On 26 March 2018, Mr Siddique had sent to the AH board a privileged and confidential email which had said that the AGHF’s monies were used for “*general corporate purposes.*”

- (e). On 26 March 2018, the Wall Street Journal and the Financial Times had published an article which used the phrase “*general corporate purposes.*”
- (f). On 27 March 2018, Mr Mann had sent to Mr Naqvi a draft email (to be sent to the AGHF’s limited partners) which included the following (underlining added):

“We acknowledge that Abraaj has not acted as the best money managers should. We have said that money was used for general corporate purposes and returned. No loss has been suffered, all investors are whole. It is now time to move on. We want to move forward as collaborators of a vision rather than as managers of a fund.”

- (g). On 12 April 2018 the Project Cheetah report (prepared by Deloitte for the AH board) had used the term (see internal page 11) (my underlining):

“Due to investment project delays, a significant amount of money awaiting deployment was deposited in AHGL s CBD bank account. These funds were subsequently transferred from AHGL s CBD account to Abraaj Holdings and Abraaj Investment Management Limited bank accounts with CBD (Abraaj Treasury). Between 21 December 2016 and 28 December 2017, a total of USD323.4m was transferred from the bank accounts of AHGL (100% owned by the Fund) and its subsidiary, Abraaj Healthcare Group Hospitals Limited to Abraaj Treasury in various tranches...

2.4.1 Commingling of AGHF funds with Abraaj Treasury

- *As per the tracing exercise we conducted, USD323.4m of funds awaiting deployment were transferred from AHGL to Abraaj Treasury and returned/settled, between 21 December 2016 and 28 December 2017. These funds were not transferred to a designated deposit account but rather were co-mingled with Abraaj funds.*
- *As per the Abraaj Team, the cash transferred to Abraaj Treasury was used by Abraaj for its general corporate purposes, such as payroll, supplier payments, to cover financing costs and to fund working capital needs of Abraaj s regional offices.*
- *the breakdown of payments, provided by the Abraaj Team related to general corporate purposes indicate Abraaj’s cash requirement for the period from 21 December 2016 to 28 December 2017...”*

165. As regards what Mr Naqvi had said regarding the potential sources of repayments of the Loans, Lord Falconer invited the Court to find that Mr Jafar had believed that the source(s) of repayment(s) of the First Loan, whatever it/they might have been, was (or were) legitimate, and that he had not considered, based on what Mr Naqvi had said, that there was any inappropriate commingling of monies or doubt that money was being handled lawfully or properly.
166. Lord Falconer also argued that the Fund Parties had not disputed Mr Jafar's evidence that Mr Naqvi had made the representations set out in Jafar 1 at [35]-[36] about the potential sources of repayments of the First Loan. But, Lord Falconer argued, even if they had done so, Mr Jafar's evidence should be accepted. His evidence had been corroborated by Mr Naqvi's email to him dated 1 April 2018 in which Mr Naqvi had said that the sale of Karachi Electric would release funds. Moreover, it was inherently likely that Mr Naqvi would have wished to reassure a potential lender that his money would be repaid with multiple potential sources of income already having been arranged.
167. Lord Falconer accepted that the Fund Parties had challenged whether Mr Jafar had believed that repayment of the First Loan out of "*investors' money*" would be legitimate and lawful. He argued that the Fund Parties' line of cross-examination was utterly misconceived since, as Mr Jafar had repeatedly explained in his answers under cross-examination, if the Healthcare Investors' Uninvested Capital was held in the Abraaj treasury (as Mr Jafar had believed it was) then once they had been repaid using and out of Mr Jafar's money (advanced pursuant to the Loans), they would no longer be out of pocket (they would have been repaid their Uninvested Capital) so that the funds remaining and held in the Abraaj treasury, or the funds (to be) reinvested by the Healthcare Investors' early in 2018, could then properly be used to repay Mr Jafar. The Healthcare Investors would not be disadvantaged. In short, Lord Falconer said, assuming that the Healthcare Investors had received their Uninvested Capital from monies advanced by Mr Jafar, they could have no objection to, and would not be prejudiced if, the funds representing that Uninvested Capital in the Abraaj treasury were then paid to Mr Jafar. The Healthcare Investors' new (re) investment in January 2018 could then be deployed and used for whatever projects they were intended to be used for. Alternatively,

if he was repaid out of the new (re) investment, the funds held in the Abraaj treasury would be available to, and could, be used for these projects.

168. Lord Falconer submitted that the Court should reject the Fund Parties' claim that Mr Jafar had made up his evidence that Mr Naqvi had referred to the possibility of investors other than the Healthcare Investors requesting the return of their uninvested capital. There was no proper basis for the allegation that he had lied in his evidence. It was entirely logical that having referred to existing requests for the return of uninvested capital Mr Naqvi would have alluded to the risk of further similar requests being anticipated since such a statement gave Mr Naqvi the opportunity to return to Mr Jafar with further requests for loans if he proved unable to source money from others (such as ENBD).
169. Lord Falconer invited the Court to accept that Mr Jafar had been consistent in saying that Mr Naqvi had said that the cash issues were short-term (see the Winding Up Affidavit and the OSOC at [177(8)]).
170. As regards the issue of whether Mr Naqvi had brought to the First 20 December Meeting and shown to Mr Jafar the three important documents which Mr Jafar had said had been shown to him (the Freshfields Opinion, the JP Morgan valuation and the AH financial statements audited by KPMG), Lord Falconer said that it should be noted that there was no dispute that Mr Naqvi had referred to these documents. In any event, he invited the Court to accept Mr Jafar's evidence on this and find that Mr Naqvi had indeed brought copies of those documents with him and briefly showed them to Mr Jafar (but did not give him copies). It was plausible that Mr Naqvi would have brought these documents with him since having copies to show to Mr Jafar would make Mr Naqvi's explanations more credible. The entire purpose of the Freshfields Opinion, Lord Falconer said, was to demonstrate that Mr Naqvi had been operating lawfully (the Freshfields Opinion appeared to have been commissioned at a time when Mr Naqvi was considering not returning monies to the Healthcare Investors) and it was logical that he would have brought with him a document that appeared to corroborate his story that Abraaj was acting within its legal rights. The JP Morgan valuation was another tool that logically would be used by a borrower to persuade a lender that their

business was sound. It had been sent to Indorama and Dr Schmidheiny and therefore copies had already and previously been used by Mr Naqvi when perpetrating other related and contemporaneous deceits. It was entirely logical that Mr Naqvi would follow the same *modus operandi*. The position was the same in relation to the audited AH financial statements, which had been an integral part of the deceits of Indorama and Dr Schmidheiny. Furthermore, Lord Falconer argued, Mr Jafar's evidence on this issue had been consistent. He had consistently said that reference had been made by Mr Naqvi to these three documents and had never said that he had not been shown them. He had only ever said that the documents had not been provided to him to take away with him (which had remained his evidence at trial and which was obviously correct).

171. Lord Falconer submitted that the undisputed statements made by Mr Naqvi of themselves gave rise to certain simple and obvious implied representations as follows, and that the following implied representations flowed from a finding that Mr Naqvi had represented that the Uninvested Capital was held in the Abraaj treasury, that this was legitimate and that there would be multiple potential sources to repay Mr Jafar:

- (a). That each of the Abraaj entities who would be using the funds advanced by Mr Jafar was financially sound and proper (this was the obvious implication of a statement to the effect that Abraaj as a whole was financially sound and the obvious implication of a statement that the need for cash was only short term).
- (b). That all these entities were managed/governed in a way that was fundamentally sound and proper. This was the obvious implication of Mr Naqvi's explanation that the complaints made by the Healthcare Investors were without foundation and of the references to and use by Mr Naqvi of the Freshfields Opinion - the only reason why someone in Mr Naqvi's position would have previously and recently sought and then referred to a legal opinion was to give the impression and represent that the business was being conducted lawfully. Furthermore, this implied representation also arose from the Reinvestment Representation (plainly investors would only be willing to re-

invest if they were fundamentally satisfied with the way that the investment fund was being run).

172. Lord Falconer invited the Court to find that Mr Naqvi obviously intended (to make) these implied representations. He said that it had not been within Mr Jafar's power to call Mr Naqvi to give evidence (because this was a case in which he accused Mr Naqvi of deceit so he would not attend voluntarily and he could not be forced to attend because and while he was being held in the UK awaiting final extradition to the USA for criminal charges including fraud). Lord Falconer noted that the Fund Parties had not chosen to call and obtain evidence from Mr Naqvi in their defence.
173. Lord Falconer also invited the Court to find that Mr Jafar had understood Mr Naqvi to be making, and the meaning of, these implied representations as set out in the Overarching Message. Mr Jafar's evidence had been consistent on the issue of his understanding of what had been said.
174. Lord Falconer submitted that there had been no real challenge to Mr Jafar's evidence, set out at [45]-[47] of Jafar 1, as to what was discussed during the 20 December Jafar -Nerguizian Call and the 20 December Badr Call.
175. He submitted that it was to be inferred that during the 20 December Second Badr Call Mr Jafar and Badr had discussed Mr Jafar's intention to make the First Loan that Mr Naqvi had requested. Lord Falconer invited the Court to reject the Fund Parties' allegation and not to find that Badr had told Mr Jafar anything that would render the Overarching Message or Reinvestment Representation false. He submitted that there was no evidence to support that speculation and that it was inherently unlikely that Mr Jafar would have proceeded with the Loans if Badr had done so (furthermore, if Badr had said anything of the sort it was likely that what Badr had said would have been raised in correspondence by Mr Jafar as a concern).

176. Lord Falconer submitted that there had also been no challenge to, and therefore the Court was invited to accept, Mr Jafar's evidence (at [53]-[55] of Jafar 1) about what had been said at the Royal Mirage Meeting.
177. Lord Falconer invited the Court to reject the Fund Parties' contention that Badr had understood the Year End Deposit Message to be an invitation to facilitate window-dressing. He argued that, as Mr Jafar and Mr Nerguizian had repeatedly stated in their oral evidence, if a loan were properly recorded as such there would be no issue of window-dressing that could conceivably arise. Given Badr's status as an AH Board member, one of a number who were kept completely in the dark by Mr Naqvi, there was no basis for the Court to accept the speculative assertion that Badr knew that he was being asked to engage in unlawful window-dressing. In any event, the Court was invited to find that Badr did not convey this exchange, or its substance, to Mr Jafar. As Mr Jafar had explained in Jafar 1 at [66]-[67], he was unaware of the Year End Deposit Message at the time (or at any time before it was drawn to his attention by the Fund Parties' reference to and reliance on it in these proceedings) and Badr had not mentioned it to him at the time. Lord Falconer submitted that the Fund Parties had not substantially challenged Mr Jafar's evidence as to this.

GP8's (and Fund IV's) submissions as to what Mr Naqvi said at the First 20 December Meeting

178. The first point to note is that GP8 had challenged the credibility and reliability of both Mr Jafar and Mr Nerguizian as witnesses. GP8 submitted that neither Mr Jafar nor Mr Nerguizian was a reliable witness and that their accounts as set out in their witness statements and as developed in cross-examination on matters in issue were not accurate. GP8 submitted that the written and oral evidence of Mr Jafar and Mr Nerguizian required close and careful scrutiny and should be approached with a large measure of scepticism. GP8 argued that the usual course in commercial cases was to place little, if any reliance, on witness recollection and instead to focus on what conclusions could be drawn from the documentary evidence, inherent likelihoods and known or probable fact. GP8 referred to and relied on the approach set out by Leggatt J (as he then was) in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm)

(*Gestmin*) at [15] – [22] where Leggatt J had emphasised the fallibility of memory (how, for example, external information can intrude into witness memory, as can internal thoughts and beliefs ([17]), and the particular unreliability of memory when it comes to recalling past beliefs ([18]), as well as the “*powerful biases*” created by the civil litigation process). At [22] Leggatt J had said that (my underlining):

“In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

179. GP8 noted that Leggatt J had returned to this passage from *Gestmin* in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [68]-[69] where at [69] he observed that “*there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light.*” This, GP8 argued, reflected a well-recognised tendency for witnesses to be biased in their recollections towards their desired outcome. That was particularly likely to be the case where, as in this case, the principal witness was also an aggrieved plaintiff who is inevitably deeply involved with the legal team in the construction and pursuit of the claim. GP8 referred to the judgment of Lord Pearce in *Onassis v Vergottis* [1968] 2 Lloyd’s Rep. 403 at [431] where he said that “*Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active.*”

180. GP8 noted that this passage had been cited with approval by Smellie CJ (as he then was) in *AHAB v SICL* [2018 (3) CILR 1] (*AHAB*) at [60] and that on appeal the Cayman Islands

Court of Appeal had approved Smellie CJ's reliance on *Onassis v Vergottis* in *AHAB v SICL* [2021 (2) CILR 704] (*AHAB-CA*) at [212].

181. GP8 said that in this case there was a body of documentation surrounding the advance of the Loans but the negotiations were nearly exclusively oral with no notes and very limited evidence in the documents as to what was said. There were documents from mid-2018 that discussed and therefore evidenced what was said in December 2017 which were of assistance but caution was required in relation to some of those documents, namely those produced by or on behalf of Mr Jafar, because they had been produced with an agenda (to advance and present Mr Jafar's case) and in some respects were clearly inaccurate in recounting what had been agreed in December 2017.
182. I discuss further below *Gestmin* and the other authorities (and the parties' submissions) on the proper treatment of and weight to be given to witness recollection but at this point I need to note what GP8 said about the approach that the Court should take to Mr Jafar's and Mr Nerguizian's written and oral evidence in light of the principles that, it submitted, were established by *Gestmin* and those other authorities. GP8 said as follows:
- (a). Mr Jafar and Mr Nerguizian both have a direct and substantial personal financial interest in Mr Jafar's claims being successful.
 - (b). Mr Jafar and Mr Nerguizian have been working together in their efforts to obtain a recovery on these claims for some time. Quite apart from the present proceedings, those efforts had ranged from negotiations with Mr Naqvi through to the criminal proceedings in Sharjah. Mr Jafar and Mr Nerguizian had doubtless discussed their recollections and accounts very many times – between themselves, with Badr, with the team at Crescent Petroleum (including Mr Singhvi and the in-house lawyers) and a wide range of external counsel (in cross-examination, Mr Jafar had said that he had told his story “*umpteenth times*”).

- (c). Each of those many conversations would have interfered with any independent recollection of events. With each discussion, retelling or interrogation, the purity of any original recollection would be diminished, particularly given the pressure to make a recovery and the isolation of what were perceived to be key issues from time to time. The passage of time, the self-interest of Mr Jafar and Mr Nerguizian and the iterative process of telling and re-telling made any uncorroborated statement about the critical events valueless, even if the Court were to accept that Mr Jafar and Mr Nerguizian were still doing their honest best to assist (as opposed to advancing consciously whatever account that they believed to best serve their interests).
- (d). In these circumstances, the contemporaneous documents were to be treated as having considerable importance. The critical documents included the Post-Mirage Meeting Email sent by Mr Nerguizian on the evening of 20 December 2017, the Year End Deposit Message, the emails and documents setting out at the time that the Loans were being discussed and advanced the stated purpose of the fund transfers and the documents recording what the AH board had been told in February 2018. GP8 said that these documents supported its case and were inconsistent with critical aspects of Mr Jafar's case. GP8 argued that what was significant was not only what was to be found in those documents but also what was missing from them. It submitted that the Court could and should infer that had Mr Jafar's and Mr Nerguizian's evidence been accurate the matters that they claim to have happened would have been reflected in the documents and in the absence of their being so mentioned, the Court should conclude that Mr Jafar's and Mr Nerguizian's evidence on the critical and disputed issues of fact should not be accepted.
- (e). GP8 also submitted that the previous accounts given by Mr Jafar (or on his behalf) of what he had been told by Mr Naqvi were of great significance. These included the Winding Up Affidavit (sworn on 31 May 2018 in support of the Auctus winding up petitions in respect of and the applications for the appointment of joint provisional liquidators to AH and AIML); the Letter Before Action (with materially identical letters sent to the other defendants and several other parties on that date) and Mr Jafar's

OSOC and subsequent replies and specific responses to GP8's requests for further and better particulars. GP8 also relied on what Mr Jafar had said, or what had been said on his behalf, in the Sharjah Criminal Complaint.

- (f). GP8 submitted that while it did not accept that the accounts given in these documents were always or necessarily accurate (indeed it had identified a number of what it claimed to be significant inaccuracies), they were an invaluable resource for testing Mr Jafar's (and Mr Nerguizian's) evidence at trial. Many of the earlier written accounts had been provided by Mr Jafar when his recollection was much fresher and untainted by exposure to the pressures and biases identified in *Gestmin*. Each of those accounts had been prepared with the involvement of professional lawyers who could be assumed to have been careful to ensure that they had clear instructions from Mr Jafar and had captured with precision Mr Jafar's recollection as it then stood.
- (g). GP8 submitted that the Court should treat Mr Jafar's (and Mr Nerguizian's) witness statements for trial as having greater probative value than the new evidence introduced for the first time at trial in cross-examination (in an effort, GP8 argued, to improve Mr Jafar's case). Any new point or argument advanced for the first time by a witness in cross-examination warranted particular scepticism, particularly in relation to matters of central importance to the claim. GP8 referred in particular to (i) what it claimed to be Mr Jafar's introduction of an elaborate two lots (or two funds) account as to why he did not believe that repayment of the Loans was necessarily going to come from monies reinvested by investors or, if it did, why that might not necessarily be improper (GP8 said that this was not in any previous account, was inconsistent with previous statements made on behalf of Mr Jafar and was inconsistent with the contemporaneous documents) and (ii) what it claimed to be Mr Nerguizian's new account of why he supposedly thought that Mr Naqvi was acting properly in requesting for the loan payment remittances to identify the purpose of the transaction as "*investments*."
- (h). GP8 argued that there were additional reasons why Mr Nerguizian's evidence was to be questioned and given reduced weight. During his cross-examination it transpired

that that Mr Southwell of Crescent Petroleum's in-house legal team had conducted at least one briefing session with Mr Nerguizian (in the presence of Ms McLennan of Forbes Hare) very shortly before his oral testimony and after Mr Jafar had given evidence, when documents were put to Mr Nerguizian for consideration and comment (including at least one document that they had decided to show him for the first time after Mr Jafar had been cross-examined on the document). While not making any accusation of professional impropriety against Mr Southwell or Ms McLennan, GP8 argued that the decision to have such a session with Mr Nerguizian after Mr Jafar had given evidence was undoubtedly ill-advised and while Mr Southwell and Ms McLennan may not have intentionally set out to taint Mr Nerguizian's evidence this had been the inevitable consequence of the meeting they had conducted with Mr Nerguizian. GP8 said that the putting of documents from this case to Mr Nerguizian appeared to be on the outer edge of permissible witness familiarisation.

183. GP8 summarised its case as follows. It said that the evidence demonstrated and the Court should find that:

- (a). Mr Naqvi told Mr Jafar that the Uninvested Capital had been placed in the Abraaj treasury and used for the general business purposes of Abraaj (that is, spent). Mr Jafar knew or suspected and turned a blind eye to the fact that the Uninvested Capital had been spent for non-fund purposes (in whole or part) and knew that this was improper. Mr Jafar therefore knew that the finances and corporate governance of Abraaj were not essentially sound and proper.
- (b). Mr Jafar also understood that Mr Naqvi intended to repay him through funds reinvested by the Healthcare Investors because Mr Naqvi had told him so and identified this as the principal source of repayment. That understanding was also consistent with Mr Jafar's general understanding that Abraaj was using investor money for general business purposes or was at least likely to do so. Mr Jafar therefore appreciated that the finances and corporate governance of Abraaj were not essentially sound and proper because he understood this was wrong.

- (c). Mr Naqvi did not say to Mr Jafar that the additional money (above the sums needed to repay the Uninvested Capital) was required to meet anticipated further demands from investors. Mr Jafar did not understand that to be the reason for the additional funds requested. To the extent that Mr Naqvi gave any explanation for why the additional funds were required, it was likely to have been in highly generic terms (namely that they were needed to meet unspecified short-term liquidity needs).
- (d). Mr Jafar found out about the request for the Third Loan by no later than 24 December 2017 and probably before then. He understood that this was very short-term lending over year-end and knew, or suspected and turned a blind eye to the fact, that there was no legitimate business need for the loan. He also understood that the funds would be returned unused. For this additional reason, Mr Jafar had appreciated that the finances and corporate governance of Abraaj were not essentially sound and proper. His appreciation on 24 December 2017 (or later) was consistent with his appreciation on 20 December 2017.
- (e). Mr Jafar was aware of the request by Mr Naqvi to record the purpose of the Loans as “Investments” and appreciated that this would create a misleading and false record, but he nonetheless acceded to the request. He thereby understood (and this was another reason why he understood) that the finances and corporate governance of Abraaj were not essentially sound and proper.
- (f). The pleaded Reinvestment Representation was not made. Mr Jafar had confirmed in cross-examination that his evidence as to what was said was set out in footnote 7 of Jafar 1. What is set out and the account given as to what Mr Naqvi had said involved and gave rise to a different representation from that pleaded and set out as the Reinvestment Representation. Even if Mr Jafar’s account was accepted, there was no evidence that the Reinvestment Representation was false or that Mr Naqvi made that representation with fraudulent intent. The claim based on the Reinvestment Representation therefore must fail.

- (g). As regards Mr Jafar's claim based on the Overarching Message, if GP8's submissions on one or more of these factual issues (identified at (a)-(f) above) was accepted and treated as correct, Mr Jafar's claim in deceit must fail.

184. GP8 invited the Court to find that (a) Mr Jafar was informed by Mr Naqvi that (i) the Uninvested Capital had been placed in "*treasury*" and accounted for as an interest-bearing loan (to AH) owed to the AGHF and (ii) that once the money was in treasury, it had been used for the general business purposes of the various Abraaj entities, (b) Mr Jafar understood what he was told to mean that the Uninvested Capital had been spent and that this was the reason why it could not be immediately returned to Healthcare Investors, and (c) Mr Jafar knew that this (spending the Uninvested Capital on ordinary business expenses) was not permissible. GP8 noted that Mr Jafar did not contend that Mr Naqvi had said that the use of Investors' funds for general business purposes was permitted. GP8 submitted that although it was possible that Mr Naqvi had said something along those lines in December 2017, (even) if he had done so Mr Jafar had not believed him.

185. GP8 submitted that there were three reasons why these findings should be made:

- (a). In February 2018 Mr Naqvi had told Badr and other members of the AH board that the Healthcare Investors' money had been spent on general business purposes. At that time he had also claimed that the use of funds in that way was not illegitimate. If Mr Naqvi was prepared to provide that explanation in February 2018 the overwhelming likelihood was that he was prepared to provide it six weeks earlier when the Loans were made. It was inherently unlikely that Mr Naqvi would have changed his story between late December 2017 and early February 2018 and it would have been incredibly reckless for him to have done so because Mr Naqvi knew that Badr was privy to the conversations concerning the Loans in December 2017. If Mr Naqvi provided a different explanation in February 2018 for what had happened to uninvested capital the game would have been up because Badr would have caught him in a lie. The very fact that Badr did not raise any complaint or even question Mr Naqvi (whether over email, WhatsApp or in the AH Board meetings in February 2018)

confirms that Mr Naqvi must have told the same story to Mr Jafar and Badr in December 2017 as he told the AH board in February 2018.

- (b). Until Mr Jafar's witness statement of 31 July 2023, Mr Jafar's account of what he had been told had happened to Uninvested Capital had been consistent with the account given by Mr Naqvi to Badr and members of the AH board in February 2018 (that the funds had been paid into treasury and used for the general business purposes of Abraaj, that this was permitted under the terms of the LPA and there was a Freshfields opinion which supported that conclusion - albeit that Mr Jafar now accepts that he was never told that Freshfields had advised that investor funds could be used for the general business purposes of Abraaj).
 - (c). The case advanced by Mr Jafar in cross examination (that he was told, or understood, that the Uninvested Capital was held in temporary investments on behalf of the AGHF in Abraaj's treasury) was a recent invention and should not be accepted. It was inherently implausible and not consistent with the documentary record and evidence of the discussions that took place at the time (there had been no attempt to establish even basic details about the nature of the alleged investments nor any attempt to tie the length of the Loans to the maturity date of such temporary investments).
186. GP8 noted that there were no contemporaneous documents from December 2017 evidencing what Mr Naqvi said had happened to the Uninvested Capital. But the documents recording what was said in two important meetings of the AH board in February 2018 (those held on 8 and 12 February 2018) could be relied on as evidence of what Mr Naqvi was likely to have told Mr Jafar (AH board meetings had been held on 3, 8, 12 and 19 February).
187. Mr Naqvi and Mr Sean Cleary were physically present at these meetings with several others and Badr had attended by video conference as did Ms Anuscha Ahmed (the company secretary). Ms Ahmed prepared the minutes, initially in what appears to be a lengthy near verbatim note but then followed by a shorter formal minute. Those attending the 8 February 2018 AH board meeting included, in addition to those I have already mentioned, Mr Sev

Vettivetpillai, Mr Waqar Siddique, Mr John Chipman, Wendy Luhabe, Mr Andrew Chvatal (as I have noted, the General Counsel of the Abraaj Group) and Mr Abbas Besrai of KPMG. Two representatives from Freshfields were also present for part of the meeting including a partner, Mr Pervez Akhtar. Mr Kito De Boer attended as an observer. The discussion at the meeting included the ambit of a review which had been undertaken by KPMG. As part of that review, KPMG had been instructed to identify what money had left the AGHF and whether an equivalent sum had been returned. The review however had not covered what had happened to the money when it was outside the AGHF but various statements were made, particularly by Mr Naqvi, during the meetings regarding what had happened to the uninvested capital and the basis on which funds had been paid to AIML.

188. GP8 relied on these statements and the record of the exchanges as set out in the verbatim notes of the meetings on 8 and 12 February. I have extracted below the relevant passages from the verbatim note of the meeting on 8 February (correcting the obvious typographical errors). I have underlined the statements that seem to me to be of particular relevance and interest and emphasised in bold the statements particularly relied on by GP8 (my underlining and emphasis):

“Badr: Net result of the exercise is that they did not look at what happened to money that did not go to investments and LPs. **There was money in the interim that did not go to investments or LPs but some went for other purposes**

.....

Arif: the work that was done. **All money in was verified as investments, or balance to bank and then traced to those investments. The cash was traced to Abraaj and for the time it was with Abraaj what the rate was verified and the amount of interest to be charged was verified.** What they haven't traced [is what] when Abraaj had the money what was done with the money.

Badr: what was the total amount that went to Abraaj Holdings? And how many different traches?

Abbass: *statement B. 1st set of payment 21 Dec in 2016 in \$140m; \$6m - \$25m; maxim was \$237m in May after which it started coming Down and Dec 28 it was 0. Whenever an investment had to be made by the fund.*

Badr: *what was the amount in the last date*

A: *Dec 20; \$26m*

Badr: *this was returned to the fund in cash?*

A: *Yes*

Arif: *the money paid in Dec was all given to LPs*

Sev: *when was the interest decided?*

A: *actual cost of funding so the actual cost was calculated at the end of Dec. Abraaj has \$ facilities with different banks. It's the weighted Abraaj .. cost of funding for Abraaj in 2017 and they got a 0.5% preference.*

Sev: *what was the lowest and highest rate.*

A: *4.85%; 7% fixed*

Sean: *where did this concept of surplus liquidity deposited with Abraaj attracting a rate of interest based on average cost of borrowing come from? Is this a device that was developed for this fund or common practice in Abraaj?*

A: *2012 agreement that talks about this. Doesn't say how the cost of funding should be calculated between Abraaj Holding and AIML.*

Arif: ***So long as Abraaj doesn't get the benefit it is OK.***

Sev: *that agreement is an interparty agreement so it doesn't have a bearing in the funds. If that was the case it should be part of the fund documents.*

...

Andrew: *yes. The KPMG report traces funds as they are drawn down and as they are applied to investments, application to investments and movement between Abraaj and the fund and distribution to investors. The legal points are centered around two topics i) were we required to return funds if not invested in a certain period of time ii) once you made a drawdown and what circumstances can you recall it: a) money drawn through distributions b) money drawn for deals aborted. And such amounts shall be distributed within 60 days. Investors said that was a blanket obligation*

irrespective of the status of the deals. The first legal point through FF and confirmed by Maples; in the circumstance of a deal proceeding to completion if we are required to return the money everyone said no; no obligation to return the funds.

Badr: what is the opposing parties legal view on that matter? Have they shared their legal opinion?

Andrew: this was an early view and this point has lessened; their view was that this was a blanket obligation to return the money regardless of the status of the deal. With the Healthcare Fund the journey between signing and completion has more twist and turns. They didn't have a strong argument but they held on to this as a point as they were not accustomed to this.

Badr: is it the word completion that is open to interpretation?

John: is there any language related to deals aborted or cancelled that gives more strength to Abraaj position that they were deals that were not aborted?

Andrew: it is around what proceeding to completion means. We sought external confirmation from three different firms.

...

Andrew: it is the investment management agreement and the LPA where the manager can operate the funds accounts in the interest of the fund. 12-15 specifically identified powers. One of those powers is to apply money on deposit (doesn't reference where or where not) or placed with temporary investments. Temporary investments identified as money market, partnership bankers or international standards. Money placed on deposit with Abraaj Holdings, looking with [at?] the agreements with [Freshfields] and Maples: 1) no prohibition of placing money 2) the broad powers are sufficient to give you the ability to do that 3) the specific power to put money in deposit further supports it and 4) if you want to talk of temporary investment you can say Abraaj is similarly standard institution
...

Sean: is there anything in your opinion that qualifies what Andrew has said?

Rob: very helpful that there is a specific limb but even if not you are still comfortable. The fact that there is a specific limb

John: if an LP had read these agreements and they were aware that money had been drawn and that they knew there was a deal would they have expected that the use of the money would be to place it on deposit and earn interest? Would that be a reasonable expectation?

Andrew: the agreements do not deal with that level of specificity. These are technical provisions. People wouldn't have had a view one way or the other.

Related party?

Abraaj was paying a market rate of interest plus 50bps that it's an objective arm's length of interest.

Sev: *those interest rates they are referring to? Do they have collateral?*

Arif: *yes*

Sev: *how was the fund money collateralized?*

Arif: *AH guarantee*

Not if [Freshfields] is right or if another legal opinion to get a. Ask the managers of the fund at the point of drawdowns what was the reason not to return investors, and what was the reason to keep the money. Did people expect that they would not use the funds?

Abraaj group is not getting the benefit of the money but paying it. We take it and sitting in cash the only people it is hurting is us. We need it to have earn a preferential return on this so as to limit the damage of the hurdle. Plus the money was available on demand.

I wanted the board to hear the legal opinion that underlay our actions.

Wendy: *did we compromise any governance principles?*

Sean: *Arif will have to answer. When the fund was placed with Abraaj even at a commercial rate of interest did that compromise any principles of governance. Were proper procedures followed and what were those or was it entirely in the discretion of the manager?*

Arif: *we were acting within our rights. Our actions in this fund were based on the construction of what the fund enabled us to do or not do. And because it was a mix of green field and brownfield and we were running it as a company. You run it as cash and assets and you deploy that cash. We believed we were doing it in the interest of the fund.*

.....

Pervez: what we did was look at the fact pattern presented by mgmt. and documents that said are there any provisions on this; is it permitted. We haven't gone beyond governance and processes.

Sean: what he has described is consistent

Pervez: funds from the HC fund to Abraaj can you tell us is that permitted or not permitted and what is your view on that? The view is that the compilation of LPA and management agreement you can get there. You have to go through the steps and the processes to say you get there.

Badr: have you issued an opinion on this and can you share it?

Pervez: lawyers do not give opinions. We have given advice and the advice is look at this agreement what does it say and look at the fact pattern and determine what it says and we have shared our advice that says you can do temp investments.

.....

Badr: agree we could waste time debating legal construct and don't want to go to court but it is clear that there will be negotiations with the LPs and so it is important to know where are strengths lie. Where there might be ambiguity within those arguments then one relays to industry best practice and it seems on that there may be a weakness on that.

.....

Sev: industry norm. for fund management business is that temp investment is only for fund strategy and when there is cash in place you put in deposit in a AAA rated bank; not allowed to take risk with it. you never comingle funds with third party. At the point this issue came up and we wanted to address this we had certain meetings one on one and LPAC meetings where representations were made that we did not use the fund for anything else. We misrepresented at that point, an investor told me we misrepresented. Legally we are Ok but 1) industry norm 2) misrepresentation as up to that report we told them we did not use the money for anything else. They already have a case to remove the manager from AGHF. Being in the industry long enough you know you are not supposed to co-mingle.

Wahid: spirit and substance. The spirit and substance may be perceived to be wrong. In the spirit given the magnitude of the amount and the time it was kept away from deployment is long. In addition to the fact that

Kito: industry norms + recycling of funds. What was different in this LPA that made lawyers to look at it differently.

Pervez: we didn't compare to industry norms. We looked at the agreements and the words.

Andrew: you can put in certificate of deposit or money market fund. We entered into the agreement

[During the part of the meeting after the executive directors had left]

*Badr: Arif is going through emotional roller coaster. Important to look at this through a compassionate lens and he cannot be stripped of his dignity or honour and that will cause long term damage. Are Sev / Mustafa trying to open role for themselves? Need to preserve Arif dignity and give him the benefit of the doubt that ultimately maybe careless and did not follow best practice but were not deceitful. **I have questions. Arif was in a bind approaching the end of last year with a liquidity crunch. Money came out of the fund was spent. After paying back the investors they didn't have money to pay Jan salary. Important board knows this. Ask Arif where did the money go. Need to ask him tough questions and get answers.** We need at least the headlines if we are going to get in front of answers [I refer to this statement by Badr as the **Badr 8 February Statement**].*

189. GP8 argued that the verbatim record showed that in the course of that meeting Mr Naqvi had explained that the monies paid to AH had been accounted for as an interest-bearing loan from the AGHF (to AH) and noted that Badr had commented that “*There was money in the interim that did not go to investments of LPs but some went for other purposes.*” GP8 argued that this showed that even before the existence of the First Loan and Second Loan was disclosed by Badr to the other non-executive directors, he informed the rest of the AH board that some of the Uninvested Capital “*went*” (i.e., was spent) for other purposes. GP8 further noted that during his cross-examination by Mr Atherton (Day 11, page 76) Mr Cleary had confirmed that his understanding was that Mr Naqvi, in the passage in bold, was referring to the rate of interest that Abraaj paid to the AGHF for access to the funds.

190. GP8 submitted that the evidence showed that after the executive directors had left the meeting Badr had disclosed the existence of the First Loan and the Second Loan. This was not found in the verbatim note or the formal minutes of the 8 February meeting but was

supported by the notes of the AH board meeting on 12 February and Mr Cleary's evidence during his cross-examination by Mr Atherton.

191. Mr Cleary had explained in his cross-examination that he recalled that Badr had chosen a moment when Ms Ahmed was not in the room at the 8 February meeting to make the disclosure. The fact that Badr had disclosed the Loans at the 8 February AH board meeting was confirmed by what he had told the AH board at the subsequent AH board meeting on 12 February 2018 and recorded in the verbatim note for that meeting (the ***Badr 12 February Statement***):

“Badr: clear that Abraaj is facing a liquidity crunch and it has been the case for some time. It was severe enough that at the end of the year they were broke. Living hand to mouth. Do not know of any deals that were done or exits made to change that. So have a major concern on this. Which is why I reported this to the last board call that Arif had asked the family to come to the company rescue.”

192. GP8 said that the Badr 8 February Statement was highly material since it was clear that by 8 February 2018 Badr knew that the Uninvested Capital had been spent.
193. GP8 noted that Mr Cleary had been taken in his cross-examination by Mr Atherton to the Badr 8 February Statement and asked what he understood Badr was saying to the AH board. Mr Cleary had responded (Day 11, page 101) as follows: *“what he's [Badr is] saying, I think [is the same as] what he's saying in the subsequent meeting, he's saying the money went into the treasury and the money was then used [paid] out of the treasury. What he's arguing for is clarity as to what it was spent on.”* Mr Cleary had noted that this disclosure by Badr reflected *“knowledge that nobody else had.”* GP8 submitted that the overwhelming likelihood was that the reason why Badr knew that the money had been spent before the other non-executives did was because Mr Naqvi had already disclosed that fact to him and Mr Jafar in December 2017.
194. Mr Cleary had referred to the further AH board meeting on 12 February 2018 which Mr Naqvi, Badr and Mr Cleary attended. Ms Ahmed's near verbatim note recorded that earlier

that day Badr had met with Mr Cleary, Mr Fadi Ghandour, Mr Naqvi and Mr Kito de Boer before the board meeting and that Badr had given a lengthy account of what they had been told by Mr Naqvi, including how the Healthcare Investor's money had been used (again correcting for obvious typographical errors) (my underlining). Badr had said this (the *12 February Statement*):

“Arif gave us an historical account of why the money was taken out and what it was used for. For some time – at least a year and a half the company has been cash strapped and Arif took the decision with the knowledge of others including Sev and Mustafa [to]put in the treasury unit comingled and used for “general business purposes” including paying salaries, paying general business expenses used to plug gaps in other funds where they did not reach fundraising targets so funding LP commitments GP had made...Arif tried to give comfort that it was not used for illegitimate purposes but to start with that a statement from mgmt. on how the money was used would satisfy the investors and their auditors ...his presentation gave us some comfort that there was nothing shocking practiced with each of the examples he presented.”

195. GP8 argued that this record of what Mr Naqvi had said in the pre-meeting was significant. It was evidence that Mr Naqvi had used the term “*general business purposes*” when describing what had happened to the Uninvested Capital (there was no reason to believe that Badr did not give an accurate account and had not adopted the language used by Mr Naqvi and the fact that these words were used and treated as of significance was indicated by the use of inverted commas/speech marks). Mr Cleary had confirmed in his cross-examination (Day 11, page 100) that the note was a broadly accurate record of what Mr Naqvi had said (and the messages he had delivered) and while he could not recall the precise words that Mr Naqvi had used (and doubted that he would have used the phrase “*put in the treasury unit comingled and used for general business purposes*”) Mr Cleary had no doubt that the message given by Mr Naqvi was that the funds in treasury were used for general business purposes. Badr's use of and emphasis on the specific term was also evidence that he understood it as having a specific meaning including the use of the funds to pay ordinary business expenses.

196. GP8 submitted that two further important points emerged from this evidence which supported the conclusion that the overwhelming likelihood was that Mr Naqvi gave the same account on 20 December 2017 and 8 February 2018:

- (a). If he had given a substantially different explanation in December 2017 the game would have been up by February 2018, since he would have then confessed an entirely different story to Badr, whom he knew was closely involved with the making of the Loans. The evidence of both Mr Jafar and Mr Nerguizian was that on 20 December 2017 Mr Jafar had informed Badr what he had been told by Mr Naqvi during the First 20 December 2017 Meeting and that Badr had said that he had already received a call from Mr Naqvi to the same effect. Mr Jafar and Badr, on Mr Jafar's case, must have been provided with the same account from Mr Naqvi and Mr Nerguizian's evidence in cross-examination was that Badr's summary of his own call with Mr Naqvi was consistent with Mr Jafar's summary to Mr Nerguizian of Mr Jafar's discussion with Mr Naqvi (Day 12, page 74). It would have been reckless for Mr Naqvi to have told an entirely different story to Badr about what had happened to the Uninvested Capital within a matter of weeks after the Loans had been advanced, and before the repayment date had arrived. Badr would have inevitably picked up on the inconsistent accounts.
- (b). There was no indication in the documentary record in the trial bundle of Mr Jafar or Badr confronting or challenging Mr Naqvi in February 2018 on the basis that they had been misled in December 2017 about the whereabouts of the Uninvested Capital or the reasons why the Loans were made. The inevitable conclusion to draw from this was that the account given by Mr Naqvi to Badr and others in February 2018 was the same as the account given by him to Badr and Mr Jafar in December 2017.

197. GP8 argued that the conclusion that Mr Jafar (and Badr) had been told in December 2017 that the Uninvested Capital had been used for general business purposes and that Mr Naqvi intended, and was understood, to say that the funds had been spent was consistent with all the accounts given by Mr Jafar prior to the service of Jafar 1 on 31 July 2023 (which tracked

closely what Mr Naqvi is recorded as having told the AH directors in February 2018) (my underlining):

(a). In the Winding Up Affidavit (sworn on 31 May 2018) he had said (at [12]) that Mr Naqvi had assured him that “the unutilized investors’ capital was placed into the Abraaj Group’s treasury and used for the “general business purposes” of the company, and that treasury accrued interest on such amounts for the benefit of the “lending” fund. He told me that this was perfectly legitimate under the terms of Abraaj’s arrangements with the funds, and that he had a legal opinion from the group’s long-time legal counsel (Freshfields) that supported this position.”

(b). The Letter Before Action contained the following statements (my underlining):

“105.2 There was no contractual or legal basis for the Healthcare Investors’ demands because: (i) the Uninvested Capital had been placed in the Abraaj Group’s treasury and used for its general business purposes with interest accruing for the benefit of the Healthcare Fund; (ii) this was permitted by the terms of the relevant contractual arrangements; and (iii) Abraaj Group’s Counsel (Freshfields) had provided a legal opinion that supported this analysis.

...

176.2 The Uninvested Capital had been properly placed in the Abraaj Group treasury and properly used for its general business purposes.”

(c). The OSOC contained the following pleading (my underlining):

“177. At the 21 December 2017 Meeting, Mr Naqvi stated that:

- (1) Certain investors in the Healthcare Fund (the “Healthcare Investors”) had demanded the return of their uninvested capital (the “Uninvested Capital”);
- (2) There was no contractual or legal basis for this demand, since the use of the Uninvested Capital for the Abraaj Group’s

general business purposes was permitted by the relevant contractual arrangements;

251(2) *The Uninvested Capital held by the Abraaj Group had been placed in the Abraaj Group treasury and properly used for the Abraaj Group's general business purposes.*"

198. GP8 said that Mr Jafar's evidence at trial (to the effect that funds had been transferred to treasury and invested in investments that could not immediately be cashed: see Jafar 1 at [29] and Day 5 at pages 120 and 127) represented, as could be seen from these three documents, a change in his case on an issue of central importance. Mr Jafar's attempt to distance himself from what was said in the Letter Before Action (by saying that the wording was that of his legal advisers and not his own, which he had not seen or paid attention to) failed. Mr Jafar, GP8 submitted, had ultimately accepted that the Letter Before Action had been sent after and based on factual input that he had provided and that his legal advisers had relied on him for an account of the facts, in particular what was said during meetings for which there were no notes.

199. GP8 submitted that Mr Jafar's answers in cross-examination on this issue had been unsatisfactory. He had given evasive and contradictory answers when asked at various times if Mr Naqvi had told him that monies had been used for "*general business purposes.*" GP8 submitted that the reason why Mr Jafar would not give a straight or consistent response was that he was clearly trying to weigh up and strike a balance between, on the one hand, the danger of contradicting his prior accounts and, on the other, the danger of undermining his case by admitting that Mr Naqvi had used words which indicated that the Healthcare Investors' money had been spent. To try to square that circle, Mr Jafar had experimented in cross-examination with accepting that the phrase had been used while explaining that he did not understand it to mean that the money had been spent and then had been forced to make a *volte-face* in re-examination by claiming at that stage that the phrase had not been used at all.

200. GP8 submitted that the reason why Mr Jafar's case on such a critical matter had changed so late in the proceedings was that he or his legal team had realised that admitting that he and

Badr had been told in December 2017 that the Uninvested Capital had been spent for the general business purposes of the Abraaj Group was fatal to his claim (which depended on establishing the belief that the corporate governance of Abraaj was essentially sound and proper). It was implausible that a man of Mr Jafar's intelligence and experience would have believed that Abraaj (and specifically AH or AIML) were permitted to use investors' funds in this way or that he would have accepted any such assertion without making further enquiries. It was clear from his cross-examination that he understood that investor money could not be used on the ordinary business expenses of the fund manager, or any other entity, unless it had been paid as fees that were lawfully due under the applicable management agreement. That was unsurprising as it represented the basic private equity or investment management structure.

201. GP8 argued that Mr Jafar's conduct when negotiating the Loans was inconsistent with his new case that he had been told that Uninvested Capital had not been spent but was sitting in Abraaj's treasury in the form of temporarily illiquid investments. Had this new case been true the investments supposedly held in treasury would have been identified as an obvious source of security for the Loans and Mr Jafar would at least have asked that they be charged or pledged as security for the Loans. Further, the investments supposedly held in treasury would have been identified as the most obvious source of funds to repay the Loans. But despite this the funds invested in treasury were never once identified as even a potential source of repayment prior to Mr Jafar's oral evidence. In addition, Mr Jafar would have asked at least some questions about these investments. On any view, Mr Jafar was being asked to provide a huge amount of money in highly unusual circumstances and on his new account those circumstances were underpinned by a liquidity problem created by a timing mismatch between Abraaj's commitment to return the Uninvested Capital by the end of the year and the time required to realise the investments. If Mr Jafar really did understand that to have been the position in December 2017 he would have asked a number of obvious questions such as how much money was tied up in treasury, when the funds could be accessed, what was the reason for the delay and how safe were they. Instead, Mr Jafar asked no questions at all about the investments.

202. Further, Mr Jafar had confirmed when responding to questions from me that all the questions that he had raised in discussions with Mr Naqvi could be answered by reference to three documents (the audited accounts of AH, JP Morgan Report and the Freshfields opinion) which he latterly claimed Mr Naqvi had happened to have brought with him to the First 20 December 2017 Meeting. But none of those documents had anything to do with, or said anything about, the whereabouts or use of Uninvested Capital. The implication of this was that Mr Naqvi did not anticipate that Mr Jafar would ask any probing questions about the status of the funds supposedly held in treasury despite the obvious likelihood that questions of that nature would be asked by a person in Mr Jafar's position. GP8 said that if and assuming that those documents really were brought to the meeting the most likely explanation for why Mr Naqvi thought he could answer all of Mr Jafar's questions by reference to documents which had nothing to do with the funds supposedly held in treasury was because Mr Naqvi did not tell Mr Jafar that the funds were retained and still held in treasury investments.
203. GP8 also submitted that its case (that in December 2017 Mr Jafar was told that the Uninvested Capital had been placed in treasury and used for and spent on general business purposes) was consistent with the communications between Mr Jafar and Mr Naqvi in March 2018.
204. GP8 said that by 27 February 2018 Mr Jafar and Mr Naqvi had discussed using the proceeds from the realisation of a fund investment in Spinneys Levant partially to repay the Loans. On that date, Mr Naqvi had provided a "*Situation Analysis*" document (one page) to Mr Jafar which Mr Jafar forwarded to Mr Nerguizian, Badr and Majid. The Situation Analysis was divided into two parts: the first was headed Situation Analysis and the second was headed Outline Suggestion. The Situation Analysis stated as follows (my underlining):

"AMN borrowed \$ 300 MM from HJ and issued cheques from AIML as a security because they were the only cheques that could be found at that time; Abraaj has no other checking account in the UAE and AMN didn't have his cheques book in the office. The debt is not recorded in Abraaj books; to do so would bust every banking covenant, lead to enforcement and the whole business collapses from an unanticipated direction. Paying HJ the Spinneys proceeds delays the APEF 4 audit and that also brings the business down. Cash sweep in place by SocGen on accounts under its control under

threat of default; and a direct second charge on AH LP stakes will entail notice to banks, which in itself will bring the business down. Any action to change the current capital structure and banking arrangements are untenable and will render all collections of receivables impossible and will lead to value impairment immediately since the LP stakes will undergo a catastrophic fall in the secondary market (currently trading at NAV) and the KE sale will be delayed

205. On 28 February 2018, Mr Naqvi met with Mr Jafar, Majid, Mr Nerguizian and Mr Ernest (Badr having attended Mr Jafar's strategy meeting beforehand) and following that Mr Ernest circulated a table (the ***Spinneys Table***), which had been reviewed by Mr Jafar, setting out the position and understanding of Mr Jafar and his advisers. It confirmed that the following points were agreed:

"The existing loan is a liability of AIML and is a pari passu loan from [Mr Jafar] and Bank of Sharjah."

New payment dates, and agreed non-presentation of AIML Cheques

Letter of Wishes from AMN to provide the Creditors [Mr Jafar and BOS] with full recourse to his personal trust assets in the event of non-payment

Deposit US\$57m (the Spinneys Levant cash) with Bank of Sharjah in the name of [Fund IV].

Apply all cash (including KE cash (approx. \$220m) and other receipts) upon receipt to partially settle the HJ Loan

AH to give perfected security over its LP interests and direct holdings in portfolio companies, such security to rank behind any existing documented/contractual pledges over the same assets

AMN to pledge his personal shares in AH

.....

AMN to issue three personal cheques...."

206. On 12 March 2018, Mr Naqvi had responded (the ***Spinneys Email***) with his comments on Mr Ernest's table and as regards the proposal that the Spinneys Levant cash to be deposited

with BOS in the name of Fund IV (with the monies to be used to repay the Loans if the first instalment of the new arrangement was not paid) (my underlining):

“Deposit is agreed, but with no written instruction or other document from [Fund IV] or any other Abraaj entity, BECAUSE I CANNOT legally bind it; the money belongs to funds, we are currently in the midst of a regulatory review and this was the very act that got us into trouble: co-mingling. Hamid told me you can take it away anyway, under UAE law, since the account opening forms have a right of set off; didn’t make me feel any better. In any event, I am trying to accelerate the first payment.”

207. GP8 submitted that the Spinneys Email was significant for three reasons. First, it revealed that Mr Naqvi was not concealing and did not feel the need to conceal from Mr Jafar how Abraaj had got itself into trouble (namely by comingling monies including the use of fund monies for non-fund purposes) and this was entirely consistent with what Mr Naqvi had told the AH board in February 2018. Secondly, there was nothing in the contemporaneous documents to suggest that this was any surprise to Mr Jafar and that strongly suggested that the comingling was known to Mr Jafar before this time. Thirdly, Mr Jafar was pressing for fund monies to be used to repay his Loans (Mr Jafar confirmed in cross-examination that he understood that the Spinneys money belonged to one of the Abraaj funds) and it was to be inferred that the reason why Mr Jafar was comfortable with this was because he already knew (from the circumstances in which the Loans were made) that Abraaj had been using fund monies for purposes other than making investments for the limited partners.
208. GP8 submitted that the evidence showed that, despite Mr Jafar’s denials, he had been told and understood that the Uninvested Capital had been spent and therefore was not available as a source of repayment for the Loans and in those circumstances the source for repayment was identified as the reinvested funds. Mr Jafar was content to be repaid from that source because he already knew that Abraaj was using investors’ monies for the general business purposes of Abraaj.
209. GP8 said that while it was common ground that Mr Naqvi had explained that US\$250 million was required to repay the Uninvested Capital to the Healthcare Investors, there was an important dispute between the parties concerning what Mr Naqvi said the remaining

US\$40/50 million was needed for. Mr Jafar's assertion that Mr Naqvi had told him that the additional funding was required to meet anticipated further demands by investors should be rejected. It was a recent invention, absent from the near contemporaneous documents and absent from the Winding Up Affidavit, the Letter Before Action and the OSOC. GP8 submitted that this account was to be treated as having been introduced into Mr Jafar's written evidence in an attempt to improve his claim by providing support for his case on attribution and the Overarching Message and in an attempt to arm Mr Jafar with an explanation of a legitimate purpose for the Third Loan. The true position was that Mr Naqvi had not stated that the US\$40 million was required to meet anticipated further demands by investors and Mr Jafar did not understand that the proceeds of the First Loan, the Second Loan or the Third Loan would be transferred to investors in other funds. It was likely that all Mr Naqvi had said was that the additional funding was required to meet further urgent liquidity needs. Mr Jafar's assertion to the contrary was inherently implausible, unsupported by and inconsistent with his earlier accounts, unsupported by the contemporaneous record and unsupported by Mr Nerguizian's written and oral evidence.

210. GP8 also invited the Court to find that Mr Jafar (a) was aware of the request from Mr Naqvi to identify the purpose of the Loans (and the use to which the funds advanced would be put) as being investment (in respect of the First Loan, this was because he had received the email requesting this from Mr Naqvi, Mr Nerguizian had raised the request with him prior to the advance of the First Loan and Mr Jafar had then signed an instruction providing that the purpose was investment, and in respect of the Second and Third Loans, this was because Mr Jafar was aware of this from the terms of the letters of instruction and draft swift messages that he had signed) and (b) appreciated at the time that the Loans were not investments (and that the funds advanced were not to be used for making investments) and that the labelling of the Loans as investments was misleading and improper. Mr Jafar did not understand this to be a mere formality. In the context of three loan payments of US\$100 million and a very short-term loan of US\$50 million over year-end, Mr Jafar appreciated that Mr Naqvi was laying down a false paper trail to disguise the nature of the funds over year-end and Mr Jafar did not have any concerns about facilitating this.

211. Further, Fund GP8 submitted that the evidence showed that the Reinvestment Representation had not been made.

212. Jafar 1 did not support Mr Jafar's pleaded case. At footnote 7 of Jafar 1 he had said this (underlining added):

“Mr Naqvi commented that the surprising thing was that Abraaj would anyway be making cash calls of the Investors in January 2018 to fund investments and that he had been assured by senior representatives of the Investors that they would continue to meet cash calls in a timely manner in the new year including to repay the returned Uninvested Capital once the delays to the relevant projects had been resolved. So the money that the Investors were demanding would very soon be returned to Abraaj anyway.”

213. However, GP8 argued, this was a different case from that set out at [20(8)] of the RRASOC. In Jafar 1 Mr Jafar alleged that he was told that senior representatives of the Healthcare Investors had indicated that they would meet cash calls (including the return of the Uninvested Capital) “*once the delays to the relevant projects had been resolved.*” This was a conditional assurance, dependent upon the underlying delays in the projects being resolved. It was materially different from the statement alleged to have been made at [20(8)] of the RRASOC which claimed that Mr Naqvi had said that he had been given an unconditional assurance from Healthcare Investors that the Uninvested Capital would be returned to Abraaj in January 2018.

The GHF Parties' submissions

214. The GHF Parties supported GP8's submissions and generally adopted the same position as GP8. I therefore do not propose to rehearse in detail the submissions made by the GHF Parties but will highlight and focus on the additional points made by the GHF Parties and their different presentation of some of the key points.

215. In summary, the GHF Parties said that the evidence established that Mr Naqvi had most likely only said the following at the First 20 December 2017 Meeting: that certain investors in the AGHF had demanded the return of the Uninvested Capital but that there was no

contractual or other legal basis for this demand; that the Uninvested Capital had been placed by “*Abraaj*” (being the word used by Mr Naqvi) in its treasury and that its use for general business purposes was permissible; that he had a concern that there could be an escalation of the situation if these investors were not repaid and that this might result in some adverse publicity for Abraaj; that Abraaj needed to borrow US\$290 million before the end of December 2017, of which US\$250 million would be used to pay back investors, with the balance serving as a cushion in case further investors demanded their uninvested capital back, thereby implying possible liquidity issues; that he was requesting a loan from Mr Jafar in the sum of US\$90 million (at that point Mr Naqvi had intended to borrow the balance of US\$200 million from ENBD); that the loan would only be required on a short-term basis, since he had been assured that the investors who were seeking repayment would reinvest the monies returned once the issues as regards the Uninvested Capital had been satisfactorily resolved, from which reinvested funds, he implied, Mr Jafar would be repaid. The GHF Parties submitted that Mr Jafar’s story of what he was told, to the extent that it differed from this account, should be rejected as a fiction.

216. As regards the issue of when the First 20 December Meeting was arranged, the GHF Parties submitted that the only sensible inference was that arrangements were made prior to 20 December 2017. Mr Jafar’s explanation that Mr Naqvi had first contacted him on 18 December 2017 regarding a training job for Mr Saalam and then on 20 December 2017 regarding a request to borrow money should be rejected. Mr Jafar’s evidence that Mr Naqvi contacted him once out of the blue asking for a meeting the same day directly contradicted this account as did the outlook calendar entry disclosed by AH, whose metadata indicated that it was sent at 10:22 hours on 19 December 2017 (albeit that it might have only been sent to Mr Naqvi or possibly just to his PA, Magdalena Hansen).
217. The GHF Parties noted that Mr Jafar was (other than Mr Naqvi) the only person who had first-hand knowledge of what was said at the First 20 December 2017 Meeting. He had had seven opportunities to tell various tribunals what was said by Mr Naqvi. These were (a) the Winding-Up Affidavit, (b) the Letter Before Action, (c) his earlier pleadings in these proceedings including the OSOC, his responses to the GHF Parties’ requests for further and

better particulars dated 18 December 2020 (*GHF RFBPs*), his original Reply dated 14 May 2021 (the *Original Reply*) and his responses (the *Further Responses*) to the GHF Parties' Further Requests for Further and Better Particulars (the *GHF Further RFBPs*) dated 20 August 2021; (d) his draft amended pleadings including the draft Concise Statement of Claim dated 14 October 2021 (the *Draft Concise SOC*) and the draft Amended Statement of Claim dated 14 October 2021 (the *Draft Amended SOC*), (d) the documents prepared for the purpose of instigating criminal proceedings that Mr Jafar brought against Mr Naqvi in the Sharjah courts (the *Sharjah Proceedings*) including the Sharjah Criminal Complaint, the docket; the Minutes of Investigation dated 9 December 2022 and the witness statement of Mr Nerguizian dated 15 December 2022 (the *Nerguizian Sharjah Witness Statement*), (f) the written evidence in these proceedings including Jafar 1 and Jafar 2 and (g) the final version of the pleadings including the RRASOC and Mr Jafar's Re-Re-Amended Reply to the GHF Parties' Defence (the *RRAR*) dated 14 November 2023.

218. The GHF Parties noted that by the GHF RFBPs they had asked Mr Jafar to “*state with precision the actual words that [were] alleged to have been used by Mr Naqvi during the [First 20 December 2017 Meeting].*” That request had been refused for three reasons, including because (according to Mr Jafar) it was not necessary to enable the GHF Parties to understand the case they had to meet. Eventually, by Further Response 310(a) Mr Jafar had said that “*Mr Naqvi used words to the effect pleaded at paragraphs 177 and 178 of the Statement of Claim [i.e., the Original SOC].*” However, those words, as embellished by the Further Responses, were subsequently amended by the Draft Amended SOC, the Draft Concise SOC, and again by the RRASOC, marking a further shift in the description of material events.
219. The GHF Parties argued that when considering whether Mr Jafar had established that the Statements were made as pleaded, the Court should bear in mind the following three points, each of which militated in favour of a finding that Mr Jafar had not established his case in this crucial regard:

- (a). The alleged Statements fell into two categories. First, those that were *prima facie* supported by what was said in Jafar 1 (being the alleged Statements in [20(3)]- [20(6)] and [20(9)] of the RRASOC). Secondly those that were not (being the alleged Statements referred to in [20(1)], [20(2)] and [20(8)] of the RRASOC). As regards the latter category, the absence of such *prima facie* support meant that there was an additional reason to reject them.
- (b). The fact that Mr Jafar's account of what was said at the First 20 December 2017 Meeting had changed in material respects over the years. There was only one true version of what was said at the First 20 December 2017 Meeting and it ought to have been readily ascertainable but it was not from the evidence.
- (c). In numerous respects Mr Jafar's and Mr Nerguizian's recollections (as described during cross-examination) as to what Mr Naqvi had said at the First 20 December 2017 Meeting were shown to be inconsistent with the accounts previously given or were shown in cross-examination to be provably false and inaccurate.
220. The GHF Parties submitted that even though in four of the nine alleged Statements Mr Naqvi was said to have referred to the "*Abraaj Group*" in Jafar 1, Mr Jafar had only referred to "*Abraaj*" and this must have been what was said. The GHF Parties submitted that this was substantiated by Mr Jafar in response to a question from me (Day 5, page 115):

“JUSTICE SEGAL: Can I ask: are you saying that Mr Naqvi mentioned the words "The Abraaj Group"? Is that what was discussed? What did he say?

A. Yes, he talked about Abraaj.

JUSTICE SEGAL: He just used the word "Abraaj".

A. Yes, it was Abraaj, yes.

JUSTICE SEGAL: No more, all the time just Abraaj?

A. Abraaj.”

221. The GHF Parties argued that as well as showing inconsistency in Mr Jafar's version of events, the reference to "*Abraaj*" in isolation most naturally connoted AH. This was the entity of which Mr Naqvi was CEO and director and it was according to Mr Jafar (for the first time in cross-examination) the entity whose financial statements Mr Naqvi had shown Mr Jafar during the First 20 December 2017 Meeting. The GHF Parties further submitted that this was how the reference had been understood by Mr Jafar (and subsequently Mr Nerguizian). When, according to Mr Jafar, Mr Naqvi, when asked if "*the Board of Abraaj*" knew about all the requests from the Healthcare Investors (see [37] of Jafar 1) had said no and that he would obviously "*inform the Board in good time and would call Badr and inform him after our meeting*", he must have been referring to, and should be understood to have been referring to, the AH board (Badr being a non-executive director only of AH).
222. The GHF Parties invited the Court to disregard Mr Jafar's evidence that some of the Healthcare Investors were identified by name at the First 20 December 2017 Meeting, particularly in light of its contradiction by Response 310(b). In that Response he had pleaded that "*Mr Naqvi identified the 'investors' simply as investors in the Healthcare Fund.*" This was inconsistent with what he said at [29] in Jafar 1 ("*Mr Naqvi said... certain of the principal fund investors, including the Bill and Melinda Gates Foundation, the IFC, CDC Group, and the Proparco Group*"). In his cross-examination Mr Jafar had said that it was Response 310(b) that was inaccurate and that his instructing attorneys had not asked him for the answer to the relevant question, he had not seen the response before and he blamed the error on the individual who drafted the response. These excuses were unconvincing and the Response was to be preferred as a specific and considered answer to the question. The answer in the Response was also corroborated by Mr Nerguizian's evidence in cross-examination. He had said that when Mr Jafar was recounting to him the content of the First 20 December 2017 Meeting he did not identify specifically the investors that were seeking the return of their uninvested capital (see Day 13, page 47 and 52).
223. The GHF Parties supported GP8's case that Mr Jafar had been told by Mr Naqvi that the Uninvested Capital had been used for general business purposes which meant, and he understood it to mean, spent. They noted that when during his cross-examination by Mr

Atherton (Day 7, page 87) Mr Jafar had been shown [106] of the Letter Before Action (which referred to Mr Naqvi saying that the uninvested capital “*had been placed in the Abraaj Group's treasury and used for its general business*”) Mr Jafar had accepted that Mr Naqvi had referred to “*general business purposes*” (“*I clearly remember treasury and general business purposes as well had been used, yes*”). Mr Jafar had gone on to deny (Day 7 page 104) that “*having been used for general business purposes*” meant, or that he understood it to mean, the funds had been spent but the GHF Parties submitted that this was untenable and not credible. It was clear (from the verbatim note of the 8 February 2108 AH board meeting) that Badr understood at that time that the Uninvested Capital had been spent and, the GHF Parties submitted, it was to be inferred that Badr knew this because Mr Naqvi had told Mr Jafar as much at the First 20 December 2017 Meeting and Mr Jafar must have told Badr this when he subsequently spoke to him. They also submitted (it could be inferred) that Badr would not have used the words “*general business purposes*” at the 12 February 2018 AH board meeting unless Mr Naqvi had used them when previously briefing Badr and other directors. If Mr Naqvi had used those words in February 2018 in the company of *inter alios* Badr and Mr Cleary there was no reason to think that he would not have used the same words in the company of Mr Jafar just a few weeks earlier.

224. The GHF Parties also noted that during his cross-examination Mr Jafar had asked rhetorically, when it was put to him that he was told the money had been spent, “*why would I advance funds into what turned out to be a black hole?*” and had argued that it did not follow from the fact that he knew that the Uninvested Capital had been spent that he thought he would be advancing money into a “*black hole*”. But, the GHF Parties argued, it would have made commercial sense for Mr Jafar to advance the Loans even though he was aware of the improper spending of investor funds by AH. While this meant that the governance and management of “*Abraaj*” (i.e. AH) was not sound or proper it did not necessarily follow or mean that AH and AIML would have (and that Mr Jafar would have believed that they would have) insufficient cash to repay him when his short-term loan fell due. Mr Jafar had understood that he was to be repaid from the monies to be reinvested by investors in January 2018 and possibly other sources.

225. On the question of whether Mr Naqvi had shown Mr Jafar a copy of the Freshfields Opinion, the GHF Parties noted that Mr Jafar's evidence in cross-examination that he had seen such a copy was, once again, flatly contradicted by his earlier pleading. By the GHF Further RFBPs, Mr Jafar was asked to provide a copy of the Freshfields Opinion, if it was alleged to exist and if it was said to have been given in writing. By Response 310(d), Mr Jafar's pleaded case was that Mr Naqvi had informed him that "*a legal opinion confirmed the position stated by him*" but that he "*was not provided with a copy of the actual Freshfields Opinion at the time.*" The GHF Parties invited the Court to find that Mr Jafar was not shown the Freshfields Opinion at the First 20 December 2017 Meeting and to reject Mr Jafar's new and inconsistent evidence given in cross-examination.
226. The GHF Parties also invited the Court to find that Mr Naqvi did not make the alleged Statement as pleaded in [20(4)] of the RRASOC, in light of the version of events in Jafar 1 and Responses 310(e) and 310(f) which referred to a one-off set of demands for the return of the Uninvested Capital, and the unchallenged evidence of Mr Farnum on this point (that he had "*never threatened to involve adverse publicity or escalate this demand in an attempt to generate adverse publicity for the GHF Fund or Abraaj more generally.*") As regards the alleged Statement in [20(5)] of the RRASOC, the GHF Parties said that it was conceivable, based on the evidence, that Mr Naqvi would have expressed a concern to Mr Jafar that he (Mr Naqvi) was worried that there could be an escalation of the situation if the investors were not repaid and that this might result in some adverse publicity and invited the Court to find that he did use words to that effect.
227. As regards what Mr Naqvi had said about the need for the additional US\$40 million, the GHF Parties relied on the following answer given by Mr Jafar during his cross-examination by Mr Ayres (Day 6, page 9), when Mr Jafar had referred to the US\$40 million as a "*cushion*":

"Q ... In the first meeting, one of the things that Mr Naqvi told you on 20 December was that he anticipated further demands from other investors, potentially in relation to other funds; yes?"

A. Yes.

Q. At that stage, US\$40 million of the funds that he was seeking to raise were to be applied for that purpose; yes?

A. Yes. As a cushion, the way I understood it.”

228. The GHF Parties said that although Mr Jafar’s account was confusing, it was conceivable that Mr Naqvi had used words along these lines implying that the sum of US\$40 million was needed as a “cushion” and invited the Court to find that Mr Naqvi did imply that the balance of the money he sought to borrow would be utilised to return funds to investors, if that became necessary.

229. The GHF Parties supported GP8’s case that the Reinvestment Representation (in the form pleaded at [20(8)] of the RRASOC) was not made. The representation which according to Mr Jafar’s evidence had been made was different from the Reinvestment Representation as pleaded. They argued that to make good his pleaded case, Mr Jafar would have needed to do at least one of the following three things: (a) he could have corrected his evidence in examination in chief, which he did not do; (b) he could have clarified what Mr Naqvi said in a relevant exchange in cross-examination, but instead he confirmed that footnote 7 accurately reflected what Mr Naqvi had said to him at the First 20 December 2017 Meeting or (c) Mr Jafar’s counsel could have put to Mr Farnum that he, on behalf of the Gates Foundation, did not express any willingness to reinvest to be conditional, contrary to the evidence contained in his witness statement but Mr Jafar’s counsel chose not to put this contention to Mr Farnum so that Mr Jafar could not now run in his closing submissions an argument that the Reinvestment Representation, as pleaded, was in fact made. The GHF Parties therefore submitted that there was no basis on which the Court could find that the alleged Statement as pleaded in paragraph 20(8) of the RRASOC was made and the Court was invited to find that it was not made. However, the GHF Parties accepted that Mr Naqvi did say that the First Loan would only be required on a short-term basis, since he had been assured that there would be reinvestment of the returned funds once the issues as regards the Uninvested Capital had been satisfactorily resolved. This was why the term of the First Loan was fixed by reference to the date of expected reinvestment.

230. As regards the alleged Statement in [20(9)] of the RRASOC (that “[t]he Abraaj Group was financially sound, but was simply facing short-term cash/liquidity issues over the year end to address in particular the [AGHF’s] problem with its investors”) the GHF Parties invited the Court to find that Mr Naqvi made no mention of the “Abraaj Group’s” financial soundness or used words to that effect. It was clear from the Winding-Up Affidavit that Mr Naqvi proposed to repay the Loans using investor funds, such that reassurances as to the financial soundness of the “Abraaj Group” were irrelevant. The accounts given in the Winding-Up Affidavit and the documents filed in the Sharjah Proceedings provided a more reliable account of what had been said and should be relied on by the Court.
231. In the Winding Up Affidavit (at [13]) Mr Jafar had given an entirely different account of how Mr Naqvi expected to repay the loans that was premised on using investor funds. He had said that (my underlining):

“Mr Naqvi told me that the Abraaj Group thus needed to borrow about USD 290 million on a short-term urgent basis before year-end - he said that approximately USD 250 million was needed to repay the four investors in the healthcare fund, who were threatening publicly to “expose” Abraaj Group if they were not paid back by the end of the year; and another USD 40 or so million was required to meet urgent liquidity needs. He urged me to lend USD 90 million to the Abraaj Group. He said he was in discussions with Emirates NBD (a major local Dubai-based bank) to raise a further USD 200 million. He repeatedly assured me that he was told by senior representatives of the investors that they would return the amount proposed to be repaid to them in January 2018 and so the loans would be comfortably repaid by 31 January 2018.”

232. The GHF Parties noted that in addition no mention had been made of an *oral* statement concerning the Abraaj Group being financially sound in the documents filed in the Sharjah Proceedings. In the Sharjah Criminal Complaint the question was asked “*What are the actions taken by the accused?*” and in response the case advanced by Mr Faris Nasrallah on Mr Jafar’s behalf was that Mr Naqvi represented that “*Abraaj Company*” (which the GHF Parties said must be a reference to AH) was “*financially stable and solvent, having submitted several documents to support that*”, namely, “*the company’s audited financial statements and a report issued by an international financial consultant.*” The sole complaint made was that Mr Naqvi had made representations by using these several documents.

233. The GHF Parties said that their case was supported by Mr Jafar’s evidence in his cross-examination by Mr Atherton and by Mr Nerguizian’s Sharjah Witness Statement. Mr Jafar was shown [11] of the Sharjah Criminal Complaint (which stated that Mr Naqvi had submitted to Mr Jafar a financial report issued by JP Morgan which “*showed the solidity of the Company’s financial position and that it does not suffer from any financial troubles*”) and [12] of the Sharjah Criminal Complaint (which stated that “[t]hus [Mr Naqvi] used all those documents ... to delude [Mr Jafar] that the Abraaj Group has the solvency to repay that amount...” and the following exchange then took place (Day 8, page 28):

“Q: ... *Not implied representations, not an overarching message; just the fact that Mr Naqvi approached you, asked for a loan and in advancing that loan you say you relied on representations of solvency...by reference to the JP Morgan valuation and the consolidated accounts. That’s correct, isn’t it?*

A Yes.”

234. Similarly, the Nerguizian Sharjah Witness Statement made no mention of oral representations but referred only to representations said to be contained in documents. Mr Nerguizian had said (underlining added) that “[r]elying on the documents produced by [Mr Naqvi] to [Mr Jafar] ... suggested the stability of the financial position of the company...” The GHF Parties submitted, and invited the Court to find, that Mr Naqvi had made no mention of the “*Abraaj Group’s*” financial soundness or used words to that effect at the First 20 December 2017 Meeting because, as was clear from Jafar 1, Mr Naqvi had proposed to repay the Loans using investor funds, such that reassurances as to the financial soundness of the “*Abraaj Group*” were irrelevant.

235. The GHF Parties also argued that Mr Jafar’s evidence did not support his pleaded case that Mr Naqvi had expressly referred to short term “*cash/liquidity issues over the year end.*” In Mr Jafar’s account of the First 20 December 2017 Meeting in Jafar 1 (at [27]-[37]), Mr Jafar had not referred to Mr Naqvi having used this language. There was, for example, no mention of Mr Naqvi referring to these liquidity issues at [39] of Jafar 1 when Mr Jafar said that he “*also believed his repeated assurances to me that: (i) the Abraaj group was financially sound (and, in that context, that Abraaj had audited financial statements and had been highly*

valued by J.P. Morgan); (ii) the funds were needed on a short-term basis only; and (iii) Abraaj would, and would be able to, repay me promptly in the New Year.” The GHF Parties submitted and invited the Court to find that Mr Naqvi did not refer expressly to short-term “cash/liquidity issues over the year end.”

236. The GHF Parties noted that in his cross-examination Mr Jafar had said that Mr Naqvi had shown him the JP Morgan Valuation at the First 20 December 2017 Meeting but there had been no mention of that in Jafar 1, which simply stated that Mr Naqvi had referred to this document. They submitted that there was an obvious and real difference between someone referring to the existence of a document and actually showing the document to another person and, if the latter had happened, Mr Jafar would have mentioned it in Jafar 1. He had had the opportunity to correct his evidence in examination in chief but did not do so. The reason he did not do so was because he had not in fact been shown the JP Morgan Valuation.
237. The GHF Parties said that, in any event, although Mr Jafar had now said that he was shown the documents, his evidence was that he did not go through them or turn the pages, save in relation to the AH Financial Statements. When asked by Mr Ayres (Day 6, page 62) whether he had “*actually [gone] through them with Mr Naqvi and [turned] the pages*” he had said “*No. I just looked at the - basically the front page I looked at and the short - the usual short statement that it was a clean audit.*” The GHF Parties said that this illustrated the casual nature of Mr Jafar’s enquiries. He did not conduct any meaningful due diligence and it was to be inferred that the reason for this was that he knew Mr Naqvi and “*Abraaj*” by reputation and it was this that he really relied upon as the basis for agreeing to make the Loans, as opposed to any assurances given at the First 20 December Meeting by Mr Naqvi. He simply assumed that the deal would be a safe one. This inference was consistent with Mr Nerguizian’s evidence. Had the content of the financial documents actually been important to Mr Jafar, and likely to play any part in his decision whether or not to make the Loans, he would at least have read the documents properly. Any suggestion to the contrary was fanciful.

238. The GHF Parties submitted that the different accounts advanced in Sharjah Criminal Complaint and in the RRASOC supported the GHF Parties' case that the claim in the RRASOC did not reflect what Mr Jafar was told and believed at the time but only what he has, or at least may have, persuaded himself to think was the truth after he had instructed teams of lawyers to find a clever way to recoup his losses.
239. The GHF Parties said that since Mr Jafar relied on what had allegedly been said to him at the First 20 December 2017 Meeting the Court would need to be satisfied by Mr Jafar that neither the words used by Mr Naqvi during, nor the context of, the further conversations and meetings had changed what was conveyed, objectively, by the Statements. The GHF Parties submitted that Mr Jafar's evidence had failed to provide a proper account of those conversations and meetings and that as a consequence the Court could not be so satisfied and Mr Jafar's claim based on the Overarching Message must fail.
240. The GHF Parties submitted that the evidence established that Mr Jafar must have clearly understood by the evening of 20 December 2017 at the latest that, whatever the precise structure of the imminent transaction was to be, the likely intended borrower was AH and that, as matters developed the following day it became clear that the borrower would in fact be AIML. In cross-examination by Mr Atherton Mr Jafar had accepted that before he advanced the money he knew that it was going to AIML (see Day 8, pages 49-50). The relevant exchange was as follows (my underlining):

"MR JAFAR

I don't recall now exactly but the funds were sent in the first loan and the second loan to both AIML, Abraaj Investment Management Limited, as well as Abraaj Holdings' accounts, by instruction redirected by Mr Naqvi. But when we made - when we agreed - when I agreed to make the loans, we did not specify which entity actually was borrowing. So we agreed to make the loans, we asked for postdated cheques, and they provided postdated cheques from just AIML - we didn't question that. We took that to mean really on behalf of, it's all one group. We didn't question that. And instructions were given as to which account to send the monies to and it was to two accounts, and that was how it happened.

MR ATHERTON

In relation to -

MR JAFAR *Are they the borrower? Yes. I guess the entity that the amount went to or the entity that - no, I think, it's a technical matter whether it's the entity that was providing the cheques, which was only one, or the two entities to whom the money went.*

MR ATHERTON *Immediately before you advanced the money, you knew to which company the money was being advanced; correct?*

MR JAFAR *Yes. We got instructions."*

241. The GHF Parties submitted that the evidence showed that in any event prior to the making of any of the Loans Mr Jafar (whatever he may have understood at the time of the First 20 December 2017 Meeting) could have been under no illusion that Mr Naqvi was and had previously been acting for and on behalf of AH and AIML and not in any other capacity.

The assessment of Mr Jafar's and Mr Nerguizian's evidence and credibility and the impact of the failure of Badr to give evidence

GP8's submissions

242. GP8 relied, in relation to the proper approach to be taken by the Court to the assessment of the witness evidence, on the judgment of Mr Justice Lewison (as he then was) in *Painter v Hutchinson* [2007] EWHC 758 (Ch) in which he identified a number of indicators of an unsatisfactory witness. GP8 said that Mr Justice Lewison's approach had recently been summarised by HHJ Richard Williams in *Singh v Singh* [2021] EWHC 2272 (Ch) at [61] in the following terms:

"Lewison J (as he then was) identified a non-exhaustive list of indicators of unsatisfactory witness evidence including:

- (a) Evasive and argumentative answers;*
- (b) Tangential speeches avoiding the questions;*
- (c) Blaming legal advisers for documentation (statements of case and witness statements);*
- (d) Disclosure and evidence shortcomings;*
- (e) Self-contradiction;*

- (f) *Internal inconsistency;*
- (g) *Shifting case;*
- (h) *New evidence; and*
- (i) *Selective disclosure.”*

243. GP8 submitted that most of the witness evidence from Mr Jafar and Mr Nerguizian was tainted by these indicators for example:

- (a). Mr Jafar’s evidence in relation to whether he was told that the Uninvested Capital had been used for Abraaj’s “*general business purposes*” was evasive and argumentative, as was his evidence as to whether he knew that the finances, management and governance of Abraaj were not essentially sound and proper. Mr Nerguizian’s testimony was particularly evasive and argumentative.
- (b). Mr Nerguizian had a marked tendency to avoid giving straight answers to simple questions, instead resorting to long speeches. Mr Nerguizian also gave what appeared to be prepared answers to anticipated questions, ignoring the actual question put to him.
- (c). Blaming legal advisers for documents was a particularly pronounced aspect of Mr Jafar’s oral evidence. He asserted that his lawyers had misstated the position or were otherwise incorrect in relation to (a) the Letter Before Action recounting what Mr Jafar was allegedly told by Mr Naqvi in December 2017; (b) every iteration of his pleaded case; (c) responses to Request for Further and Better Particulars and (d) the Sharjah Proceedings.
- (d). There were continuing and relevant shortcomings in Mr Jafar’s discovery and evidence. Badr’s documents had not been provided and no efforts had been made to recover data on his previous mobile telephone (said to have been lost when Badr changed telephones in 2020) despite Mr Jafar’s admission that Badr would ultimately do as Mr Jafar wished (if Mr Jafar had pressed the issue). Discovery had not been provided from Crescent Petroleum’s servers generally, despite the fact that Mr Jafar

now accepted that he controls Crescent Petroleum (contrary to his position at the interlocutory stage). Jafar 1 had only addressed a limited number of his interactions with Mr Naqvi, virtually ignoring the events of 2018. Badr, despite his central role, had not been called as a witness notwithstanding Mr Jafar's evidence that Badr would do as Mr Jafar wished.

- (e). Many aspects of Mr Jafar's evidence were contradictory and inconsistent. For example, Mr Jafar was unable to give a coherent account as to Badr's involvement. He had accepted his role as a messenger and negotiator whilst simultaneously trying to distance Badr from these proceedings. In addition, his evidence on whether he was told that the Uninvested Capital had been used for general business purposes was also inconsistent. Furthermore, Mr Nerguizian's evidence was also contradictory and internally inconsistent.
- (f). Mr Jafar's case had evolved over time. For example, Mr Jafar's position on whether he was informed that the Uninvested Capital was used for the general business purpose of Abraaj had changed. Mr Jafar now also claimed that Mr Naqvi had told him that additional funds beyond the Uninvested Capital were required to meet other similar demands. He has also changed his account of his understanding as to repayment: his earlier accounts identified monies to be reinvested by the Healthcare Investors as a principal source of repayment.
- (g). Mr Jafar had claimed for the first time in cross-examination to have been shown the audited financials of AH, a valuation by JP Morgan and the Freshfields Opinion (despite the contents of his pleadings, RFBP responses and Jafar 1 suggesting otherwise). In addition, Mr Nerguizian had advanced in cross-examination an entirely new account in relation to the remittance information and why he allegedly did not consider it to be of any significance.

244. As regards Mr Jafar, GP8 argued that:

- (a). Mr Jafar was evidently an intelligent, experienced and sophisticated businessman and was thorough, diligent and details orientated.
- (b). Despite this there were many instances in cross-examination where Mr Jafar had tried to distance himself from his previous accounts of the meetings in December 2017 and to suggest that from February 2018 onwards he was not involved in the detail of matters concerning the Loans. But this was contradicted by the contemporaneous documents and known facts.
- (c). Although Mr Jafar had a personable outward demeanour, beneath that there was a focused businessman used to getting what he wanted, particularly in circumstances where he felt aggrieved and wronged. The impression of Mr Jafar in his oral evidence was akin to that recorded by Mr Edward Bartley Jones QC (sitting as a Deputy High Court Judge) in the English case of *Eaton Mansions (Westminster) Ltd v Stinger Compamia de Inversion S.A.* [2012] EWHC 3354 (Ch) in which Mr Jafar gave oral evidence for the defendant. Mr Bartley Jones had said (at [25]) that “*Mr Jafar was charming, courteous and thoughtful in his evidence before me. But behind this outward personality lies, undoubtedly, a man of steel. He honestly formed the view that the Company was engaging in “extortion” and “discrimination” as against him (his own words to me). He was not prepared to be treated in this way.*”
- (d). It was clear that Mr Jafar felt aggrieved and wronged by Mr Naqvi’s conduct in failing repay to the Loans he had negotiated; by the failure of his contractual counterparties to repay the Loans (AH and AIML) and the loss of a significant sum (having pledged all of his funds with BOS in late 2017 in support of the First Loan and the Second Loan).
- (e). In these circumstances and in accordance with the usual approach in commercial cases outlined above GP8 invited the Court to treat the expressed recollection of Mr Jafar and Mr Nerguizian with appropriate caution and careful scepticism. This was particularly so in circumstances where significant aspects of that recollection were

unsatisfactory when assessed against the contemporaneous documents, the known facts and in light of the answers given in cross-examination.

- (f). GP8 submitted that Mr Jafar's cross-examination had established that:
- (i). A number of Mr Jafar's supposedly clear recollections were incorrect when tested against the contemporaneous documents and/or were contradicted by his earlier accounts. One important example concerned his evidence as to how the First 20 December 2017 Meeting had been arranged. Mr Jafar's account was demonstrably wrong. The meeting was not arranged on very short notice on 20 December 2017. An appointment for a meeting with Mr Jafar at 11 am at Crescent's office on 20 December 2017 was entered into Mr Naqvi's electronic diary at 10:22 UAE time on 19 December 2017. That diary entry did not come out of nowhere. It had obviously followed a discussion between Mr Naqvi and Mr Jafar the previous day at which they agreed to meet at 11 am on 20 December 2017. Another important example concerned Mr Jafar's purported recollection of the substance of the First 20 December 2017 Meeting. It was put to Mr Jafar that he could not possibly remember all of the detail of the First 20 December 2017 Meeting set out at [22] to [44] of Jafar 1 which included 27 separate oral statements said to have been made by Mr Naqvi. Mr Jafar had suggested that he had a clear recollection because *"this saga has been going on ever since February 2018 and I must have described the events in December 2017 umpteen times, you know."* But it was incredible to believe that Mr Jafar actually remembered and recalled each of the 27 alleged statements being spoken by Mr Naqvi. Furthermore, Mr Jafar's position as to why his account was reliable would only hold true if his story had remained consistent over each time it has been recounted, but that was not the case.
- (ii). Mr Jafar's story had changed in material respects over time and continued to evolve in the witness box. Mr Jafar had repeatedly sought to disavow those past accounts or tried to argue that they were not in fact inconsistent with his case as

it now stood (despite the obvious conflicts). He had also sought to explain away, unconvincingly, his changed account. At the beginning of his cross-examination Mr Jafar had confirmed that he personally took care in giving accurate and factual instructions for the purpose of inclusion in his pleadings (Day 5, page 10) but he had been quick to distance himself from his pleadings when it suited him: *“I know pleadings were filed and they were given to me. But I didn’t go through them in any detail but they were explained to me”* (Day 5, page 33). Mr Jafar’s version of events appeared to be that his lawyers gave him inaccurate explanations of what the pleadings said and had repeatedly filed documents without being sure that they reflected their client’s recollection and instructions. This was an extraordinary allegation for him to have made against his own lawyers. In any event, the proposition that Mr Jafar paid little to no attention to the contents of the pleadings was inherently implausible and demonstrably false. Mr Jafar is a details-orientated man, closely involved in this litigation and he would not have simply ignored what was being said on his behalf. Furthermore, his attempts to distance himself from his pleadings were contradicted by the Metadata Table (a table produced by GP8) which had demonstrated that Mr Jafar had given comments on and read emails relating to his own pleadings.

- (iii). Mr Jafar had previously advanced misleading narratives in relation to the Loans, either by misrepresenting the position or withholding material detail. He had tailored each of his narratives to various audiences including the Sharjah authorities so that they were fit for purpose. There were several further examples of Mr Jafar’s willingness to say whatever it took to advance his interests at any particular time, in particular the false narrative he had advanced in 2018 concerning the security interests he had been offered; his non-disclosure of control over Auctus to this Court in the Winding Up Proceedings and his control over Crescent Petroleum in the context of the interlocutory applications in these proceedings. There was every reason to believe that he was also tailoring his account for the trial.

(iv). Mr Jafar had admitted in cross-examination that he had entered into a “gentleman’s agreement” (i.e., a sham agreement) with BOS for the purpose of creating a false documentary trail in relation to the Loans to mislead third parties (Day 7, page 45). That agreement, and its subsequent reversal, were not honest and showed Mr Jafar’s willingness to propagate a false narrative.

(v). Mr Jafar had not been an open and honest witness in respect of other discrete topics, most notably the role of Badr in the negotiation of, and subsequent dealings in relation to, the Loans.

245. GP8 also invited the Court to place no weight on the witness testimony of Mr Nerguizian. GP8 argued that Mr Nerguizian was an unsatisfactory and evasive witness. He avoided giving straight answers to simple questions and often resorted to long speeches seemingly intended to bolster Mr Jafar’s case, but which failed to answer the question asked. Consistent with the observations of Leggatt J in *Gestmin* it was clear that he had limited, if any, actual recollection of events. His evidence conflicted with the contemporaneous documents and prior accounts advanced by Mr Jafar. Mr Nerguizian’s dealings in relation to the Loans, his false account to the Sharjah authorities and his deeply unsatisfactory account in cross-examination on those matters demonstrated that he could not be treated as a credible witness. This was particularly so in relation to the core factual matters concerning the negotiation of the Loans, for example the remittance information where Mr Nerguizian’s new account was a fiction intended to disguise what was known and understood by Mr Jafar and him:

(a). On many occasions, Mr Nerguizian’s evidence was contradicted by the documentary record. Notable examples of this included Mr Nerguizian’s evidence concerning: (i) the proposed participation of Badr and indeed Badr’s involvement more generally; (ii) the agreements concerning the BOS’s exposure to the First Loan (with Mr Nerguizian insisting that those were genuine agreements entered into on the dates stated) and (iii) his attempts to distance himself from prior documents within these proceedings where it was clear that he was sent copies of such documents, as evidenced by specific entries within the Metadata Table. In relation to Badr, Mr Jafar, Mr Nerguizian and Mr

Singhvi had each tried to sideline Badr despite the clear documentary record. This was an obvious party line, indicative of strict instructions to stick to this position no matter how unreal.

- (b). In relation to the Loans, Mr Nerguizian had an unfortunate history of not acting in an honest and open manner. On 20 December 2017 he had proposed a structure for the Loans to evade AML and KYC requirements and also advised Mr Jafar on how to disguise Badr's anticipated participation so that the First Loan would not be disclosed as a related party transaction. Then in 2018 Mr Nerguizian created with the knowing participation of Mr Jafar a false documentary trail concerning BOS's exposure to the Loans. More recently, Mr Nerguizian gave a misleading account of the loan negotiations to the Sharjah prosecuting authorities and the Sharjah Court.
- (c). Mr Nerguizian also gave unsatisfactory evidence in relation to other aspects of the negotiations in December 2017 which was clearly at odds with the contemporaneous documents. For example, when it was put to Mr Nerguizian that the ENBD term sheet with its extensive security indicated that ENBD considered what became the Second Loan to be high risk lending he repeatedly evaded the question. He also gave an untrue account of his involvement with Badr saying that he never spoke with him but that Mr Jafar was the one who always called him (Day 12, page 150). This was inconsistent with the documentary record which (in the form of the phone logs and emails) showed that Badr was in close communication with Mr Nerguizian and that Badr had told Mr Naqvi that he (Badr) was giving instructions to Mr Nerguizian.
- (d). Mr Nerguizian's evidence regarding the loss sharing agreements between BOS and Mr Jafar was that the agreements dated 28 February 2018 and 1 July 2018 were genuine agreements concluded around those dates but the documentary record showed that there was no agreement on or around 28 February 2018 and that both agreements were drafted in parallel long after the event. In cross-examination, Mr Nerguizian's evidence was that he signed the Addendum dated 28 February 2018 (the *Addendum*) a few days after 28 February 2018 (Day 13, pages 14-15) but the contemporaneous documents

showed that no such agreement was reached or signed in or around February 2018. Mr Nerguizian was unable to give a coherent account of the circumstances in which that agreement was reached. He was unable to explain why Mr Jafar had agreed to assume US\$45 million of risk. He had said that at that time Mr Jafar and “we” (seemingly BOS) were “*not really worried about the nonpayment, that’s why Mr Jafar accepted it*” (Day 13, page 18) and that “*at that time we were not considering that we would not be paid. It was a matter of delay only.*” But this was inconsistent with the contemporaneous documents which evidenced a clear and growing concern on the part of Mr Jafar and Mr Nerguizian (in particular) as to repayment. Mr Nerguizian had been taken to his email of 8 March 2018 to Majid Jafar (copying Mr Jafar and Badr) (Day 13, page 25-27) in which he had said that he “*for one [could] not go beyond 21 March in recovering BOS share it would put me in an uneasy situation and I would be forced to present the check related to BOS then he will understand that we mean business.*” This email was a private internal discussion and there was no reason for Mr Nerguizian to avoid being truthful. If on 28 February 2018 it really had been agreed that BOS would no longer be exposed Mr Nerguizian would not have expressed his concern about recovering the “*BOS share*” or refer to his “*uneasy position*” if recovery was not made by 21 March 2018. Nor would Mr Nerguizian have threatened to present the cheque. The only logical conclusion was that at that stage BOS was still exposed to the First Loan. Similarly, Mr Nerguizian’s evidence was that the agreement purporting to transfer risk back to BOS (the **July Letter**) (in which BOS had confirmed to Mr Jafar that in the event that he should fail to recover all the amounts due under the AIML cheques BOS would bear its “*fifteen per cent proportionate share (being 45/300) of any eventual losses*”) was signed within a few days of 1 July 2018 (Day 13, page 21). He had explained that the reason why he (BOS) voluntarily assumed over US\$40 million of risk was that, since Mr Jafar and BOS did not know if the First Loan was going to be repaid, it was not fair that BOS “*gets out of the deal*” and BOS was required “*morally ... as a responsible banker*” to do this. Mr Nerguizian was taken to Mr Jafar’s email to him dated 30 September 2018 and its attachments which appeared to indicate that both the agreements were still in draft at that date. Mr Nerguizian had been unequivocal in asserting that the documents were signed before then and sought to

explain away the email and draft unsigned documents by saying that there was a discussion about the allocation of the part payment in March 2018. But that was not what the email addressed and it was clear that the agreements had not been agreed or signed by that time.

- (e). Mr Nerguizian also sought to distance himself from prior accounts of the negotiations in December 2017 put forward on behalf of Mr Jafar. For example, his initial evidence had been that he had not seen the Letter Before Action prior to his cross-examination and he had suggested that any involvement would be limited to the banking matters but the evidence showed that he had been fully aware that the Letter Before Action was being prepared, had requested copies of related documents, had been sent a copy of the Letter Before Action and had at least some input into its drafting. GP8 argued that the obvious reason why Mr Nerguizian was provided with the Letter Before Action was to allow him to consider its accuracy as an individual who was personally involved in the negotiations and likely to be a witness in the proceedings and also as CEO of BOS who was hoping to recover its exposure through the litigation which it was part funding and supporting.
- (f). At an early stage of the negotiation in December 2017 Mr Nerguizian had decided not to apply any AML or KYC requirements in connection with the Loans notwithstanding the fact that BOS was effectively providing the financing to Abraaj and would have a risk exposure. Mr Nerguizian suggested that he did not consider it necessary to apply AML and KYC requirements as BOS and Mr Jafar were providing clean money to the investors *“and we are expecting that clean money will come back to us”* and *“Mr Jafar’s money was clean, we club them together, we sent them to Abraaj, they sent it to whoever they were promising to send and the money came back clean”* (Day 12, pages 97-98). GP8 argued that this answer was clearly unsatisfactory and its logic denuded the regulatory requirements for proper AML and KYC checks of any content. It was, GP8 said, incredible that any banker, still less an experienced banker, would take such a naïve position. Mr Nerguizian cannot have believed this and must have appreciated that what he was doing was improper. Moreover, Mr Nerguizian then

undermined his own account by saying that although the expectation was that repayment would be made from money received from the Healthcare Investors, there were other potential sources (Day 12, page 99). But on Mr Nerguizian's own account, if there was any prospect of repayment from other sources then AML checks should have had to be, and would have been, performed.

- (g). Mr Nerguizian also gave a false account of the negotiation of the Loans to the Sharjah criminal authorities in his witness statement dated 15 December 2022 in support of the Sharjah Proceedings.

246. GP8 submitted that it was remarkable that Badr had not given evidence and invited the Court to draw various adverse inferences from his failure to do so:

- (a). GP8 said that it was plain that Badr was centrally involved with the Loans. As regards the negotiation of the Loans, he was involved from 20 December 2017 through to the advance of the Third Loan. Prior to the Royal Mirage Meeting Mr Jafar consulted with Badr, and he was a prospective participant in the First Loan. Thereafter, he was in close contact with Mr Naqvi, exchanging emails and SMS messages and having frequent calls (there had been at least forty-seven calls along with nineteen undisclosed SMS messages) and WhatsApp messages. He was also in close and continuous contact with his father, working closely with him in the negotiation of the Loans. In the course of his cross-examination Mr Nerguizian had let slip that Badr was “*convincing*” his father to make the Loans (Day 12, pages 159-160). GP8 argued that regardless of whether Badr was in fact the real driving force behind the Loans, he was centrally involved in their negotiation and was in close communication with Mr Jafar throughout the relevant period in December 2017. Badr and Mr Jafar were effectively working in tandem to promote and protect the Jafar family interests in relation to the Loans. On Mr Jafar's own case, Badr would be an important corroborating witness for his account of the events of December 2017. On GP8's case, his evidence concerning the events of December 2017, if truthful, accurate and complete, would fatally undermine Mr

Jafar's claims. Either way, Badr was a highly material witness who should have given evidence.

- (b). Moreover, Badr's involvement extended long after December 2017. In early February 2018 he had disclosed the Loans to the AH board (Badr's account given to the AH board of the circumstances in which the Loans were advanced was of significance to the present proceedings as it showed that Mr Jafar had been told that the Uninvested Capital had been spent, having been used for general business purposes). Thereafter, Badr was heavily involved in the efforts to restructure and recover the Loans, albeit that efforts were made to conceal that involvement from Mr Naqvi and Abraaj more generally by sending Badr away from the meeting with Mr Naqvi (having included him in the pre-meeting planning session), blind copying Badr or resorting to simply forwarding emails and responses to Badr. The deception extended to Badr emailing his fellow directors falsely denying any involvement with the Loans in an attempt to cover his tracks. On 5 May 2018 Badr had responded to an email from Mr Cleary of the same date (the ***Cleary 5 May 2018 Email***), copied to all AH directors (in which Mr Cleary had provided such directors with an update on discussions regarding "*the shareholder loan advanced by [Mr Jafar] at the request of Arif Naqvi in December 2017*") as follows (the ***Badr May 2018 Email***) (my underlining):

"Let me make it crystal clear to all, as I have done to Sean, Fadi, Arif, Arun and anyone else who tried to reach out to me to discuss the loan agreement between my Father and Abraaj: I am not, and have never been involved with any discussions in relation to this arrangement or its rescheduling post-default. Specifically, regarding Sean's note below, I made no such representations or taken any positions on behalf of my Family or my father. I took calls from Sean and Fadi in my capacity as a highly concerned and frustrated board member, and offered advice where I could, as a board member. And as a board member who also happens to be a member of the Jafar family, I must continue to excuse myself from any such board deliberations that concern this matter."

- (c). GP8 argued that after denying his involvement to the AH board, Badr had continued to be involved with the settlement discussions, in the so-called assignment of the Loans to Auctus, the AIML and AH winding-up petitions and the efforts to realise assets received from Mr Naqvi. GP8 said that the extent of his involvement went well beyond

the documents in the trial bundle. As the Metadata Table showed, between the 20 December 2017 and September 2022 Badr received, sent or was identified in the subject matter of 3,772 emails relevant to these proceedings but which had been withheld from production on the grounds of privilege (in whole or part).

- (d). GP8 said that it had emerged during Mr Jafar's cross-examination by Mr Ayres that the reason why Badr had not given evidence was because Mr Jafar did not want to make Badr feel pressured into participating. Mr Jafar had explained that had he insisted Badr would have participated but Mr Jafar did not want to press him (Day 6 pages 111-112). GP8 submitted that accordingly Mr Jafar could have secured the participation of a central and available witness (along with the provision of further documents) but chose not to do so. GP8 submitted that the likely reason for this was because any truthful account from Badr would be highly damaging to Mr Jafar's case and Mr Jafar did not want to ask his son to lie on oath. The documents in the trial bundle showed that Badr knew that the Third Loan was being requested by Mr Naqvi to support a year-end window dressing transaction at Abraaj by reason of the Year End Deposit Message and therefore knew that a substantial degree of financial or accounting wrongdoing was being perpetrated within the Abraaj entities and that this needed to be concealed. GP8 submitted that it could be inferred that Badr would have informed his father about the Year End Deposit Message and the reason given by Mr Naqvi for seeking further funds prior to the advance of any monies. There was no possible legitimate explanation for the Year End Deposit Message and it was inconceivable that Badr had sat by and watched his father pay over US\$350 million of Jafar family money without alerting him to the request and its import.
- (e). Moreover, had Badr given evidence he would have been cross-examined on the AH board meetings on 8 and 12 February 2018 and on his reaction to the fact that Mr Naqvi had told him and other members of the AH board that Healthcare Investor money had been spent on the general business purposes of Abraaj. That too would have stripped away the façade of Mr Jafar's case.

- (f). As a result of Mr Jafar's failure to call Badr the Court should dismiss any suggestion by Mr Jafar that Badr may have had an innocent explanation for or understanding of contemporaneous communications or that Badr would not have appreciated that the use of Uninvested Capital for general business purposes was improper or not have appreciated the obvious and clear meaning of the Year End Deposit Message or failed to understand in December 2017 that investor monies could not properly be mixed and used for non-fund purposes.
- (g). In addition, the Court was entitled to and should draw adverse inferences by reason of the absence of Badr as a witness (regardless of the precise reason why Mr Jafar chose not to call him); the limited documents provided by Badr (capturing only a narrow period of time and not including data held on his mobile telephone) and Badr's and Mr Jafar's dishonest and self-serving attempts to marginalise Badr's historic involvement.
- (h). GP8's primary position was that the documentary evidence and inherent probabilities justified the findings set out below.
- (i). In addition, and as a secondary position, GP8 said that the Court could make these findings by way of inference pursuant to the principles set out in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 (*Wisniewski*) at p 340. These principles were set out by Lord Justice Brooke in that case as follows:
- “(1) *In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
- (2) *If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
- (3) *There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*

(4) *If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."*

(j). These findings were as follows:

- (i). Badr was aware of financial irregularities and corporate misfeasance on the part of Mr Naqvi and alerted his father prior to the advance of funds. It was exceedingly unlikely that Badr did not tell his father about these issues.
- (ii). Badr also understood that there were significant financial problems within the Abraaj entities and made those known to his father. Nevertheless, he, and his father, were willing to advance funds to AH and AIML.
- (iii). Badr understood that Mr Naqvi's request for funds was for the purpose of window dressing and Badr informed his father of this.
- (iv). Badr knew and understood that Mr Naqvi could not himself contract on behalf of GP8 or Fund IV and knew and understood that in the negotiation of the Loans Mr Naqvi was only acting for himself, AIML and AH (Badr was a director of AH and very likely knew that Mr Naqvi was not a director of GP8 and understood that GP8 and Fund IV were not operational entities in the context of the Loans).
- (v). Badr was acting as his father's agent in connection with the Loans and kept his father fully apprised of communications with Mr Naqvi and, consistent with his conduct in 2018, also his knowledge of matters concerning Abraaj more generally.
- (vi). The reason why Badr had not given evidence was because his cross-examination would reveal the true position and thereby undermine Mr Jafar's account of the

circumstances in which the Loans were made and the purposes for which they were being requested. Badr's principal loyalty was and is to his father and family, not to AH, and he had no interest in providing a truthful account of events to the Court. Mr Jafar had decided not to put his son in a position where he had to choose between telling the truth or supporting Mr Jafar's claim.

The GHF Parties' submissions

247. The GHF Parties' submissions on these issues in substance followed those made by GP8 and do not need to be set out at length. I would however note the following citation of authority.
248. The GHF Parties argued that Mr Jafar had advanced very different and inconsistent factual accounts of relevant events before different tribunals for which no satisfactory explanation had been given. Mr Jafar's evidence was incapable of sustaining the case he had pleaded in these proceedings and in material respects, his evidence did not even support his case. When confronted with inconsistencies, he blamed his lawyers and his failure to read documents. At times, he simply resorted to denying what was obvious. In his answers in cross-examination, Mr Jafar showed a refusal to accept the plain meaning of words used and the documents also show his willingness to take steps to conceal the true position as regards BOS. The GHF Parties submitted that Mr Jafar's account was inherently unlikely and not a genuine recollection of his belief and understanding of what Mr Naqvi had conveyed to him at the time. Rather it was a manufactured recasting of events constructed after the event with the assistance of his advisers.
249. The GHF Parties submitted that Mr Nerguizian's evidence should be given very little weight and that no reliance should be placed on it save where it is clearly corroborated by contemporaneous documentation or other unimpeachable evidence. They highlighted his partiality, the inconsistencies in his evidence, his failure to keep and therefore the absence of contemporary records (which a banker in his position could reasonably have been expected to maintain and whose absence meant that critical support for his account was missing), his evasiveness in cross-examination and his willingness to mislead (he had been

forced to accept during his cross-examination that the First Loan was structured in a way that would circumvent money-laundering regulations and had demonstrated a lack of concern at this; had participated in the preparation and deployment of sham documents to hide BOS's exposure to AIML/AH and had been willing to follow Mr Naqvi's instructions in relation to the mislabelling of the loans as "investments"). By way of an example of the obvious errors and inconsistencies in his evidence, the GHF Parties pointed to the Nerguizian Sharjah Witness Statement where Mr Nerguizian had said that he had "*attended the meetings held between 20 and 27 December 2017 in the presence of [Mr Jafar and Mr Naqvi], which were held in Sharjah at the office of [Mr Jafar], and at the head office of Sharjah Bank in the Emirate of Sharjah.*" However, there had been only one meeting at which Mr Naqvi, Mr Jafar and Mr Nerguizian were present and that meeting was in Dubai.

250. The GHF Parties also submitted that the Court should take into account and reduce the weight to be given to Mr Nerguizian's evidence because of his involvement in the witness preparation that GP8 had identified, done after Mr Jafar's cross-examination and which involved documents being shown (and therefore selected by Mr Jafar's legal representatives) to Mr Nerguizian. Whilst Lord Falconer had given "*assurances*" which I had accepted as the basis for concluding that Mr Jafar's counsel and attorneys had been careful to avoid manipulating and seeking to alter Mr Nerguizian's evidence the GHF Parties submitted that this preparation clearly gave rise to a risk of there being some unconscious contamination of Mr Nerguizian's evidence.

251. On the issue of the impact of the failure of Badr to give evidence, the GHF Parties noted that in *AHAB* Smellie CJ (as he then was) had referred to Lord Justice Booke's analysis in *Wisniewski* and explained the inference to be drawn where (as he found to be the case) an obviously relevant witness had not been called by a party (AHAB in that case) when that party had "*made no serious or earnest attempts to secure his [the relevant potential witness] attendance at trial.*" Chief Justice Smellie had concluded (at [142]) that in these circumstances there was "*a compelling general inference that his oral evidence under cross-examination would have been deeply unhelpful to [that party].*" At [143] Chief Justice

Smellie had also noted and approved the following submissions made by the defendants (my underlining):

- “77. *It is trite law that, in general, a Plaintiff seeking to bring a fraud claim should seek to prove the matters that form part of their claim by oral evidence at trial. While, as set out above, the probative value of that evidence may be very limited, it is nonetheless incumbent upon AHAB to provide evidence (particularly as to the partners’ knowledge) in order to support its case.*
78. *However, it cannot seriously be disputed that, in a number of cases, AHAB’s witnesses are silent on important topics or do not give evidence at all. In such circumstances, the first question for the Court is: what inferences, if any, may be drawn from such a failure?*
79. *The starting point is that where a party either fails to call evidence from an important witness or is silent in the face of evidence presented by the other side, that failure may have the effect of converting that evidence into proof:*

“In our legal system generally, the silence of one party in face of the other party’s evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party’s failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified. [R. v. Inland Revenue Commrs, Ex p T.C. Coombs & Co. [(131)] [(1991) 2 A.C. 300, per Lord Lowry with the support of the rest of the Committee). Approved in Prest v. Petrodel Resources [(126)] [(2013) UKSC 23; [2013] 2 A.C. 415, per Lord Sumption JSC at para. 34).

80. *Moreover, the ability of the court to draw an adverse inference from a party’s silence extends not just to the failure to call a witness but to the failure of a witness (or witness statement) to address particular topics which the Court can legitimately expect the witness to address: ... ”*

Discussion, findings of fact and decision regarding what Mr Naqvi said and represented at the First 20 December 2017 Meeting

252. I now go on to consider:

- (a). The law to be applied when assessing, and the approach to be adopted by the Court to the assessment of, the disputed evidence in a case such as this.
- (b). The law to be applied to determining whether there has been an express or implied representation.
- (c). My assessment of the reliability, credibility and honesty of Mr Jafar and Mr Nerguizian and of the evidence given by them.
- (d). My findings of fact as to what happened and what was said by Mr Naqvi.
- (e). My conclusions as to whether the Express Representations (in particular the Reinvestment Representation) and the Implied Representations (in particular the Overarching Message) were made.

Relevant legal principles to be applied or considered when assessing the witness evidence of what Mr Naqvi said at the First 20 December 2017 Meeting

The proper approach to be adopted by the Court to the assessment of the evidence

253. I need to begin with a review of the authorities that deal with the approach to be adopted by the Court when reviewing and assessing the evidence adduced.

254. The Fund Parties argued and Mr Jafar accepted that the Court should bear in mind the guidance regarding the fallibility of memory as set out by Mr Justice Leggatt (as he then was) in his judgment in *Gestmin* at [16]-[22]. Critically, Leggatt J had said that “*the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts...*”

255. Leggatt J’s guidance was approved and applied by Chief Justice Smellie in *AHAB* who summarised the position as follows (my underlining):

“61 *A more modern exposition of the reasoning appears in Gestmin SGPS v. Credit Suisse (UK) Ltd. (59) ([2013] EWHC 3560 (Comm), at paras. 15–22) where Leggatt, J. (who seems to have studied relevant research material for this purpose) explained why little weight can be given to evidence for recollection in any commercial case and why oral factual testimony is often of such limited value. Among his conclusions were the following:*

- (1) *The process of civil litigation itself subjects the memories of witnesses to powerful biases, the effect of which is to alter the witness’s memory of events so as to reflect the witness statements and other materials shown to the witness, whether they be true or false, rather than the original experience of the events:*
 - (i) *The nature of litigation is such that witnesses often have a stake in a particular version of events or ties of loyalty or even simply a desire to assist the party calling them;*
 - (ii) *Considerable bias is introduced by the process of drafting witness statements, often long after events, normally by lawyers conscious of the significance of what a witness does or does not say, referring to documents such as pleadings which they have never seen or “refreshing” memory of things long forgotten.*
- (2) *Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.*

62 *It is submitted by the defendants therefore that the court should adopt a robust skepticism to many of the self-serving assertions made by AHAB’s witnesses. It is one thing to remember a fact that goes against AHAB’s interests (indeed the fact that the witness does have such a recollection means it is more likely to be true), it is quite another to remember matters which assist AHAB’s case but run contrary to the contemporaneous documentation and which are only recalled many years later (having been forgotten in the interim).*

63 *In this massive and complex case of pervasive fraud, where self-serving and even dishonest motives - rather than mere honest but mistaken recollections - might hold sway with a witness’s testimony, the advice to rely upon the contemporary documents becomes highly relevant and persuasive. It is advice which I accept and will heed assiduously as I examine the crucially important question of the state of the AHAB partners’ knowledge and authority given by them at the relevant times.*

256. The Court of Appeal in *AHAB-CA* approved Chief Justice Smellie’s approach. At [212] the Court of Appeal said this (my underlining):

“The Chief Justice quite properly directed himself that contemporaneous documentation and the probabilities of the matter, rather than current memory, assisted and/or undermined as the latter so often is by self-belief, self-interest and outright dishonesty, were the better touch-stone of the truth. He cited the famous authorities on the subject, such as Onassis v. Vergottis [1968] 2 Lloyd’s Rep 403, Armagas Ltd v. Mundogas SA (The Ocean Frost) [1985] 1 Lloyd’s Rep 1 (CA, per Lord Justice Robert Goff at 57), Grace Shipping v. Sharp & Co [1987] 1 Lloyd’s Rep 207 (PC) at 214-6, and Villeneuve v. Gaillard [2011] UKPC 1 at [67], as well as the recent CICA (Civil) 15 of 2018 – AHAB v SAAD Investments Company Limited et al – Judgment – subject to editorial corrections 55 exposition by Leggatt J (as he then was) in Gestmin SGPS v. Credit Suisse (UK) Ltd [2013] EHC 3560 Comm at [15]-[22], and the extra-judicial writings of Lord Bingham in The Judge as Juror: the Determination of the Factual Issues (1985)”

257. The Court of Appeal also went on to review Chief Justice Smellie’s approach and made the following comments (my underlining):

“241. As the Chief Justice himself observed, in relation to the critical issue of the knowledge of the AHAB Partners:

“...everything will depend on what the Court makes of the evidence of the knowledge, recollections, truthfulness or untruthfulness of witnesses.”

242. It also needs to be said, as both sides acknowledged, that over-reliance on oral testimony where it runs directly counter to documents and probabilities, which have not been properly assessed, may be suspect...

.....

246. In the present case, the factual issues did not, on the whole, depend on conflicts as to what was said in particular meetings and conversations, indeed the absence of evidence from Al Sanea ensured that that was the case. Rather, the Chief Justice had to evaluate the motivations and personalities, credibility and reliability of key witnesses, and especially the AHAB Partners, as to their case that, over a long period of time, they lacked the knowledge of Al Sanea’s borrowings which the documents strongly suggested that they had. In such a case, the trial judge’s estimation of the honesty and integrity of the witnesses’ evidence seems to us, as directed by the authorities, to be of particular significance.

247. The Chief Justice himself, in a passage at the outset of his judgment headed “General probabilities or improbabilities”, directed himself expressly by several of the authorities cited above as to the approach to be taken by a trial judge in a case – so heavily burdened with allegations of fraud on all sides and

where everything will depend on what the Court makes of the evidence of the knowledge, recollections, truthfulness or untruthfulness of witnesses.

248. Thus, the very first authority he cited under this heading was the famous passage from Robert Goff LJ's judgment in *The Ocean Frost*, repeated and applied, as the Chief Justice remarked, in *Grace Shipping v. Sharp & Co* [1987] 1 Lloyd's Rep 207 at 215-216 and by the Privy Council in *Villeneuve v. Gaillard* [2011] UKPC 1 at [67]. He also referred in this connection to Gestmin, and to other similar expressions concerning the importance of balancing subjective impressions of witnesses and their evidence against the objective factors of documents, admitted or incontrovertible facts, and motive: such as is found in Lord Pearce's dissenting judgment in *Onassis v. Vergottis* [1968] 2 Lloyd's Rep 403 at 431 and extra-judicially in Lord Bingham's 1985 paper, *The Judge as Juror: the Judicial Determination of Factual Issues*. 238 249. In sum, whatever criticisms AHAB have to make of the Chief Justice's approach to issues of fact and his handling of witnesses' testimony, there cannot be any disquiet as to the self-direction he gave himself at the outset...

258. As the Court of Appeal noted, Chief Justice Smellie had referred to and relied on the "famous" authorities in this area and there is no need for me to review and give extensive citations from them. It is, however, helpful I think in the context of the issues arising on the evidence in this case to refer to the following extracts from the judgments in the English Court of Appeal ([1985] WLR 640 at 676) and the Privy Council ([1987] 1 Lloyd's Rep 207 at 215-216) in *Armagas Ltd v Mundogas S.A. (the Ocean Frost)* (my underlining):

"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth" [per Robert Goff LJ]

259. It is worth noting that there has been some judicial caution expressed about an unqualified acceptance and application of Leggatt J's guidance. The concerns were very recently summarised by Lord Justice Newey as follows in the English Court of Appeal in *Solad Sakander Mohammed and others v Sabit Ahmed Ebrahim Daji* [2024] EWCA Civ 1247 (judgment dated 21 October 2024) (my underlining):

“Judges have for many years remarked on the vulnerabilities of evidence as to what witnesses remember. Popplewell LJ recently discussed human memory and how witnesses can come to give mistaken evidence in his 2023 COMBAR lecture, Judging Truth from Memory: The Science. In Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), [2020] 1 CLC, at paragraph 22, Leggatt J went so far as to suggest that “the best approach for a judge to adopt in the trial of a commercial case is ... to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts”. However, Popplewell LJ explained in his lecture that he did not himself wholly agree with this remark and in Natwest Markets plc v Bilta (UK) Ltd [2021] EWCA Civ 680 the Court of Appeal pointed out at paragraph 50 that “it is important to bear in mind that there may be situations in which the approach advocated in Gestmin will not be open to a judge, or, even if it is, will be of limited assistance”. In Kogan v Martin [2019] EWCA Civ 1645, [2020] FSR 3, the Court of Appeal said at paragraph 88 that “a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence”.

260. In *Natwest Markets plc v Bilta (UK) Ltd (In Liquidation)* [2021] EWCA Civ 680 the English Court of Appeal (in a judgment written by Asplin, Andrews and Birss LLJ) had noted that in cases where the contemporaneous documentary record is limited the guidance given by Leggatt J and the related authorities (and it is only guidance) will be of limited assistance to the Court (my underlining):

49. *In a case such as the present, where the events in question took place over 9 years before the trial and occurred in a narrow period of around 3 weeks, the salutary warnings about the recollections of witnesses in Gestmin SGPS SA v Credit Suisse UK Ltd [2015] EWHC 3560 at [22] and Blue v Ashley [2017] EWHC 1928 at [68] are pertinent. It was therefore of paramount importance for the Judge to test that evidence against the contemporaneous documents and known or probable facts if and to the extent that it was possible to do so.*

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

documents from which inferences might be drawn about what was or was not said at that dinner, there are no notes of the discussions and no memoranda or emails sent afterwards which appear on their face to record or report what was said on that occasion.

261. In *Kogan v Martin* [2019] EWCA Civ 1645 the Court of Appeal (Floyd LJ) considered the status of the *Gestmin* guidance and emphasised the importance of giving proper weight and reasons for disregarding the witnesses' recollections (my underlining):

- “88. We think that there is real substance in this ground of appeal. We start by recalling that the judge read Leggatt J's statements in *Gestmin v Credit Suisse* and *Blue v Ashley* as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay *The Judge as Juror: The Judicial Determination of Factual Issues* (from *The Business of Judging*, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.
89. Secondly, the judge in the present case did not remark that the observations in *Gestmin* were expressly addressed to commercial cases. For a paradigm example of such a case, in which a careful examination of the abundant documentation ought to have been at the heart of an inquiry into commercial fraud, see *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413 and the apposite remarks of Males LJ at paras. 48-49. Here, by contrast, the two parties were private individuals living together for much of the relevant time. That fact made it inherently improbable that details of all their interactions over the creation of the screenplay would be fully recorded in documents. Ms Kogan's case was that they were bouncing ideas off each other at speed, whereas Mr Martin regarded their interactions as his use of Ms Kogan as a sounding board. Which of these was, objectively, a correct description of their interaction was not likely to be resolved by documents alone, but was a fundamental issue which required to be resolved.”

262. The need to consider all the relevant evidence was also emphasised by Moore-Bick LJ (who was in the majority) in *Mohammad Jafari-Fini v Skillglass Ltd & Ors* [2007] EWCA Civ 261, where he made the same point (my underlining):

“.... Whenever an allegation of fraud or similar misconduct is made it is particularly important to consider the whole of the evidence before reaching a final conclusion, to test the oral evidence by reference to any contemporaneous documents and to consider the inherent probabilities. Having said that, however, it must be recognised that since the final conclusion must be capable of accommodating any facts which are admitted or which are established by evidence which is not capable of being seriously challenged, such facts provide a useful starting point for the assessment of the more controversial parts of the evidence.”

263. The difficulties that arise where there is only a limited and incomplete contemporaneous documentary record was discussed in the judgment of HHJ Havelock-Allan QC in *Thomas and another v Triodos Bank NV* [2018] 1 BCLC 530 at 558-560 (my underlining):

“91. My second preliminary observation is that the misrepresentation case rests largely on what is alleged to have been said by the bank's personnel in telephone conversations. The critical conversations are those between Mr Thomas and Mr Price on 28 May 2008 and 5 June 2008 and between Mrs Thomas and Mr Roylance on 17 June 2008. It is salutary to bear in mind what Leggatt J recently had to say about the reliability of the recollection of witnesses of what was said in conversations (see *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]–[22]). His view was that— 'the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollection of what was said ... and to base factual findings on inferences drawn from the documentary evidence and known probable facts.' It is not altogether easy to adopt that approach in this case because the bank kept no log or notes of its conversations with the claimants. The contemporaneous written record from the bank's side consists of the e-mails and periodical credit reports written by Mr Price when he was the claimants' relationship manager. These reports were based on his understanding of information he had gleaned from the claimants at meetings with them. They contain a narrative history of the claimants' business, their future plans, present borrowing and future borrowing requirements. They do not address the decision to fix the rates. Moreover, when updating the narrative in later reports, Mr Price did not always delete earlier history which was no longer relevant because it had been overtaken by subsequent events. The result is that the credit reports need to be read with some care, because they were not always a wholly accurate reflection of the claimants' current thinking. On the claimants' side it has to be said that none of the misrepresentations now alleged, in particular that they were

given to understand that any redemption penalty would not be more than £10,000 to £20,000, is referred to in any of their e-mails or letters to the bank before the formal complaint was written in November 2012. The manuscript note which the claimants made sometime after the phone call on 5 June 2008 is therefore an important document.

92. Against this background it is inevitable that I will have to place some weight on the oral evidence...

...

97. The third preliminary observation is that any assessment of the evidence of what was said in the critical conversations must be made against the background in which those conversations took place. Context is almost always of considerable importance. One must not examine evidence of conversations given in the cold analytical atmosphere of a trial, without having regard to the situation in which the parties found themselves when those conversations occurred.

264. As regards the proper approach to be adopted by the Court when assessing the credibility of witnesses, in addition to the judgment of Justice Lewison in *Painter v Hutchinson* [2007] EWHC 758 (Ch) and of HHJ Richard Williams in *Singh v Singh* [2021] EWHC 2272 (Ch), the judgment of HHJ Pelling KC in *Gorbachev v Guriev* [2024] EWHC 2174 (Comm) provides a helpful summary of the approach to be adopted (my underlining):

7. As will become apparent from what I say later in this judgment, any assessment of the parties' respective cases will depend very heavily on the credibility of their oral testimony. In the course of challenging the credibility of that testimony, allegations of dishonesty and wrongdoing were made (particularly by the defendant against the claimant) in relation to events that occurred decades ago that were often tangential to the issues that arise. The purpose of this was to demonstrate that particular witnesses could not be relied on and that I could not safely rely on the oral evidence of either the claimant or defendant. Finally as will be apparent from what I have said already, the trial involved a detailed investigation of events occurring as long ago as 1989 and the critical events on which this claim depends which are alleged to have occurred in 2005.
8. In those circumstances, it is important to identify at the outset some fundamental principles that I am bound to apply and have applied when reaching conclusions as to what has been alleged. In summary:
 - i) The legal and evidential onus of proof rests from first to last on the claimant who must prove his pleaded factual case on the balance of

probabilities although an evidential burden rests on the defendant to prove any affirmative case he seeks to advance;

- ii) Whilst the standard of proof in a civil case is always the balance of probabilities, the more serious the allegation, or the more serious the consequences of such an allegation being true, the more cogent must be the evidence if the civil standard of proof is to be discharged – see Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 per Lord Nicholls at 586, where he said: "The balance of probabilities standard means that a court is satisfied that an event occurred if a court considers that on the evidence the occurrence of the event was more likely than not. In assessing the probabilities, the court will have in mind as a factor to whatever extent it is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence...Built into the preponderance of probabilities standard is a generous degree of flexibility in respect of the seriousness of the allegation."
- iii) The oral evidence of each of the witnesses of fact should be tested, wherever possible, against such contemporary documentation as there is, admitted and inconvertible facts and inherent probabilities – see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyd's Rep 403 at 407 and 413 – and their subsequent conduct – see Bailey v. Graham [2012] EWCA Civ 1469 per Sir Andrew Morritt CHC at [57];
- iv) In reaching conclusions on the issues that arise and on whether a party bearing either the legal or an evidential burden has discharged that burden, it is necessary to consider all of the relevant evidence and not simply such documentation as may be available – see Kogan v. Martin [2019] EWCA Civ 164 per Floyd LJ at [88]-[89]. There is however nothing [in] either ... of these authorities or the requirement to consider all of the evidence that prevents the evaluation of oral evidence using the techniques I have referred to in (iii) above;
- v) Given the passage of time since the occurrence of the events that are said to give rise to this claim and those that are said to be relevant to assessment of the credibility of the witnesses generally, and of the claimant and defendant in particular, use of the techniques I have referred to in (iii) above (to the extent that is possible in the circumstances) is all the more appropriate – see Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) per Leggatt J (as he then was) at [15]-[22];
- vi) In assessing whether a witness is lying it is usual to test that proposition by five main tests being (1) consistency with what is agreed or clearly

established by other evidence, (2) internal consistency, (3) consistency with previous statements of the witness, (4) the general credit of the witness and (5) his demeanour – see Bailey v. Graham (ibid.) per Sir Andrew Morritt CHC at [47(1)]; but

- vii) *Where it is concluded that a witness or party has lied in relation to a particular issue, it is necessary to remember that it does not necessarily follow from the fact that a witness has been shown to be dishonest in one respect that his evidence in all other respects is to be rejected. Experience suggests that people may give dishonest answers for a variety of reasons including an entirely misplaced wish to strengthen a true case that is perceived to be evidentially weak as opposed to a desire to advance a dishonestly conceived case in a dishonest manner. What such conduct will usually mean however is that the evidence of such a witness will have to be treated with great caution save where it is corroborated, either by a witness whose evidence is accepted or by the contents of contemporaneous documentation, or is against the witness's interests or is admitted."*

265. A further issue arises from the fact that Mr Jafar's case is based on his limited recollection of what Mr Naqvi actually said. His case is pleaded on the basis that Mr Naqvi made the Statements or *used words to the same effect*. Mr Jafar's evidence was also that he was now unable to recall, with limited exceptions, the precise words used by Mr Naqvi and relied, in effect, on what he took to be the substance and general meaning to be given to words which Mr Naqvi actually used (see [22] of Jafar 1 and Mr Jafar's evidence in cross-examination when asked about the nature and limits of his recollection of the words Mr Naqvi actually used). Mr Jafar's evidence was generally given in indirect speech to reflect this. In relation to the approach which the Court should take when assessing such evidence, I have found the following passage from the judgment of Jackman J in the Federal Court of Australia in *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381 to be of assistance (my underlining):

"124 The following passage from the judgment of McLelland CJ in Eq in Watson v Foxman (1995) 49 NSWLR 315 at 318-319, a case dealing with alleged misleading conduct arising from oral statements (which the plaintiff endeavoured unsuccessfully to prove in direct speech) pursuant to the former s. 52 of the Trade Practices Act 1974 (Cth), has often been cited with approval:

"Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that

they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether the spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

125. *The passage is characteristically pithy and insightful. I would respectfully add the following observations relevant to the present issue. Whether the evidence of spoken words is sufficiently precise to enable the court to be reasonably satisfied that the words spoken were in fact misleading is plainly a question of degree, not a demand for unattainable perfection. In some cases, that may depend upon the use of a specific word or phrase, but in many cases the court can be reasonably satisfied of the misleading nature of an oral statement from evidence of the substance of what was said. The statement towards the end of the quoted passage, as to what is actually remembered being little more than an impression from which plausible details are then constructed, is particularly pertinent to the present issue, although many would find his Honour's reference to that often occurring "subconsciously" to be overly charitable."*

266. The question also arises as to how the Court should assess a party's claim based entirely on spoken words. I have found helpful the following passage from the judgment of Mr Justice Hammerschlag in *John Holland Pty v Kellogg Brown and Root Pty* (2015) NSWSC 451 at [94]-[96] (a case involving a dispute as to whether the parties had agreed during a meeting to litigate rather than arbitrate their dispute) (my underlining):

"94. Where a party seeks to rely upon spoken words as a foundation for a cause of action, including a cause of action based on a contract, the conversation must be proved to the reasonable satisfaction of the court which means that the court must feel an actual persuasion of its occurrence or its existence. Moreover, in the case of contract, the court must be persuaded that any consensus reached was capable of forming a binding contract and was intended by the parties to be legally binding. In the absence of some reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof.

Such reasonable satisfaction is not a state of mind that is obtained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question of whether the issue has been proved to the reasonable satisfaction of the court. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences: see Briginshaw v Briginshaw (1938) 60 CLR 336 at 362; Helton v Allen (1940) 63 CLR 691 at 712; Rejfeek v McElroy (1965) 112 CLR 517 at 521; Watson v Foxman (1995) 49 NSWLR 315 at 319.

95. *The sensation of feeling an actual persuasion, after a contest, that an event has happened or that something exists is one which is well known and recognised by experienced trial judges for what it is.*
 96. *John Holland has the onus of establishing the agreement for which it contends. This entails proving to the reasonable satisfaction of the Court that the words said to give rise to the agreement were actually said, and that the alleged consensus was capable of forming a binding agreement and was intended by the parties to be legally binding."*
267. I have taken into account and sought to follow this guidance (particularly the underlined wording) and would summarise the main points as follows:
- (a). The legal and evidential onus of proof rests from on Mr Jafar who must prove his pleaded factual case on the balance of probabilities.
 - (b). The Court's core task is to make findings of fact based upon all of the evidence.
 - (c). Witness evidence must be assessed in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed.
 - (d). Where a party's sworn evidence is disbelieved the Court must say why that is and assess the merits of the challenge. The Court cannot simply ignore the evidence.
 - (e). Where the events in question took place many years before the trial the salutary warnings about the recollections of witnesses in *Gestmin* (and the other authorities I

have cited above) are pertinent and it becomes of paramount importance for the Judge to test that evidence against the contemporaneous documents and known or probable facts if and to the extent that it is possible to do so.

- (f). The *Gestmin* guidance applies (with full force) to commercial cases in which it is to be expected that the parties will be familiar with, use and anticipate placing reliance on documentation. It will have less weight in other cases.
- (g). The need to test witness recollections by reference to such contemporaneous documents as exist (and inherent probabilities and established facts) is particularly important where the witness evidence is self-serving and promotes the witness' own case or that of a party who has called him/her. When considering the weight to be given to a witness' recollection of past conversations it is necessary to bear in mind that it is one thing to remember a fact that goes against that person's interests and another thing to remember matters which assist his/her own case but run contrary to the contemporaneous documentation and which are only recalled many years later (having been forgotten in the interim).
- (h). Where the plaintiff's case is based on serious allegations of fraud the evidence must be cogent and convincing.
- (i). Where a plaintiff relies on words spoken in the course of a conversation it is necessary that those words be proved with a degree of precision sufficient to enable the Court to be reasonably satisfied that they were in fact spoken but the Court may be reasonably satisfied as to the meaning an oral statement from evidence of the substance of what was said (when the formula "*or words to that effect*" is used).
- (j). When considering whether it can be reasonably satisfied in this way, the Court will take into account the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are

considerations which must affect the answer to the question of whether the issue has been proved to the reasonable satisfaction of the Court. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

- (k). The assessment of the evidence of what was said in the critical conversations must be made against the background in which those conversations took place. Context is of considerable importance.
- (l). When assessing whether a witness is lying the Court applies the five main tests I have referred to above (consistency with what is agreed or clearly established by other evidence, internal consistency, consistency with previous statements of the witness, the general credit of the witness and his/her demeanour).

268. These are the principles to be applied in this case. In particular, my approach should be to consider the all the evidence but to give particular weight to the objective evidence, in particular the documentary evidence, as well as the inherent probabilities and admitted and incontrovertible facts and to test the accounts of Mr Jafar and Mr Nerguizian against those matters.

269. This is not a case in which there is a conflict of direct witness evidence of what Mr Naqvi said. As in *AHAB*, the factual issues do not depend on conflicts as to what was said at the First 20 December 2017 Meeting (and the other meetings and conversations). The absence of evidence from Mr Naqvi ensured that that was the case. In the absence of such evidence the Funds have relied, and been forced to challenge Mr Jafar's (and Mr Nerguizian's) account by reference to what are said to be inconsistent accounts previously given by Mr Jafar (in the Winding Up Proceedings and the Sharjah Criminal Proceedings), what is recorded in some contemporary documents, in particular the records of the AH board meetings in February 2018, the adverse inferences to be drawn from the failure of Badr to give evidence and what the Funds claim to be the inherent probabilities.

The law governing the drawing of adverse inferences from a party's failure to call a witness

270. I have already quoted the well-known passage in the judgment of Brooke LJ in *Wisniewski* at p 340 and from the judgment of Smellie CJ in *AHAB*, cited and relied on by GP8 and the GHF Parties.

271. It is important also to refer to the following additional authorities.

272. In *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882 Sir Ernest Ryder SPT (with whom Sales LJ agreed) commented on *Wisniewski* as follows (at [30]):

"... Wisniewski is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles [set out by Brooke LJ] are engaged. As the first principle adequately makes plain, there is a discretion i.e. 'the court is entitled to draw adverse inferences'."

273. More recently, in *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3863 Lord Leggatt in the UK Supreme Court (with whom all the other Justices agreed) said (at [41]) (my underlining):

"The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

274. I note that the position following *Efobi* is summarised as follows in Phipson on Evidence (20th ed., 2022) at [45-35] (my underlining):

“The court may be entitled to draw adverse inferences from the absence of a witness who was available to and might have been called by a party. However, the court does not usually do so, not least because there may be all sorts of reasons why a particular witness is not called and one usually cannot be confident to infer what the witness would actually have said. Further, in general it is for a party to choose which witness he wishes to call and there is no property in a witness, and in the case of a witness in the jurisdiction the opposing party can seek to compel a witness’s attendance by means of a witness summons.

*It is in a comparatively small number of cases that it would be appropriate to draw an adverse inference, but where it is sought to do so, the party inviting the court to exercise such a discretion must [this relies on the judgment of Cockerill J in *Magdeev v Tsvetkov* [2020] EWHC 887 (**Magdeev**) and the helpful judgment of His Honour Judge Hodge QC in *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 (**Ahuja**)]:*

- (1) Set out clearly (a) the point on which the inference is sought and identifying the inference sought; (b) the reason why it is said that the missing witness would have material evidence to give on that issue; (c) why it is said that the party seeking to have the inference drawn has himself adduced relevant evidence on that issue; and (d) why the party seeking the inference could not himself be expected to call or witness summons the witness.*
- (2) Explain why such inference is justified on the basis of other evidence that is before the court.*

It is then open to the other party to resist such an inference by giving a good reason why the witness is absent or silent. If he is able to do so, then no inference should be drawn. If there is some credible explanation given, even if not wholly satisfactory, the potentially detrimental effect of his absence or silence may be reduced or nullified.

*As to whether to draw an adverse inference, the Supreme Court has held in *Efobi* this to be a matter of ordinary rationality ...”*

275. In *Magdeev* Cockerill J held that if the above-mentioned conditions were satisfied the Court then had a discretion and would exercise it not just in the light of the principles set out but also in the light of the overriding objective. Where the missing evidence was not properly regarded as material such it would be inappropriate to draw an inference.

276. In *Ahuja*, Judge Hodge also noted (at [32]-[33]) that the omission to call a material witness without reasonable explanation may have a significance that goes beyond the drawing of appropriate adverse inferences. In particular:

- (a). First, in a case where there are contemporary documents which appear on their face to provide cogent evidence on an issue which is contrary to the evidence of one of the parties to the litigation, the Court may decide to take the documents at their face value, and decline to accept that party's evidence to the contrary, where this is unsupported by the evidence of a non-party witness who clearly could have given evidence material to that issue and who might have, but has not, been called by that party as a witness. The same may apply where the evidence of one of the parties to the litigation is contrary to the known or probable facts.
- (b). Secondly, the failure to call a witness who might have been able to give evidence on a material issue may mean that the Court is left with no direct evidence at all on that issue. In that situation, the party who might be expected to have called that witness cannot complain if the court rejects that party's case on that issue and either makes a finding based on the inherent probabilities presented by the limited evidence that is before the Court, or simply concludes that it is unable to make any finding of fact at all on that issue.

277. In *Ahuja* HHJ was prepared to draw adverse inferences from the claimant's failure to call the solicitor who had advised it on the transaction which was the subject of the proceedings (Mr Jandu). HHJ noted that the court had not heard from three witnesses who had played a central role in the dealings that had given rise to the litigation including Mr Jandu and said that he had decided, having borne in mind Cockerill J's observations in *Magdeev* that this case was "*one of those perhaps rare cases where it [was] appropriate to draw inferences adverse to Ahuja from its failure to call Mr Jandu as a witness.*" It was, it should be noted, a case in which the claimant had declined to give a reason as to why it refused to call Mr Jandu (relying on litigation privilege) and the defendants had issued but then withdrawn a witness summons in respect of Mr Jandu. Judge Hodge decided that it was reasonable for the defendants in the circumstances to have decided not to seek to force Mr Jandu to attend (see [64]) and went on to say the following (my underlining):

“65. *The inescapable inference that I find it proper to draw from the evidence from Ahuja's present solicitor (cited above) is that Mr Jandu has provided Ahuja with*

information material to these proceedings which: (1) is not apparent from the conveyancing file, and (2) Ahuja does not wish to disclose to the defendants or make available to the court. I have no evidence from Ahuja as to why the court has not heard from Mr Jandu. I am satisfied that the defendants have established both: (a) that Ahuja could have called Mr Jandu as a witness, and (b) that he has material evidence to give to this court. I am also satisfied that the defendants: (c) have identified the particular inferences which they would invite the court to draw from Mr Jandu's absence, and (d) have explained why such inferences are justified on the basis of other evidence that is properly before the court. Mr Clarke submits that the manifest desire on the part of Ahuja to keep Mr Jandu from giving evidence permits the court to infer that his evidence would be unhelpful from Ahuja's perspective. In particular, he invites the court to infer that Mr Jandu would have given evidence to the effect that: (1) Prior to exchange of contracts he had either read the ground floor leases and told Mr Singh about them or he had told Mr Singh that he did not know about the ground floor lease terms and that Mr Singh had told him to proceed to exchange in any event. (2) At some point over the course of 29 June to 1 July 2018, Mr Jandu informed Mr Singh about the contents of Chhokar & Co's letter dated 29 June 2018 confirming that "the inscription on the Tenancy Schedule was an error". (3) During the conference call on 20 August 2018, Mr Pandher had told Mr Jandu and Mr Singh that the tenants were not paying the 10% rental increase that had been due in February 2018. In his oral closing, Mr Clarke emphasised: (a) that he was not inviting the court to draw any adverse inference from Ahuja's assertion of litigation privilege but rather from its failure to call its former solicitor as a witness when it is implicit in Ahuja's case that that solicitor was equally misled by the lease term representation, and (b) that Mr Jandu's evidence would have gone to the heart of an issue advanced by Ahuja yet, having received undisclosed information not apparent from the conveyancing file, Ahuja has elected not to call him as a witness.

66. Whilst I have borne the observations of Cockerill J in Magdeev v Tsvetkov firmly in mind, I am satisfied that this is one of those perhaps rare cases where it is appropriate to draw inferences adverse to Ahuja from its failure to call Mr Jandu as a witness. Indeed, I can conceive of few cases where it would be more appropriate to do so. However, I do not consider that it is appropriate for the court to go so far in the drawing of adverse inferences as Mr Clarke would invite me to go. I do not consider that it would be appropriate for me to infer that Mr Jandu had actually read any of the ground floor leases or that he had told Mr Singh about them. That would be difficult to reconcile with Mr Jandu's acceptance of the lease term representation in the schedule to the contract when (on this hypothesis) he would have known that it was incorrect. But I do consider that it is appropriate to draw the inference that Mr Singh had instructed Mr Jandu not to trouble to consider the terms of the leases (or to charge Ahuja for doing so) because Mr Singh was concerned only with the rental income from the leases and not with their length. That attitude on the part of Mr Singh is consistent with: (1) other documents in the case ... all of which suggest that Mr

Sohal appreciated that the length of the ground floor leases was no interest to Mr Singh; (2) the commercial realities of the case, notably the common perception (shared by Mr and Mrs Pandher, Mr Sohal and Mr Singh, and spoken to by Miss Morris) that, irrespective of the length of their tenancies, the individuals who were the tenants of the retail units at the property would remain in occupation for as long as they were continuing to trade profitably whilst, if they ceased to do so, it would not be worthwhile seeking to pursue them, or difficult to find alternative tenants; and (3) the fact that Stradbrooms did not see fit to scan the leases until they returned them to Chhokar & Co on 13 April 2016. Mr Holland submits that this inference would be inconsistent with Stradbrooms' report on title, but I do not discern any necessary inconsistency ..."

The law to be applied to determining whether there has been an express or implied representation – the law governing a claim for deceit under Cayman Islands law

The basic elements

278. The basic elements of a claim for deceit as a matter of Cayman Islands law are largely common ground. The basic ingredients of the tort of deceit were summarised in England by Mr Justice Henshaw in *Ivy Technology Ltd v Martin & Bell* [2022] EWHC 1218 (Comm) (*Ivy Technology*) at [338] (whose judgment was referred to in the recent decision of this Court in *Carroll & Carroll v Harbeck & Cayman Islands Sotheby's International Realty*, unreported, 17 July 2023 at footnote 37) as follows: (a) the defendant made a false representation to the claimant; (b) the defendant knew the representation to be false, or had no belief in its truth, or was reckless as to whether it was true or false; (c) the defendant intended the claimant to rely on the representations; (d) the claimant did rely on the representation and as a result the claimant has suffered loss and damage. I elaborate below briefly on each of these requirements, based on the parties' submissions and consider two points in dispute.

Determining whether a representation has been made

279. When determining whether a representation has been made and, if so, its meaning, the Court adopts an objective approach. That is to say, the existence and meaning of a representation

is ascertained by construing the statement in question and determining what a reasonable person in the position and with the known characteristics of the actual representee would have understood it to mean. In *Ivy Technology* Henshaw J observed at [340] that:

“Determining whether any, and if so what, representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee”.

280. The Court performs a similar task when determining the existence and meaning of implied representations except that the Court has *“to consider what a reasonable person would have inferred was being implicitly represented by the representor’s words and conduct in their context”* (*IFE Fund SA v Goldman Sachs International* [2007] 1 Lloyd’s Rep. 264 (*IFE*) at [50]). In *Marme Inversiones 2007 SL v NatWest Markets Plc* [2019] EWHC 366 (Comm) (*Marme*) Picken J at [123] set out the following principles from the authorities concerning implied representations:

- “(1) First, it is possible for a representation to be made expressly or impliedly through words or conduct. For a representation to be implied, silence or mere assumption is not usually enough as there is no general duty of disclosure. It is necessary to view the words or conduct objectively to determine whether an implied representation has been made, although the natural assumptions of the reasonable representee will be helpful in assessing whether an implied representation has been made through the conduct of the representor.*
- (2). Secondly, whether or not a representation is implied is ultimately a question of fact to be determined in the circumstances of the particular case: see also *Deutsche Bank AG v Unitech Global Ltd* [2013] EWCA Civ 1372 per Longmore LJ at [25].*
- (3). Thirdly, more may be required, in terms of words or conduct, for a representation which is wide in meaning or complex to be implied.*
- (4). Fourthly, it is less likely that a representation that is vague, uncertain or ambiguous would be objectively understood to have been made from words or conduct.”*

Widely phrased, unclear and ambiguous statements

281. Paragraphs (3) and (4) from the judgment of Mr Justice Picken in *Marme* just quoted deal with the position in relation to complex, vague, uncertain or ambiguous representations. The Court's approach to cases where the representations relied on can properly be said to be complex, vague, uncertain or ambiguous can be seen in the judgment of Mr Justice Christopher Clarke (as he then was) in *In Raiffeisen Zentralbank Österreich AG v The Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) (**Raiffeisen**) and *Standard Chartered Bank v Ceylon Petroleum Corp* [2011] EWHC 1785 (Comm) (**SCB**).
282. In *Raiffeisen* the claimant (RZB) alleged that it had been induced into participating in a syndicated loan to an SPV by misrepresentations made by the defendant bank (RBS). The SPV had been incorporated by RBS and capitalised by it with 3.5% equity and 96.5% debt. RZB contended that it had been induced into participating in the loan by a number of implied representations, including a representation that RBS's equity was "*at risk, in that there was no support for the returns thereon and the repayment of capital other than as identified in the transactional materials*". Christopher Clarke J held (at [111]) that the alleged representation was too vague and uncertain to be implied:

"The meaning of 'no support' is, in any event, unclear. If, as RZB contends, it means that there was no support of any kind it is extremely wide. The representation would be falsified if RBS had any arrangement with anyone which would or might provide it with any compensation if the value of the shares fell or was not realised or any particular rate of return was not achieved. If the scope of the implied representation is to be narrowed the ambit of the reduction is not clear. 'No support' could signify no contractual undertaking or something different. If it means the former... there would have been no misrepresentation. This elasticity of possible meaning is a factor against regarding the representation that there was 'no support' as necessarily implied."

283. In *Standard Chartered* at [562] one of the reasons why Hamblen J rejected a suggestion that there was an implied representation that a hedge was a "*true hedge*" or part of a "*proper hedging strategy*" was because of its vagueness and uncertainty. He said that (my underlining) "[t]he Term Sheets do not refer to any of these matters and they are vague, imprecise and inherently implausible statements for a selling bank to make. The vague and uncertain nature of the statements mean that they are ill-suited to constitute actionable statements. What, for example, is meant by a 'true hedge', a 'proper hedging strategy' and

how, precisely, is a bank meant to judge whether the benefits for its counterparty of any transaction outweigh the risks? A reasonable person would not have understood that [Standard Chartered] was making representations in such vague and ill-defined terms.”

Deceit - the need to establish the meaning that the representor subjectively intended to convey

284. In order to establish deceit, a plaintiff must demonstrate the meaning that the representor subjectively intended to convey by the representation. As explained in *Ivy Technology* by Henshaw J at [350]: “*The representor must, however, understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement: Vald Nielsen § 137. It is also necessary “to show that the representor intended his statement to be understood by the representee in the sense in which it was false” (Goose v Wilson Sandford & Co [2001] Lloyd’s Rep PN 189 § 41 per Morritt LJ).*” Therefore, in the case of an implied misrepresentation it is necessary to show that the representor subjectively intended to convey the implied representation in the sense that it was understood and relied on by the representee.

Inducement – the representor’s state of mind and intention

285. Actionable fraud involves an intention on the part of the representor to induce the representee to act as he did (*Ivy Technology* at [361]). But it is not necessary for the representor to intend to induce the specific action taken by the representee in reliance on the misrepresentation (*Mead v Babington* [2007] EWCA Civ 518). It is only necessary that there should be an intention that the representation should be acted on.

286. It is necessary for the statement relied on to have the character of a statement upon which the representee was intended, and entitled, to rely. In some cases, for example, the statement in question may have been accompanied by other statements by way of qualification or explanation which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement or was saying

that no reliance can be placed upon it. Thus the representor may qualify what might otherwise have been an outright statement of fact by saying that it is only a statement of belief, that it may not be accurate, that he has not verified its accuracy or completeness, or that it is not to be relied on (see *Vald. Nielsen* at [138]).

Was the representee induced? – the representee’s state of mind – reliance and the evidential presumption

287. For a plaintiff to establish reliance they must show that they understood the representation to have been made, including in the sense alleged (see *Marme* at [281]-[286]), and that he did, in fact, rely on the representation in the sense intended by the representor.

288. While the onus of proof is on the representee to prove inducement, he may have the benefit of an evidential presumption. If the representee can show that the representation was actively present in his mind when he made the decision to enter into the transaction and that the representation is material in the sense that it would probably play a part in the decision of a reasonable person to enter into a contract, there is an evidential presumption (of fact) that the representation induced the representee (*Marme* at [291]) (the requirement of awareness precedes the presumption of inducement). Mr Jafar argues that the presumption applies in this case.

289. When the presumption applies it is then for the representor to seek to rebut the presumption (but this has been said to be a difficult task). Ultimately, the Court must determine on the facts, by applying the presumption if it applies, whether the representee was induced by the representation on the basis of all the evidence available to it (*Ivy Technology* at [366] and [367]) (note that if, having heard the evidence and applied the presumption, the Court cannot make up its mind on inducement, it is not entitled to decide as a matter of law to give the representee the benefit of the doubt: “*that would be contrary to the law as I conceive it to be ... which requires the representee to prove the inducement albeit with the assistance of a presumption that ‘will be very difficult to rebut’*” (*NIVE v Rembrandt Enterprises Inc* [2019] EWCA Civ 596 (*NIVE*) at [45], see further below).

290. Mr Justice Jacobs (as he then was) summarised the position in *Vald Nielsen* as follows (my underlining):

152. A representee must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it, and that, having that understanding, he relied on it: Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland [2010] EWHC 1392 (Comm) at [87]. This requirement is of particular significance in the case of implied representations.

153. In *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises* [2019] EWCA Civ 596, the court held at [43] that, in a case of deceit "there is an evidential presumption of fact (not law) that a representee will have been induced by a fraudulent misrepresentation intended to cause him to enter the contract and that the inference will be "very difficult to rebut" to use the words of Lord Clarke (at [43])."

154. While the onus of proof is on the representee to prove inducement, he has the benefit of that evidential presumption, and he only needs to show that the misrepresentation was "actively present in his mind" when he made the decision to enter into the transaction (BV Nederlandse at [45]). The phrase "actively present in his mind" is taken from the judgment of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch. D 459, 483 where he explained the principle as follows:

"But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference".

155. It is sufficient for the misrepresentation to be an inducing cause of the claimant entering into the transaction on the terms that he did. It is not necessary for it to be the sole cause (Hayward v Zurich at [33]).

156. There were differing submissions as to the necessary weight of impact of an inducing representation. The Defendants, relying on *Dadourian v Simms* [2009] EWCA Civ 169; [2009] 1 Lloyd's Rep 601, submitted that the misrepresentation must play a "real and substantial part", albeit not decisive, in inducing the representee to act. The Claimants, relying upon a decision of the High Court of Australia referred to in [33] of Hayward, submitted that the representation need only play some part, even if only a minor part, in contributing to the course of action.

157. As Lord Clarke indicates in [36] of *Hayward*, in the context of his discussion as to what is required to rebut the presumption of inducement, "the authorities in this area are not entirely consistent as to "whether what must be proved is that the misrepresentation played "no part at all" or that it did not play a "determinative part", or that it did not play a "real and substantial part"". This issue was not directly addressed in *BV Nederlandse*, although Longmore LJ did refer to the relevant part of Lord Clarke's judgment: see [42]. The inducement issue in *BV Nederlandse* was determined in the claimant's favour because the representation was "one of the reasons why the representee made the relevant contract": see [49]. It seems to me that this – combined with the statements that "it is very difficult to rebut the presumption" – indicates that it is not appropriate to try to measure the precise weight of a representation **where it is one of the reasons why a representee has entered a contract**. If the representation is of no real significance, then a court will decline to hold that it was one of the reasons which induced the contract. If, however, it was a matter of significance, the decision will be the other way."

291. The nature and effect of this presumption was described by Longmore LJ in the Court of Appeal in *NIVE* at [25] in the following terms (my underlining):

"...if a representor fraudulently intends his words to be taken in a certain sense and the representee understands them in that sense and enters into a contract, it is likely to be inferred that the representee was induced to enter into the contract on the faith of the representor's statement. It is fair to call this a presumption of inducement. But it is a presumption of fact which can be rebutted, not a presumption of law which cannot be rebutted or can only be rebutted in a particular way. The tribunal of fact has to make up its mind on the question whether the representee was induced by the representation on the basis of all the evidence available to it. If a claimant does not give evidence, or if he does give evidence which is equivocal, that is part of the overall picture but is not conclusive. It also follows that the legal burden of proving inducement/reliance is on the representee and the fact that the court may start by making a presumption of fact in his favour does not change that position."

292. That presumption was also described as follows by Mr Justice Briggs (as he then was) in *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch) at [241] (my underlining).

"[In] a case where fraudulent misrepresentations have been deliberately made with a view... improperly to influence the outcome of the negotiation of the contract... by an experienced player in the relevant market, **there is the most powerful inference that the fraudsman achieved his objective, at least to the limited extent required by the law,**

namely that his fraud was actively in the mind of the recipient when the contract came to be made.”

293. Accordingly, for a claim in deceit to succeed the plaintiff must have given some contemporaneous conscious thought to the fact that the alleged representations were being impliedly made. The core question is what was the state of the plaintiff’s (representee’s) mind, whether his mind was impacted or affected by the misstatement and whether such impact was at least in part the cause of what he did (it was a cause or one of the causes but not necessarily the only cause). Was the representation one of the reasons why the representee decided to act as he did (to enter the relevant contract)? Where the representation can be characterised as being of no real significance the Court will (or at least is likely depending on the facts, to) decline to hold that it was one of the reasons which induced the contract:

- (a). *“It is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee. It follows that if the misrepresentation did not affect the representee’s mind, because he was unaware that it had been made, or because he was not influenced by it, he has no remedy”* (Chitty on Contracts 34th ed. at [9-041]) (my underlining).
- (b). *“The representee’s state of mind (inducement) when changing his position after receiving the representation is relevant in all cases of misrepresentation...He must establish that the misrepresentation operated on his mind and caused him, or helped to cause him, to act as he did”* (Spencer & Bower and Handley: Actionable Misrepresentation, 5th ed., at [4.12]) (my underlining).
- (c). It is not sufficient for a plaintiff to establish that he would have acted differently if he had known the truth. If this were so a plaintiff who gave no thought to a representation, or did not understand it to have been made, might be entitled to recover (*Raiffeisen* at [187]). In *Foster v Action Aviation Ltd* [2013] EWHC 2439 (Comm) at [101] Hamblen J (as he then was) held that *“Unless one understands that a representation is being made it is difficult to see how it can be said to have been relied on. Mr Foster’s*

evidence was that had he known at the time that the factory had financial issues he would not have signed the contract. However, the case is one of positive representation, not non-disclosure” (underlining added).

294. If the representee in fact knew that the representation was false in the sense pleaded his claim must fail because in those circumstances the representee cannot have been induced by, or have acted in reliance upon, the statement (and in that situation the representee would not have been deceived).
295. While inducement and reliance require conscious awareness the Court may be prepared to take a pragmatic, real-world, view of whether there was an inducement and reliance on the facts, as is demonstrated by the judgment of Mr Justice Calver in *E D & F Man Capital Markets Limited v Come Harvest Holdings Limited, Mega Wealth International Trading Ltd & Others* [2022] EWHC 229 (Comm) at [445] (my underlining):

“As to reliance, Mr Riley [plaintiff] does not say that he gave any conscious thought to the question of whether the first to fourth defendants were making an express or implied representation to him in the specific terms that have been pleaded. However, this is not a case which requires a complex analysis of reliance. It was clear from his evidence before me that Mr Riley considered the defendants to be making representations that the goods they were selling were genuine. This would have been actively present in his mind. That is sufficient. Furthermore, the 'representation' actively present in the claimant's mind need not correspond precisely with what the court subsequently decides that the relevant representation(s) comprised. ... in the case of a representation that is to be implied because it 'goes without saying', it would be counter-intuitive to require anything more than this.”

The status and relevance of the helpful test – one factor to be taken into account when deciding whether a representation has been made

296. Mr Jafar relied, in relation the Court’s approach to determining what a reasonable person would have inferred was being impliedly represented by the representee, on what has been described in the authorities as the “*helpful test*.” In England and Wales the Court of Appeal in *Property Alliance Group Ltd v Royal Bank of Scotland* [2018] 1 WLR 3529 (***Property Alliance***) at [132] approved what Mr Justice Colman had said in *Geest Plc v Fyffes Plc* [1999] 1 All E.R. (Comm) 672 at 638B. Mr Justice Colman had said that (my underlining)

“In evaluating the effect of the [representor’s] conduct a helpful test is whether, having regard to the [representor’s] conduct in such circumstances, a reasonable [representee] would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it.”

297. As the Fund Parties pointed out, the relevance and application of the helpful test have recently been the subject of judicial scrutiny and comment. The Fund Parties argued that to the extent that it was suggested that an implied representation could be found solely by applying the helpful test or on the basis of the natural assumptions of the representee alone, this was wrong in law. I agree.
298. The Fund Parties noted that a submission in these terms had been rejected by Picken J in *Marme* at [119] and by Cockerill J in *Loreley Financing (Jersey) No. 30 Limited v Credit Suisse Securities (Europe) Limited* [2023] EWHC 2759 (Comm) (***Loreley***) at [299]-[306] (my underlining):

“299. Central to the debate before me was the significance of the so called “helpful test” enunciated by Colman J in Geest plc v Fyffes [1999] 1 All ER (Comm) 672 at 683B. L30 contended that it was highly significant in three places. First it contended that it per se justified the conclusion that some of the implied representations had been made (C13 and C14) and that it was an element (alongside prior authority) in finding representations C10-12. Secondly it contended that the test had significance at the reliance stage. Thirdly it was said to have relevance at the stage of finding fraud; L30 argued that knowledge that the CDO group was selling CDOs linked to the credit risk of CS-securitised RMBS, plus the helpful test, was enough to lead to a conclusion that implied representations C10-14 and D20 had been made.

...

301. *That test was considered and expressly approved in the case of [Property Alliance], having been followed on numerous occasions at first instance, most notably perhaps in IFE and Raiffeisen...*
302. *Both these citations, when given in full, make clear the problems which face L30 in its approach to the “helpful test”. The first problem is that, as is clear from these citations, the test has thus far been used simply at the stage of deciding what if any representations have been made. The second problem is that even in that context it has not been given (by Colman J, whose use of language is always*

scrupulous) or adopted as “the test” for determining the existence of an implied representation:

- i) Colman J was careful to say that this is part of “All the circumstances ...including in particular ... (b) the extent of the beneficiary’s conduct”;
 - ii) The Court of Appeal in [Property Alliance] gave the immediate rider as to the need for clear words or conduct from which the relevant representation can be implied.
303. The necessity to keep this latter part of the equation (the need for clear words or conduct) in mind is illustrated by the cautions in the other authorities. Those as to context have already been given. But in addition:
- i) The Courts should be cautious, such that implied representations should not be “too easily found”: see Raiffeisen [85] quoting Rix J in Royscot Trust Ltd v Rogerson [1991] 2 QB 297...
 - ii) The more vague, uncertain, imprecise or “elastic” the meaning of the implied representation, the less likely it is that it will be implied and the more that would be required in terms of words or conduct: see Raiffeisen [111]; Innovatorone [911]; Ceylon Petroleum [562]; Marme [123(3)-(4)] and [139]; Pisante v Logothetis [2022] EWHC 161 (Comm) [6(4)(b)].
304. That need for balance is required by the underlying position as a matter of law – there is generally no obligation to disclose information, as explained in Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 QB 665 at 798-799
305. As Christopher Clarke J makes clear in Raiffeisen, the boundary between pure omission and misrepresentation must be carefully distinguished. The helpful test, stripped of its proper context erodes that distinction.
306. Therefore to the extent that L30 contends that representations can be found on the basis of the “helpful test” alone, I reject that argument. The test is that stated in IFE: what a reasonable person would have inferred was being implicitly represented by the representor’s words and conduct in the context in which they were used. The “helpful test” is no more than a “helpful test” in relation to one of the inputs into the overall decision.

299. The helpful test set out by Colman J in *Geest* is or may be a factor in one element of the decision as to the existence of the representation. It has no role to play at the inducement stage. The position was analysed, to my mind persuasively, by Mrs Justice Cockerill in *Loreley* in the following passages of her judgment:

“385. I will start with what Leeds says, or attempts to say. At the heart of it is what I saw as a necessary and logical bridge between the representation and inducement (Leeds [67], [70]). The starting point – which is not controversial – is that representation has to cause inducement (see Lord Selborne in Smith v Chadwick 9 App (1884) Cas 187 “it must have produced in his mind an erroneous belief, influencing his conduct.”) and that causative link has to be at least capable of being discerned.

386. That bridge consequently has to exist in all cases of representation: express, implied, by words and by conduct or any combination thereof (Leeds [65]). It is sometimes referred to as “understanding” or “conscious thought” or “active presence”; or it may be referred to as “awareness” (Leeds [57]). The formulation of “active presence” is classical – it dates back to the judgment of Bowen LJ in Edgington v Fitzmaurice ...

390. As to the presumption, my conclusion remains as stated in Leeds at [140] that logically the requirement of awareness precedes the presumption of inducement...

391. Dealing first with the counterfactual of truth [The question what would the claimant have done had it known the true position?] pure and simple, I consider the arguments that such a test can stand in for the relevant test of understanding/awareness are doomed to failure. The counterfactual of truth is not without purpose: it can be used as (another) helpful test applicable in some cases. For example, particularly where there is some doubt about whether a representation has been received or understood, the counterfactual of truth can provide some evidence which is relevant to deciding the question of whether there has been receipt or understanding. So it can be helpful in some cases. That is effectively the point being made by Flaux J in Parabola Investments Ltd v Browallia Cal Ltd [2009] EWHC 901 (Comm) [106].]: “where the evidence is that, had the claimant known the true position, he would have acted differently, that in itself demonstrates that the fraudulent misrepresentation, which by definition does not reveal the true position, “was actively present to the mind” of the victim of the fraud to a sufficient extent to establish inducement.”

392. But it only works when there are not competing causes for the action; and particularly the possibility – of huge import in cases such as this one where representations of honesty are posited – that the representee’s own pre-existing (mistaken) assumption may be operating. Christopher Clarke J in Raiffeisen at [187] makes clear that the counterfactual of truth is not necessary and:

“may not be sufficient, either. If it were, a claimant who gave no thought to any representation, or did not understand it to have been made, might be entitled to recover.”

....

396. *Overall I deprecate the tendency to seek a single universally applicable test in a situation of this sort. In the case of implied representations one is discerning something on the basis of anything from simple conduct to a combination of actual words and conduct against a background of considerable complexity and sophistication. Ultimately, as here, in complex situations it may well be that as a result a clear representation cannot be spelled out; and it is thus that this debate can become a little artificial, because understanding/awareness is so often falling to be considered when there is no representation. But even so one cannot shut the door to the possibility (as in PAG); and in those cases an open question test will be as defective in a different way as the counterfactual of truth. In addition this search for a single test creates an extra formal stage within the process of analysing misrepresentation and hence adds to the already sufficient complexity.*

397. *I therefore maintain the view that, like the question of deciding whether a representation was made, the question is a nuanced one; and that the court and the parties are better focussing their minds on the need for the bridge (however expressed) and the reason why it is necessary than exhausting themselves in the search of the elusive single perfect test.*

398. *I should here deal with the deployment of Geest by L30. At some points this appeared to be the central plank in the argument of L30. Mr Lord submitted that if the representation was being decided via Geest it was illogical or incoherent for the same test not to be deployed at the understanding level. Obviously that does not work on the approach I have taken because I consider that Geest is or may be a factor in one element of the decision as to the existence of the representation; what it is emphatically not is “the test”. But secondly even if Geest were “the test” at the stage of finding a representation, this approach of engaging it again at the inducement stage would collapse the stages of finding an operative misrepresentation. Perhaps inspired by reliance on the Spice Girls case, two [stages] become one. But having distinct stages is not incoherent – it is disciplined, and more significantly it is part of the gatekeeping function of the law because absent these stages non-disclosure becomes misrepresentation. This is of course legal heresy.*

...

400. *Mr Lord also suggested that this approach of decoupling the test from Geest created a rogue’s charter, because a representation could be found, and then the second stage could not be surmounted. However there is no unfairness in not providing a remedy in respect of a representation which has not been received or comprehended. The greater unfairness is to provide a remedy when the standard requirements of the cause of action are not satisfied.”*

300. Mrs Justice Cockerill’s point is that where on the evidence there are no competing reasons for the representee’s decision to enter into the contract (or otherwise act) and it can be shown that the representee (plaintiff) – or a reasonable representee in his position – would have acted differently had he known the true position (by applying the counterfactual of truth), then the Court may well find that the fraudulent misrepresentation was actively present to his mind and that the inducement requirement is established. But where the evidence shows that there are or maybe competing reasons, in particular that the representee’s own pre-existing (and mistaken) assumptions may have been operating to affect his decision making, the counterfactual of truth cannot on its own be sufficient. The representee’s assumptions may have been the reason for his decision.
301. Accordingly, as the Fund Parties submitted, it is not sufficient in order to establish that an implied representation was made for the plaintiff to show that a reasonable representee would “*naturally assume*” that the true state of affairs did not exist. A representee’s own mistaken assumptions about a state of affairs, however reasonable those assumptions might be, are not the same as, and must not be conflated with, an implied statement having been made about that state of affairs. Only the latter can form the basis of a claim in deceit because an actionable deceit is founded on actual and dishonest communication of a state of affairs between two persons.

Mr Jafar’s submissions in outline

302. Mr Jafar focussed his closing submissions on two main issues. First, whether the Overarching Message could properly be implied from the Statements and the Express Representations and secondly on whether Mr Jafar had been induced to rely on and did rely on the Overarching Message and the Reinvestment Representation.
303. With respect to the first issue, Mr Jafar submitted that the Overarching Message was simply a distillation of the most pertinent express representations that were made to Mr Jafar and which were pleaded at [20] of the RRASOC. There were three main limbs of the Overarching Message. First, the implied assurance as to financial soundness, secondly the implied

assurance as to proper management or governance and thirdly the implied identification of AGHF and Fund IV as being Abraaj entities covered by these assurances. Mr Jafar said that when a realistic approach was taken to the interpreting the Overarching Message it was not ambiguous or convoluted. If Mr Jafar had understood, as he submitted was the case, that there had been a representation of such soundness (and that representation had been intended and objectively had been a representation that a reasonable representee would have understood to have been made), then it was clear that an implied representation was made that hopelessly false.

304. The first limb (that Mr Naqvi impliedly represented that the finances of the Abraaj entities were essentially sound and proper) was drawn directly from one of the Statements, namely that set out at [20(9)] of the RRASOC (*The Abraaj Group was financially sound, but was simply facing short-term cash/liquidity issues over the year end to address in particular the Healthcare Fund's problem with its investors*) and the Express Representations (in particular the First Express Representation that *The Abraaj Group was not in any underlying financial trouble, it was simply facing short-term liquidity issues over the year*) and the Third Express Representation (that *Mr. Naqvi believed, and had a reasonable basis for his belief, that the borrower would be able to repay the money to Mr. Jafar before the end of January 2018 or shortly thereafter*). Mr Jafar submitted that the statement that entities were “*financially sound*” had an unambiguous meaning entailing that their financial affairs were not substantially worse than they should be. That unequivocal meaning was bolstered by Mr Naqvi’s express statements – in addition to his representation of financial soundness – to the effect that the cash issues being experienced by AGHF and Fund IV were short-term. Mr Naqvi could only have possibly intended to convey that all the Abraaj entities were financially sound when he said words to that effect and Mr Jafar could only possibly have understood those words in the clear and unequivocal sense in which they were intended.

305. As regards the second limb (that Mr Naqvi impliedly represented that the management or – which I take to mean and – governance of the Abraaj entities were essentially sound and proper), it was obviously the implicit premise of each of Mr Naqvi’s Statements that there was such soundness. Mr Jafar argued that Mr Naqvi must have intended to refer to the

Freshfields Opinion to explain that the Funds were being managed or governed properly (because he was positively denying an attack by the limited partners on their management and governance and that was the sense in which Mr Jafar had understood the reference). This positive representation(s) taken together with the absence of an explanation that the Abraaj entities via their leadership had, in reality, recklessly been transferring monies between the Funds and other Abraaj entities so as to meet working capital demands, would indicate to any reasonable person that the Abraaj entities were subject to proper management and governance.

306. The inclusion of the reference to “*substantially*” did not make the Overarching Message impermissibly vague or imprecise. There could be no realistic debate that entities that have suffered consistent major cash shortfalls and which were being misused in a Ponzi scheme can be described as not being essentially sound.
307. As regards the third limb, it was clear that Mr Naqvi intended to refer to AGHF when making the Express Representations (and therefore that it was tied to and covered by the Implied Representations derived from them) because he had mentioned it by name. While Fund IV had not been mentioned by name, it was plainly the other Fund to which Mr Naqvi was referring (or, in any event, for which he was seeking to raise monies) given that Fund IV had faced the same kinds of issues as AGHF had. It had received queries from limited partners; was required to make payments totalling US\$150 million by January 2018 and faced an audit for the year end of 30 December 2017. Mr Jafar submitted that there could be no serious dispute that monies were being raised for the purposes of the audit, which would plainly be scrutinised by limited partners (he referred to Mr Lakhani's email of 11 December 2017).
308. It is worth recording that as regards the Reinvestment Representation Mr Jafar argued that it was a straightforward factual representation, namely that Mr Naqvi had been given an assurance of reinvestment by the end of January 2018. There was no conceivable ambiguity to this.

309. As regards inducement/reliance, Mr Jafar submitted that the essential question was whether the Reinvestment Representation and the Overarching Message were actively in Mr Jafar's mind. He argued that while, since the judgment of Mrs Justice Cockerill in *Leeds City Council and others v Barclays Bank plc and another* [2021] EWHC 363 (Comm) it had become increasingly common to see defendants dispute whether a deceitful representation was actively in the mind of the recipient, the law did not encourage or permit an artificial approach to awareness. The Fund Parties were wrong to argue that what was in Mr Jafar's mind at the time (20-28 December 2017) must correspond word for word with the existing pleading. As Picken J had said in *Marme* (at [286]) "*the precise formulation of those representations may not correspond with what the court subsequently decides that those representations comprised*" and Mr Jafar relied on Mr Justice Calver's summary of the position in *E D & F Man Capital Markets Limited* at [445], which I have quoted above.
310. Mr Jafar noted that the Fund Parties had made much of the speed with which he had agreed to part with large sums of money but that did not negative reliance. Indeed, he said, it could be seen as indicative of the fact that he had been persuaded by Mr Naqvi's story about the urgent need for money, and that it was because of the things he had been told that he acted as he did. Mr Jafar submitted that the Fund Parties' submissions on this point invited the Court to exercise a (negative) judgment on the commercial prudence of the transactions he had entered into and to conclude that his evidence about it must be disingenuous. But this was illegitimate. He was a man of substantial means and a seasoned businessman who, as he had repeatedly said in his evidence, made a rapid commercial judgment and taken a rapid commercial view, as he was capable of doing and frequently did. Mr Jafar submitted that lawyers in court rooms, considering matters with hindsight, may form views about commercial prudence which simply did not reflect how businessmen thought or operated. Mr Jafar noted that the authorities in the context of contractual construction urged judges not to apply their own conceptions of what was or was not commercially prudent. He referred to *dicta* and extra-judicial comments to reinforce this point. Mr Jafar referred to what Neuberger LJ had said in *Skanska Rashleigh Weatherfoil Ltd v. Somerfield Stores Ltd* [2006] EWCA Civ 1732 at [22] and to Lord Neuberger's speech given to the Banking Services and Finance Law Association Conference in Queensland on 11 August 2014 (in which he had

said that there were two practical reasons why judges should exclude their own notions and considerations of commercial common sense, namely that, first a judge's idea of commercial common sense may be thought by some to be about as reliable as a businessman's idea of legal principle, and secondly, the judicial view of commercial common sense in a particular case is almost bound to be influenced by the facts as they have transpired since the contract, which should plainly be irrelevant).

311. Mr Jafar submitted that the Fund Parties had not properly challenged his evidence at [41]-[43] of Jafar 1 (quoted above). Mr Jafar's beliefs and understandings as set out therein (regarding in particular his belief that the Abraaj entities had a formidable global reputation as large, successful and legitimate organisations) were integral elements of his case on reliance. It was precisely because he had believed what he was told (in the context of his knowledge of the Abraaj entities acquired from his extensive business experience) that he relied on what Mr Naqvi had represented.
312. Mr Jafar noted that Mr Nerguizian had said in cross-examination that "*at no moment*" did he consider that Mr Jafar would not be repaid (Day 13, page 53) but it was clear that the reason that it did not occur to Mr Nerguizian that there would not be repayment was because he (like Mr Jafar) had believed what Mr Naqvi had said. Mr Nerguizian gave answers during his cross-examination which clearly confirmed that a belief in what Mr Naqvi said was central to his reliance.
313. Mr Jafar argued that the authorities made it clear that a party induced by deceit may rely on multiple factors and that the Court was not required to disentangle these. The Court needed only to find that the representations were active in the mind and played some role. A misrepresentation need not be the sole or even main inducement. It simply had to be a substantial factor and it need not play a "*decisive part in inducing the claimant to have entered into the transaction*". As Jacobs J had said in *Vald Nielsen* at [157] "*It is not appropriate to try to measure the precise weight of a representation where it is one of the reasons why a representee has entered a contract.*" Mr Jafar submitted that this threshold had been more than met by his evidence.

314. During his oral submissions, I asked Lord Falconer to identify his best case, that is the case whose facts and reasoning he considered to be closest to the present case or otherwise supportive of Mr Jafar's position in this case. He picked the decision of Mr Justice Jacobs in *Vald Nielsen* (see Day 26, pages 23-26). He said that it had considerable similarities to this case.
315. In *Vald Nielsen* a company's managers were held liable in deceit to the company's former parent company (and another shareholder) for having given false information in the course of a management buy-out which misled the two claimants into selling when they did and at an unduly low price. When the company was experiencing financial difficulties, including in respect of its indebtedness to a bank, the parent company sold its 60% shareholding for £5.2 million in July 2009 to a new company owned by the managers and a private equity house (*LMS*). The second claimant, another shareholder, rolled over its 12.4% shareholding into the new company. The parent's owners came to believe that they had been misled in the sale negotiations by information the management had given them as to the company's current and forecast performance. There had been a competing potential purchaser (N). In March 2009, the management gave N a financial overview which indicated that the company was behind budget and its performance would decline. In April (the *April Email*), the second defendant (Mr Bennett) emailed the parent (acting by Mr Johnsen) the financial overview, saying that the same figures had been given to LMS and N. In June (the *June Email*), Mr Bennett emailed to Mr Johnsen a PowerPoint presentation containing forecasts, saying that LMS had not been provided with any different information. The claimants alleged that the managers had known that the company's performance was better than represented. The parent assigned its claims to the first claimant (the assignments were signed in January 2011 but backdated to 19 November 2010).
316. Mr Justice Jacobs held that in the April email the managers had falsely represented that the figures in the financial overview represented their forecast of the company's financial position, that the projections in the financial overview were those which had been provided to LMS by the management and that those were the projections which had been used by LMS in deciding upon its offer. The second defendant had known he was making

deliberately false statements. He had wanted the LMS bid to succeed and the lies improved the prospect of its success. In the June email, the managers had falsely represented that the forecast in the presentation represented the management's genuine forecast of the company's financial position and that they had not provided LMS with any information which the sellers did not have. The managers had known that deliberately false statements were being made, telling the truth would have risked the parent's willingness to accept the LMS offer and risked higher offers from N. All the defendants were responsible for the deceit arising from the emails. Although the second defendant had sent the emails, the other defendants had manifestly approved and adopted the presentations. Further, the witness evidence and contemporaneous documentation showed that the representations in the April email and the presentation were an inducing cause of the parent entering into the transaction with LMS on the terms it did.

317. Mr Justice Jacobs described the relevant email exchange as follows:

160. At 9.41am on 20 April 2009 Mr. Johnsen e-mailed Mr. Bennett. The subject-line was "Re: Latest budget".

*"Could you forward the latest budgets for Updata UK for 2008/9, 2009/10 and 2010/11. Some adjustments need to [have] been made regarding the changes that are mentioned in the letter from LMS.
Thanks in advance.*

PS. I would very much like to use them today if possible".

161. At 3.05pm, Mr. Bennett replied. He attached 6 pages of February 2009 management accounts and the Financial Overview. The text of his e-mail was:

"The numbers used by LMS were taken from the February Management Accounts. The projections used were the same that we presented to Helge Homann and Jens in March. Please see attached. I do not know what adjustments LMS have made internally."

318. Jacobs J decided that read in context (in particular that the April Email was a response to a specific request sent by another email), the April Email contained a number of factual representations that were material (my underlining):

171. This is a case where express representations were made in a particular e-mail. The question of what representations of fact were made is in my view to be answered by construing that e-mail in the context in which it was made, and interpreting the statements objectively according to the impact that they might be expected to have on a reasonable representee in the position and with the known characteristics of Mr. Johnsen...

...

176. ...there is in my judgment no difficulty at all in concluding that there was a representation in the terms pleaded in paragraph 48 (2) of the Re-Amended Particulars of Claim, namely, that "the figures in the Financial Overview represented the UK management's genuine (and current) forecast of Updata UK's financial position". Indeed, this is a classic case where, as discussed in Clerk & Lindsell paragraph 18-13, a party provides a representation of his opinion as to what will happen in the future, and the law has no difficulty in saying that the opinion must be honestly entertained at the time that it is made. For reasons explained hereafter, I consider that this representation alone is sufficient for the purposes of the Claimants' case based upon deceit in relation to the 20 April e-mail. Nevertheless, I will address the other representations which are set out in paragraph 48 of the Re-Amended Particulars of Claim.

177. Paragraph 48(1) of the Re-Amended Particulars of Claim pleads a representation that "the UK management had a reasonable basis for believing the figures included in the Financial Overview to be correct". The formulation of this representation can be criticised because, in the context of a forecast as to what results will be in the future, it is inappropriate to say that the figures are "correct"; at least if "correct" means that what will actually happen in the future. However, the Claimants did not contend that this pleaded representation was to be understood in that rather literal way. Rather, this pleading is intended to reflect the type of representation discussed in paragraph 18-14 of Clerk & Lindsell; namely a representation that by expressing an opinion (here as to the future results), the representor impliedly states that he believes that facts exist which reasonably justify it. I consider that in the circumstances of this case – where the senior Updata UK management knew the up-to-date information and where there was an imbalance of information between the management and the representatives of Updata Europe – such a representation was made. Indeed, this is in my view the substance of the representation pleaded if the words "to be correct" were omitted: i.e. a representation that the UK management had a reasonable basis for believing the figures included in the Financial Overview.

178. Paragraph 48 (3) of the Particulars of Claim pleads that the "figures in the Financial Overview were the only forecasts of Updata UK's financial position for the financial year 2009/2010 which had been prepared by or on behalf of UK management". In so far as this representation goes beyond that pleaded in paragraph 48 (1) and (2), I do not consider that it was made in the 20 April e-

mail. That e-mail contained a representation as to what were the latest or current forecasts, and (as discussed below) what projections had been provided to LMS, but did not represent that no other forecasts had ever been prepared in the past.

179. I also consider that the representations pleaded in paragraphs 48 (4) ("that all the information which was material and/or relevant to Updata UK's financial position and/or the value of Updata UK had been made available to the European Vendors"), 48 (5) ("that there was no other relevant or material information to disclose") and 48 (6) ("that the UK management had not provided to LMS and/or Tenon any information which the European Vendors did not also have") are not made out on the basis of the 20 April e-mail. These are all, in my view, far too broadly expressed and cannot reasonably be derived from the statements made in the 20 April e-mail.

180. However, that e-mail did state, in response to the request for the latest budget for the years in question, that the "projections used were the same that we presented to Helge Homan and Jens in March". It was common ground that the "projections used" referred to projections used by LMS. The first sentence of the e-mail referred to the "numbers used by LMS". The statement in the second sentence as to the "projections used" is equally to be read by reference to what LMS had used. In context, any reasonable representee would understand that he was being told that these were the projections which had been provided to LMS by Updata UK's management (just as they had been provided to Mr. Homann and Mr. Nielsen) and that these were the projections which had been used, in the sense of being considered or evaluated, by LMS in deciding upon their offer. In my view, this is the objective interpretation of what was said in the second sentence.

...

185. Accordingly, I conclude that the representations which are material to the case advanced by the Claimants, and which can properly be derived from the 20 April e-mail are as follows:

- a) That the figures in the Financial Overview represented the UK management's genuine (and current) forecast of Updata UK's financial position.
- b) That the UK management believed that facts existed which reasonably justified the figures included in the Financial Overview.
- c) That the projections in the Financial Overview were those which had been provided to LMS by Updata UK's management (just as they had been provided to Mr. Homann and Mr. Nielsen) and that these were the projections which had been used, in the sense of being considered or evaluated, by LMS in deciding upon their offer."

319. Lord Falconer relied on Mr Justice Jacobs' discussion of the inducement issue at [397] – [403] and in particular at [399]. I think that it is helpful to set out the relevant parts of Jacobs J's judgment from [395] which is where his analysis and conclusions begin (my underlining and emphasis):

“Analysis and conclusions

395. *In my judgment, the representations made in the 20 April 2009 e-mail, and those in the Updated Kelso Presentation, were an inducing cause of Updata Europe entering into the transaction with LMS on the terms that it did. In so far as this is a necessary legal requirement, I consider that they played a real and substantial part in Updata Europe's decision. In this respect, the Claimants have the benefit of an evidential presumption which is difficult to rebut, and none of the points made by the Defendants has persuaded me to hold that it has been rebutted.*
396. *In reaching these conclusions, I have taken into account the contemporaneous documents and the inherent probabilities, as well as the evidence of Mr. Johnsen and Mr. Hildebrandt. I start with the former.*

The contemporaneous documents and inherent probabilities

397. *The starting point in my view is the 20 April e-mail itself. Mr. Johnsen was seeking out information a matter of days after the LMS offer: the offer had been made on Thursday 16 April and Mr. Johnsen asked for the information on the following Monday morning. The Defendants accepted the obvious fact that Mr. Johnsen was doing this in order to evaluate the LMS proposal. He was clearly doing this because the information requested was highly material within the context of what was happening at that time. Decisions as to whether to sell, and if so at what price, were going to be required by Updata Europe as matters moved forward, within an overall context where Mr. Nielsen was also on the scene and Mr. Johnsen was himself looking for outside investors. Accordingly, this is not a case where a representee is relying upon a chance remark made to him spontaneously in the course of discussions. It is a case where the representee has deliberately sought important information.*
398. *For reasons already given, Mr. Bennett appreciated the materiality of the information that had been requested. He answered Mr. Johnsen's e-mail dishonestly because he wanted, and perceived that he needed to, influence the course of the subsequent decision-making by Updata Europe in favour of the MBO. There is therefore nothing inherently improbable in Updata Europe contending that the 20 April e-mail materially influenced their subsequent and ultimate decision-making. That is exactly what Mr. Bennett understood would be the likely impact of providing the false information which he provided.*

399. It is true that there is no documentation showing an internal analysis of the figures by Updata Europe in the context of its subsequent decision-making. But the figures in the Financial Overview were not complex, and they could easily be compared to the figures which were set out in the LMS letter. It is inherently probable, in my view, that having asked specifically for the figures, Mr. Johnsen would have **carefully considered** what was provided, and discussed them with one or more of his colleagues at Updata Europe, and that this would have happened without internal analyses being prepared. As to the ease of comparison between the figures contained in the LMS offer and the Financial Overview: the LMS offer letter used an EBITDA figure of £1.5 million (derived from the February 2009 YTD figures), and this was in the same ballpark as the forecast for 2009 (£1,496,000), and rather better than the "Middle Case" forecast for 2009/10 (£1,393,000). I have no doubt that this is the conclusion that Mr. Bennett wanted Mr. Johnsen to draw. I shall come to Mr. Johnsen's evidence in that regard in due course.
400. Furthermore, there is other contemporaneous evidence that, consistent with the inherent probabilities, Updata Europe were indeed considering the financial information provided, and evaluating proposals from LMS in that context. On 20 May 2009, Mr. Birkeland sent an e-mail to Mr. Jorgensen, attaching a copy of the improved offer which LMS had made on 15 May 2009. The letter identified various objectives which Updata Europe was working to achieve including redeeming the current loan facilities with the Bank, redeeming the loan made by Vald. Nielsen, and achieving "maximum upside from the investment in England". The e-mail also stated: "We want to ensure that we are fully familiarized with the material upon which LMS has based their valuation. We would therefore ask to receive a copy of it, in order to evaluate their assumptions before we risk closing the door to other offers".
401. When this e-mail was sent, and as the chronology described above indicates, it was Mr. Nielsen who by this time (20 May 2009) was concerned to obtain relevant financial and other information and to be put on an equal footing with his competitor bidder. And it was on that day that Mr. Jorgensen wrote to Mr. Birkeland and Mr. Homann stating that it was "crucial that all interested buyers (the management at Up-data UK and Jens Nielsen via their respective capital funds) are ensured equal conditions for the transaction". He went on to recommend that "the data room be opened for both interested parties on the same conditions applicable from Tuesday 26 May 2009". These matters then formed the backdrop to the meeting of 29 May, the 3 June e-mail and the Updated Kelso Presentation.
402. The documentary evidence demonstrates that the Updated Kelso Presentation was e-mailed in the first instance to Mr. Birkeland and Mr. Holm, as an attachment to the 3 June e-mail. The attachment was then forwarded by Mr. Birkeland to Mr. Hildebrandt under cover of an e-mail dated 9 June 2009 in

which he said that the "Business Presentation is attached, as agreed, that was updated last in May by UK Management". It is in my view inherently probable that Mr. Hildebrandt would have considered this presentation, and indeed he was cross-examined on the basis that he did...

403. *As described in Section E above, Mr. Bennett had not sent the Kelso Presentation in the form in which it existed, already amended, as at 3 June; i.e. the form in which it had been updated on 26 March 2009, prior to the meetings on that morning. He went to the trouble of reducing the figure shown for "Best Case" to the same figure as had been shown in the Financial Overview, even though management's expectation at this time was that the results would be some millions of pounds higher. The reason that he did this was for the same reason that he had given false figures on 20 April. He again wanted, and perceived that he needed to, influence the course of the subsequent decision-making by Updata Europe in favour of the MBO. No doubt he also wanted to give false information, as to the management's expectations, to Mr. Nielsen as well. But again, there is therefore nothing inherently improbable in Updata Europe contending that the projections in the Updated Kelso Presentation, which showed that there had been no change in the management's "Best Case", materially influenced their subsequent and ultimate decision-making. Again, that is exactly what Mr. Bennett understood would be the likely impact of providing the false information which he provided.*"

320. Lord Falconer submitted that the helpful similarities were as follows, First, the case involved a representation made in the context of a relationship of trust. Where, Lord Falconer said, there is a relationship of trust, the thought that is going through the mind of the representee is not "*I must record this because it is important*" but "*I trust this person, therefore the question for me [(Mr Jafar in these proceedings and Mr Johnsen in *Vald Nielsen*) is of course I will accept what they have got to say and it will then inform what I do.*" Secondly, the absence of any documentation showing that the claimants attached importance to what was said or provided did not mean that they did not attach importance to it. The present case was a much stronger case than *Vald Nielsen* – which was an implied representation case – because in this case the statements made and relied on were specific and express whereas the content of the 20 April Email was quite muted. Mr Justice Jacobs had properly identified that Mr Bennett, the fraudster, was trying to mislead Mr Johnsen and in those circumstances had held that there was no reason to conclude that it was implausible that Mr Johnsen had placed reliance on what Mr Bennett had said in the April Email. Thirdly, *Vald Nielsen* involved a case where implied representations arose in an answer to questions. The interrogatory

indicated that Mr Jafar wanted to know the answer and it would be likely that he would treat the answer as material and rely on it. As in *Vald Nielsen*, the present case did not involve reliance by Mr Jafar on a chance remark made by Mr Naqvi spontaneously in the course of discussions. It is a case where Mr Jafar had deliberately sought important information.

321. Mr Jafar also submitted that the Court is entitled to conclude that it is obvious what Mr Naqvi was seeking to convey. There were, he said, numerous authorities in which the Court has concluded that, for example, a willingness to proceed with a transaction amounted to an implied representation of solvency: see in particular *Lindsay v O'Loughnane* and *Contex Drouzhba* [2012] B.C.C. 153 (*Lindsay*) (see [600] of Mr Jafar's Closing Submissions).

The Fund Parties' submissions

The Overarching Message cannot be implied from the express statements alleged by Mr Jafar

322. The Fund Parties noted that the Overarching Message was alleged to arise as a matter of implication from the Statements (alleged at RRASOC [25]) and that those express statements provide the only foundation on which the Overarching Message had been built. They were the words, assuming they were spoken, which the Court must assess objectively to determine whether the implied representation alleged by Mr Jafar was made. If the Court concluded that, objectively assessed, a reasonable person would not have inferred that the Overarching Message was impliedly represented by the express words used by Mr Naqvi, Mr Jafar's claim (insofar as it relies on the Overarching Message) must fail.
323. The Fund Parties submitted that a reasonable person in the position of Mr Jafar would not have inferred that Mr Naqvi intended to imply the Overarching Message by reason of the express words alleged in [25] of the RRASOC. This was for two main reasons. The first concerned the chaotic, imprecise and complex nature of the alleged Overarching Message and the second concerned the particular express statements relied on by Mr Jafar in his pleading as having conveyed that Overarching Message.

324. They argued that the Overarching Message, as pleaded at [26] of the RRASOC was a complex and vague representation. It depended on a number of elastic or ambiguous concepts which were not suitable to support an implied representation because it was insufficiently clear to be capable of being spelled out from the express words used (see *Loreley* at [328] and [396]). The Overarching Message was a composite of three implied representations said to have been made through the express statements alleged at RRASOC [25].

325. As regards the First Implied Representation:

- (a). It included many layers of vagueness and ambiguity. It was unclear if the alleged statement as to the essential soundness of the “*finances and management / governance*” of the entities in question was supposed to be a single representation regarding “*finances and management*” or two representations – one concerning the finances and one concerning “*management or governance*.”
- (b). It was unclear if the alleged implied statement in the First Implied Representation that “*any liquidity issues which they were experiencing were short term*” was a separate statement or an aspect of the statement as to the “*essential soundness of finances and management / governance*.”
- (c). It was unclear who the “*entities for the benefit of which [Mr Naqvi] was seeking to raise monies*” were. When the Loans were being advanced to AH/AIML, why would any representation not be limited to them? And what does “for the benefit of which” mean? In what sense was Mr Naqvi borrowing money “for the benefit” of AGHF and Fund IV as opposed to, say, for the benefit of the investors in those funds?
- (d). What was the meaning of the phrase “*essentially sound and proper*”? “*Sound*” and “*proper*” were themselves relatively imprecise concepts. Moreover, the word “*essentially*” appeared to qualify the alleged representation as to “*soundness*” and “*propriety*” of the finances or management and to import a vague evaluative judgment

into what degree of financial problems or improper management or governance was within such an elastic formulation of the implied representation (what degree of deviation was permitted from “*sound*” and “*proper*” finances or management before it could be said that the finances and management were no longer essentially sound and proper?). The Fund Parties submitted that this vagueness gave rise to the same concerns that led to the court rejecting the alleged implied representations in *Brown v Innovator One* [2012] EWHC 1321 (Comm) (**Brown**) and *SCB* (which I have referred to above already).

- (e). In *Brown*, Hamblen J held that various individuals and entities involved in establishing and operating investment schemes, which were intended to take advantage of certain tax benefits, were not liable to the investors in deceit. He rejected the investors’ claims that various misrepresentations had been made primarily on the basis that the representations relied on in the information memorandum (statements as to tax relief or potential commercial success) amounted to statements of opinion or expectation and could not reasonably be regarded as statements of fact. But he did also reject claims based on representations which he considered to be complex and vague. And he did state in order for imprecise and vague statements such as a statement that assets had been “*properly valued*” would generally need to be clearly spelt out. He said this (my underlining):

“(2). *The alleged technology representations*

909. As to each of the individual representations alleged:

...

- (4) *The alleged “technology price representation” appears nowhere on the face of an IM. One cannot infer a complex and contentious representation of this kind, still less one involving vague concepts such as “reasonable relationship” and “true value”. The basis of the acquisition cost is set out in the IM. No statement beyond that was made.*

- (5) *As to the alleged “technology rights valuation representation” there is a statement in most of the IMs that the Technology had*

been independently valued. Where such statement was made it was true. No statement was made that it had been “properly” valued. It is unclear what that means and any representation to this effect, in so far as it is a matter of fact, would need to be clearly spelt out, which it is not.

...

(3) *The alleged due diligence representations*

911. *The alleged due diligence representations do not appear in the IMs. There is no basis for inferring such a contentious and far reaching representation. Issues of this kind are properly the subject matter of negotiation and, if agreed, a promissory warranty. What is “appropriate” or what is “due diligence” is a matter of evaluation and judgment, not a statement of fact.*

- (f). The Fund Parties submitted that it was no answer for Mr Jafar to say that Abraaj was so rotten that the alleged implied statement was obviously false (which was clearly why he had pleaded his case in this manner). The issue as to whether or not any implied statement is made was an anterior issue, and the uncertainty, vagueness and necessity for a large measure of evaluation militates strongly against the finding of the pleaded Overarching Message.

326. As regards the Second Implied Representation, the Fund Parties said that:

- (a). The combined effect of [26(1)] and [26(2)] of the RRASOC was to generate an alleged implied representation that “*the finances and management or governance of the Healthcare Fund was essentially sound and proper, and any liquidity issues which it was experiencing were short term.*” But if that was the implied representation why was it that the Overarching Message had been constructed in such a complex manner, involving a general implied representation concerning “*the entities for the benefit of which Mr Naqvi was seeking to raise funds*” followed by a further implied representation which identified Healthcare Fund as one of those entities?

- (b). The answer was obvious, namely that the Overarching Message was not a representation that was actually made in December 2017 or would ever be made in the real world but rather was an odd lawyers' construct.
327. As regards the Third Implied Representation, it was also contrived and not a statement which was likely to have been actually made (implicitly) by Mr Naqvi. Rather, it had been inserted into the pleadings to grapple with the common ground that the words GP8 or Fund IV never came up during any of the December 2017 communications between Mr Naqvi and Mr Jafar
328. The Fund Parties submitted that overall the combined effect of RRASOC [26(1)], [26(2)] and [26(3)] was to generate an alleged implied representation that: *“the finances and management or governance of the Healthcare Fund [and one or more other unidentified entities for the benefit of which he was seeking to raise monies] were essentially sound and proper, and any liquidity issues which they were experiencing were short term.”* It was simply unreal, they said, to suggest that such a convoluted, elaborate and uncommercial statement was impliedly represented by means of the express statements referred to in [25] of the RRASOC or that anyone could intend to convey a representation of that apparent complexity through the express statements alleged.
329. As regards Mr Jafar's claim that the First Express Representation was a basis for implying the Overarching Message, the Fund Parties argued that, even assuming that a representation to this effect was made, a reasonable person in the position of Mr Jafar would not have understood Mr Naqvi to have impliedly stated that the *“the finances and management or governance of the Healthcare Fund [and one or more other unidentified entities for the benefit of which he was seeking to raise monies] were essentially sound and proper, and any liquidity issues which they were experiencing were short term.”* A statement that the *“Abraaj Group”* was not in any underlying financial trouble and was simply facing short term liquidity issues does not, on any objective basis, contain an implied representation about the finances, management or governance of any individual fund associated with the Abraaj brand. In any event, Mr Jafar's evidence was that the word *“Abraaj”* was used and not *“Abraaj Group”* (Day 5 pages 115-116). To the extent that *“Abraaj”* could be objectively

understood as a reference to particular entities then, in the context of negotiations of loans to AH and AIML, it would objectively be understood as a reference to AH or AIML as the operational entities of the Abraaj platform and not to the numerous underlying funds and other structures.

330. As regards the Second Express Representation, the Fund Parties argued that, once again, a reasonable person in the position of Mr Jafar would not have inferred any part of the Overarching Message as being impliedly represented from that express statement. This was because it was simply a statement as to intention (namely that there was in December 2017 an intention to use a portion of the loan monies to return Uninvested Capital to Healthcare Investors).
331. As regards the Third Express Representation, the Fund Parties argued that a reasonable person in the position of Mr Jafar would not have inferred any part of the Overarching Message as being impliedly represented from that express statement. This was also an alleged representation as to a state of mind, namely that Mr Naqvi in fact believed, on reasonable grounds that the borrower (which was AIML for the First Loan and AH for the Second Loan) would be able to repay the sums borrowed. They argued that it was unreal to extract from that alleged statement an implied representation to the effect that “*the finances and management or governance of the Healthcare Fund [and one or more other unidentified entities for the benefit of which he was seeking to raise monies] were essentially sound and proper, and any liquidity issues which they were experiencing were short term.*”
332. The Fund Parties submitted that it was significant that the Express Representations failed to include any reference let alone representation as to the management, finances or governance of Fund IV. It was not sufficient for Mr Jafar to have assumed that the position was as reflected in the Overarching Message. An assumption was insufficient to ground the claim in deceit. They said that at its highest, there may have been some representation as to the ability of AH or AIML to repay the Loans but that is insufficient because that was not Mr Jafar’s pleaded case and any such representation would evidently not have been made on

behalf of GP8/Fund IV (and even if it had been, it would fall squarely within and be unenforceable pursuant to section 6 of the Mercantile Law Act, which I discuss below).

333. The Fund Parties also argued that when the context in which the Overarching Message was claimed to have been made was examined it was clear that no reasonable representee in the position of Mr Jafar would have understood that an implied statement in the form of the Overarching Message was being made. The authorities were clear that “*context may have a significant impact when it comes to the question assessing the impact [express statements] might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee*” (Loreley at [297]) and the relevant context included, among other things, any other express statements made during the course of negotiations (Loreley at [296(iv)]). The Fund Parties relied on six aspects of the context. These six facts or matters meant that no reasonable person in the position of Mr Jafar would have inferred from the Express Representations (or the Statements) alleged to have been made by Mr Naqvi that “*the finances and management or governance of the entities for the benefit of which he was seeking to raise monies were essentially sound and proper*” (that is the First Implied Representation):

- (a). First, Mr Jafar was being asked to provide a considerable amount of short-term funding on an urgent, undocumented and (in the case of the First Loan) unsecured basis, including for the purpose of returning US\$250 million of Uninvested Capital to the Healthcare Investors. At the outset of the negotiations, Mr Naqvi had told Mr Jafar that he needed to raise US\$290 million within eleven days and that increased later that day to US\$300 million, then later to US\$350 million. The Fund Parties submitted that any reasonable representee in Mr Jafar’s position would have understood that no properly run private equity fund or group would have such a huge liquidity hole to plug on such exceptionally short notice. The quantum and urgency of the demands was such that, objectively assessed, a reasonable person in the position of Mr Jafar would not have inferred that the First Implied Representation was being made and was implicit in what Mr Naqvi had said.

- (b). Secondly, Mr Naqvi had told Mr Jafar that he needed to borrow US\$250 million because that money had been used for the general business purposes of Abraaj (i.e. spent) and any reasonable person in the position of Mr Jafar would have appreciated that was improper and therefore was inconsistent with the First Implied Representation.
- (c). Thirdly, Mr Naqvi had told Mr Jafar that a key source of repayment would be money contributed by Healthcare Investors to AGHF in response to future capital calls and any reasonable person in the position of Mr Jafar would have appreciated that this was improper and therefore, once again, inconsistent with the First Implied Representation.
- (d). Fourthly, since Mr Naqvi had requested that an inaccurate and misleading description of purpose be included in the remittance slip for each of the Loans a reasonable person in the position of Mr Jafar would have appreciated that this was improper and again inconsistent with the First Implied Representation.
- (e). Fifthly, Mr Jafar knew, or suspected and turned a blind eye to the fact, that the Third Loan served no legitimate business purpose (that it was going to be used to facilitate an accounting year-end window dressing transaction). A reasonable person would have understood that that this was also improper and again inconsistent with the First Implied Representation.
- (f). Sixthly, Mr Naqvi had told Mr Jafar that the AH Board was not aware of the urgent need to raise funds to repay the Uninvested Capital (Day 5, pages 38-39) and any reasonable person would have appreciated and considered that this was contrary to the proper management or governance of AH. A reasonable person would have understood that that this was also improper and again inconsistent with the First Implied Representation.

334. As regards the fifth point, the Fund Parties argued that the circumstances surrounding the provision of the Third Loan were highly suspicious. By 27 December 2017, Mr Naqvi was

known to be “*frantic*” and in a “*panic*” about receiving a further loan of US\$50 million over year-end. While Mr Naqvi plainly did not have access to US\$50 million on 27 December 2017 (hence the need to borrow it from Mr Jafar) on his account he was somehow going to have access to that amount just one week later, when it was due to be repaid. The Fund Parties said that the only way that would be possible was if Mr Naqvi was simply going to return the US\$50 million to Mr Jafar unused after year-end. They argued that Mr Jafar must have appreciated that (as anyone in his position would have done). Mr Jafar had never provided any alternative explanation as to how he thought the Third Loan was going to be repaid. In cross-examination, he simply asserted that he “*didn’t inquire*” and “*did not go into precisely where the repayment was going to come from*” (Day 6, pages 142-143). He also failed to provide a satisfactory explanation as to what he understood the purpose of the Third Loan to have been. In Jafar 1 (at [79]) he had said that he “*inferred*” that the need for the Third Loan had been created by the further demands from other investors being made, which he said Mr Naqvi had told him that he was expecting. However, the Fund Parties submitted, the evidence did not establish that Mr Naqvi had said that and it was unbelievable and therefore highly improbable that a man as capable and sophisticated as Mr Jafar could possibly believe that new demands had suddenly materialised, had caused Mr Naqvi to “*panic*” and become “*frantic*” and which needed to be settled almost instantaneously, before year-end. In any event, Mr Jafar’s evidence in cross-examination was not that he believed that Mr Naqvi needed the Third Loan to meet further demands from other investors. Instead, he said that the purposes of the Third Loan “*was his [Mr Naqvi’s] business. I didn’t ask*” (Day 6, page 143-144). The Fund Parties invited the Court to find that this was untrue and that Mr Jafar fully understood the purposes of the Third Loan. The true position they said was that Mr Jafar understood that the money he was being asked to provide as part of the Third Loan was going to be returned to him unused after year-end. That was how he was going to be repaid. Since he knew that (and in the absence of any other account from Mr Jafar as to why he believed the Third Loan was required), it followed that Mr Jafar also knew that there was no legitimate business purpose for Mr Naqvi to obtain US\$50 million simply to return it seven days later, after year-end (Mr Jafar knew, or turned a blind eye to the fact, that the Third Loan was going to be used for an accounting year-end window dressing

transaction). Mr Jafar would have known all of that simply because of circumstances in which the Third Loan was being sought and because of its terms.

335. The Fund Parties submitted that the evidence showed that Mr Jafar had been told about the true purpose of the Third Loan. Mr Naqvi had made no secret of the true purposes of the Third Loan. He had told Badr, with a striking degree of candour, early on of his plan to use the US\$50 million for the purposes of a window dressing transaction over year-end in the Year End Deposit Message. The Fund Parties submitted that there was no plausible innocent construction of the Year End Deposit Message since the purpose and the use of funds were set out and were obviously improper; Mr Naqvi had identified the precise purpose for which these funds were required; the funds were requested for the purposes of creating an (a false) impression and Mr Naqvi had made it clear that the funds would be returned unused. The Fund Parties argued that Mr Jafar's explanation (at Jafar 1 [69]) that the Year End Deposit Message could be understood as an innocent request from Mr Naqvi for the provision of cash deposits over the year-end should be rejected as unreal. Mr Jafar asserted that (at the time, in December 2017) it was "*common practice for banks and other financial institutions to encourage investors to deposit cash (particularly at year-end) in order to demonstrate investors' confidence in the relevant institution.*" But AH/AIML and none of the Abraaj entities were banks or financial institutions that held money in cash deposits for third parties. They operated a private equity business pursuant to which money was paid by third parties for investments, not as short-term deposits. Showing a surfeit of cash sourced from third parties was of absolutely no value to the Abraaj entities, particularly in the context of year-end reports and particularly if it was merely a short-term loan deposit. What would have demonstrated investor confidence was actual investments by investors in the Abraaj funds or cash in fund bank accounts, either pre-investment or the proceeds of the realisation of investments. The fact that Mr Naqvi had said that the receipt of the funds he requested was not "*mission critical*" did not indicate that Mr Naqvi did not need the money. The very fact that Mr Naqvi was asking for funds for this purpose (whether presented as a need or a want) was directly inconsistent with the Overarching Message and the reality was, the Fund Parties submitted, that Mr Naqvi's comment about this not being "*mission critical*" was evidently attempted sangfroid and was in any event superseded since it was clear (and understood by

Mr Jafar) that Mr Naqvi was soon “*frantic*” to receive the funds. It was also not the case, they argued, that the Year End Deposit Message did not contain any suggestion that any money deposited would have been presented to anyone as anything other than what it was, a short-term client deposit over year-end. The Year End Deposit Message had stated that the funds would be used to present Abraaj in “*a healthy light at year end and as the various reports go out*” and that purpose would not be achieved if the reports disclosed that the money was just a short-term loan that needed to be, and would be, paid back, with interest, almost immediately. The Fund Parties argued that given the family relationship between Badr and Mr Jafar and their close co-operation in relation to the Loans, Mr Naqvi must have appreciated that the contents of that message would also be conveyed to Mr Jafar. There was nothing to suggest that Mr Naqvi sought to divulge information only to Badr and keep it from Mr Jafar. If Mr Naqvi was prepared to tell Badr that he was interested in obtaining a further loan for the purposes of presenting Abraaj in a healthier financial position than it really was, then there was no reason why he would not have explained the purposes of the Third Loan to Mr Jafar in the same terms. It was obvious, the Fund Parties submitted, that Mr Jafar would have asked what the purpose of the Third Loan was and how it was going to get repaid in such short order. Any reasonable lender, confronted by a “*frantic*” counterparty, who had already made two significant loans totalling US\$300 million would have asked those questions. Mr Jafar’s evidence in cross-examination that he did not ask about the purpose of the Third Loan should be rejected as inherently implausible.

336. GP8 noted that none of the Statements referred to investors in Fund IV seeking repayment of uninvested capital. It was only in Jafar 1 at [32] (quoted above), where Mr Jafar had said that Mr Naqvi had told him that he expected that similar demands for the return of uninvested capital from other investors and/or in relation to other funds would follow once word got around, that a basis was set out for Mr Jafar’s claim that Mr Naqvi was to be understood as referring to and making representations about the finances and management of Abraaj funds beyond AGHF. That statement had not been referred to in Mr Jafar’s pleaded case and was not in play in these proceedings as a statement which supported the existence of an implied representation having been made regarding the finances and management of funds other than

AGHF. GP8 argued that it was far too late for Mr Jafar to seek to fix the position by amending his pleadings and, as it had turned out, Mr Jafar had not sought to do so.

337. The GHF Parties noted that none of the Express Representations concerned AGHF or implicated AGHF as being one of a number of entities in need of funds and for which Mr Naqvi was seeking to borrow money. The only such entity was AH (although by reason of having a cheque book AIML had become the borrower under the First Loan, although AH was the borrower under the Second Loan). It was AH that needed to return the Uninvested Capital to investors and it was AH that needed money in order to be able to do so, the Uninvested Capital having been placed in AH's treasury (therefore held outside AGHF) having been used for AH's general business purposes (as Mr Jafar had been told). The only reference (whether express or implied) to AGHF itself was to the need for Uninvested Capital to be returned to the Healthcare Investors. This was understood by Mr Jafar at the time given that his evidence was that the only reference to AGHF was in the context of a general description of the investors that were seeking the return of their Uninvested Capital. Furthermore, Mr Jafar's evidence was that he had never heard of AGHF and that he had no knowledge of the structure of the "*Abraaj Group*" or what companies or entities it comprised save that he knew AH was at "*the top*."

338. The Fund Parties further argued that Mr Jafar had failed to establish that Mr Naqvi had subjectively intended to convey the Overarching Message to Mr Jafar by way of an implied statement made through the express words alleged in the RRASOC at [25]. Whilst it was easy to condemn the absent and unrepresented Mr Naqvi as an inveterate fraudster and a putative criminal awaiting extradition to the USA and a lengthy jail sentence, the pertinent question for this case was whether the evidence established that Mr Naqvi had told any lies to Mr Jafar in precisely the manner alleged. The Fund Parties submitted that it was unreal to suppose that anyone, including Mr Naqvi, would set out to defraud a person in the position of Mr Jafar by deliberately intending to convey, by way of implication, the Overarching Message. If Mr Naqvi's intention had been to defraud Mr Jafar through conveying the Overarching Message then there was every reason to suppose that he would have made that representation expressly. If, as Mr Jafar claimed, Mr Naqvi was willing expressly to state

that the “*Abraaj Group was not in any underlying financial trouble, it was simply facing short-term liquidity issues over the year end*” ([25(1)] of the RRASOC) and if his purpose and intention was to defraud Mr Jafar by representing that the “*finances and management or governance of the entities for the benefit of which he was seeking to raise monies were essentially sound and proper*” ([26(1)] of the RRASOC) and such a statement was important both objectively and subjectively for inducing Mr Jafar to lend vast sums of money, then why would he not simply say that? The Fund Parties submitted that it was incredible to believe that Mr Naqvi would instead have set out intentionally to make such a complex and intricate statement implicitly via the Express Representations. Had Mr Naqvi wished to defraud Mr Jafar by telling him that the finances and governance of AGHF and Fund IV were essentially sound and proper that is what he would have told him.

339. The overwhelming likelihood, the Fund Parties argued, was that Mr Naqvi did not set out to defraud Mr Jafar *through conveying the Overarching Message*. Rather, he likely represented to Mr Jafar that the Loans would be repaid and, in doing so, may have sought to give Mr Jafar comfort that AH and AIML were likely to be able to draw on sources of money to enable that to happen. However, this was not the case which Mr Jafar has brought. The reason for this, the Fund Parties submitted, was that proceedings in deceit based on statements to the effect that AH and AIML were sufficiently financially robust to enable repayment of the Loans would not provide any basis for a claim against either AGHF or Fund IV.
340. The Fund Parties submitted that Mr Jafar had also failed to establish that he had relied on the Overarching Message. They submitted that the evidence (including the inferences to be drawn from the evidence adduced and the failure to call Badr as a witness) showed that Mr Jafar had advanced the Loans knowing that the finances, management or governance in the Abraaj entities were not essentially sound and proper. As Mr Justice Nugee (as he then was) said in *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [388], “*the essence of the tort of deceit is that the claimant was deceived, and if he knows that what he is being told is a lie, he is not deceived.*”

341. The Fund Parties argued that the evidence showed that when making the Loans in December 2017 Mr Jafar knew, or at least suspected and turned a blind eye to the fact, that the Abraaj entities were in a precarious financial position and that they were being mismanaged and misgoverned. More specifically, Mr Jafar knew or suspected and turned a blind eye to the fact that the Healthcare Investors' monies were being used for improper purposes and that improper window dressing transactions were being entered into to disguise the true financial position of entities managed by AIML. The Fund Parties relied on the same six facts or matters as they had done in support of their case that no reasonable person in the position of Mr Jafar would have inferred the First Implied Representation from the Express Representations (or the Statements).
342. In relation to the involvement and knowledge of Badr, they submitted that the documentary record showed that Badr had known before the First Loan was advanced that Mr Naqvi was seeking funding for no legitimate business purpose and that Badr had made Mr Jafar aware of this. If the request in the Year End Deposit Message was out of line with Mr Jafar's understanding at that time of the position at Abraaj then Badr would have immediately informed him of what Mr Naqvi had said (and Mr Jafar nevertheless advanced the First Loan). If Badr had not alerted Mr Jafar at that time this was only explicable on the basis that Badr believed that the contents of the Year End Deposit Message were consistent with Mr Jafar's understanding of Abraaj's position (i.e. both men understood that the finances, management and governance of Abraaj were not materially sound and proper and that the desire for funds for a window dressing transaction was consistent with what they had already understood).
343. The Fund Parties argued without prejudice to their case as to Mr Jafar's actual knowledge of the position, that Badr's knowledge (if uncommunicated) fell to be attributed to Mr Jafar. Badr was acting on behalf of Mr Jafar in the negotiation of the Loans – passing on messages to Mr Naqvi on behalf of Mr Jafar and receiving communications from Mr Naqvi to be passed on to Mr Jafar. They said that it could be seen and inferred that the expectation of all involved was that Badr was to pass on any communications and information to his father. In

this context, the knowledge of Badr as Mr Jafar's agent was to be attributed to Mr Jafar as principal.

344. As regards the applicable law, the Fund Parties relied on the statement of the position at [11.08] of Spencer Bower and Handley which was based on the judgment of Sir Nicolas Browne-Wilkinson V.C. (as he then was) in *Strover v Harrington* [1998] 1 Ch 390 (**Strover**). In Spencer Bower and Handley on Actionable Misrepresentation (5th ed. 2014) it was noted that the proposition, stated in a previous edition, that actual and personal knowledge must be proved and that constructive or imputed notice was entirely out of the question had been disapproved in *Strover v Harrington* where knowledge received by the solicitor for the purchaser correcting an innocent misrepresentation was imputed to the client. Clerk & Lindsell had said as follows (my underlining):

"In this, as in all other normal conveyancing transactions the parties hand the matter over to their solicitors who become the normal channel for communication between vendor and purchaser in all matters relating to that transaction. In so doing the parties impliedly give actual authority to those solicitors to receive on their behalf all relevant information from the other party relating to that transaction. The solicitors are under an obligation to communicate the relevant information to their own clients. At the very least the solicitors are held out as having ostensible authority to receive such information In my judgment such knowledge should be imputed to the principal."

345. The Fund Parties noted that Mr Jafar had placed heavy reliance upon the decision of Mr Justice Scrutton in *Wells v Smith* [1914] 3 KB 722 (**Wells**) but (as footnote 6 to [11.08] of Spencer Bower and Handley confirmed) *Wells* only stood as authority for the proposition that the knowledge of an agent acting in fraud of his principal will not be attributed. It did not support the wider position adopted by Mr Jafar that an agent's knowledge of the truth of a misrepresentation or the correction of a misrepresentation cannot be attributed to a principal. The judgment of Flaux J (as he then was) in *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm) at [152] also did not support that wider proposition as Flaux J was specifically dealing with a situation where the agent was also acting in fraud of its principal. Furthermore, Jacobs J in *Vald. Nielsen* had merely cited *Wells* and Clerk & Lindsell on Torts (24th ed., 2023) at [17-41] (footnote 197). The text of [17-41] stated that a "representor [could not] escape liability on the ground that knowledge of the

truth must be imputed to the representee; as for example where the representee's agent knew the true facts." But the authority for this proposition cited in footnote 197, was only *Wells* and Professor Tettenborn, who had written the chapter, had noted that *Wells* had been distinguished by Sir Nicolas Browne-Wilkinson V.C in *Strover* albeit that Professor Tettenborn had questioned, without supporting argument, whether this was correct.

346. The Fund Parties argued that as a matter of principle Badr's knowledge should be attributed to Mr Jafar. Badr was acting on his father's behalf as the principal means of communication between his father and Mr Naqvi. He was obviously under an obligation to pass on communications and information gleaned in the negotiations to his father as principal. Regardless of whether the Year End Deposit Message was first received in a personal capacity, it was plainly part of the relevant communications when the Third Loan was being negotiated and should have been passed on. In negotiating and communicating with Badr (on behalf of his father), Mr Naqvi was entitled to proceed on the basis that Mr Jafar had been apprised of the reason for the Third Loan.

347. The Fund Parties said that the Court should reject Mr Jafar's case that it was absurd to suggest that he would have advanced the Loans in circumstances where AH and/or AIML were practically insolvent and investor funds had been misappropriated. They submitted that there was nothing inherently absurd about Mr Jafar knowing, on the one hand, that (for example) the Uninvested Capital had been improperly spent or that the Third Loan was being requested for an illegitimate window dressing transaction and believing, on the other, that he could make a profit from his short-term Loans and that they would be repaid. Mr Jafar may not have known precisely how precarious Abraaj's financial position was, or the precise extent of its governance failings but that was beside the point. He knew that the finances, management or governance at Abraaj were not "*essentially sound and proper*" and nevertheless decided to make the Loans. The reality was that Mr Jafar was likely motivated by the opportunity to make a substantial sum of money in short order (approximately US\$23 million in eight weeks) and likely believed that those aspects of improper management and improper governance at Abraaj which he was aware of would not stand in the way of obtaining repayment by the end of February 2018, having obtained the post-dated cheques

(and associated criminal sanctions under UAE law) and a promise of security for the Second Loans. And there may have been other reasons, apart from the lucrative nature of the lending, why Mr Jafar would have wished to advance monies to Abraaj despite knowing that its finances, management and governance were not essentially sound and proper. He may have seen an opportunity to place Mr Naqvi in his moral debt by helping Abraaj in its hour of need or have seen a potential opportunity as regards enforcement over the AH shares promised as security in the event of non-payment.

348. The GHF Parties put the point in this way. Mr Jafar may well have believed that AH would be able to repay the money to him before the end of January 2018 or shortly thereafter but this was not on the basis that he believed AH was not in any underlying financial trouble. Instead, it was on the basis that he believed that the Healthcare Investors would re-invest capital from which Mr Jafar would be repaid once the relevant issues had been resolved and that these issues would be resolved in January. That this was the case was, they submitted, plain from the Winding Up Affidavit wherein (at [13]) Mr Jafar's evidence was that Mr Naqvi, *"repeatedly assured me that he was told by senior representatives of the investors that they would return the amount proposed to be repaid to them in January 2018 and so the loans would be comfortably repaid by 31 January 2018"* Although that representation was not made in those terms, what is clear is that Mr Jafar was given to understand that the likely source of any repayment was funds that it was anticipated would be reinvested once the issues with the Uninvested Capital had been resolved.

Assessment of Mr Jafar and Mr Nerguizian's evidence – findings of fact

Points covered

349 I now turn, having set out in some detail Mr Jafar's pleaded Cayman law deceit claims, the evidence adduced in support of those claims, the parties' submission with respect to those claims (including what the parties have identified as the key factual issues in dispute), and having outlined the relevant legal principles to be applied when assessing the witness evidence and in respect of a claim for deceit under Cayman Islands law, I now turn to my

assessment of that evidence and my findings of fact as to what Mr Naqvi said to Mr Jafar at the First 20 December 2017 Meeting and with respect to the other factual disputes.

Approach

350. I accept that in relation to the proper approach to be taken by the Court to the assessment of witness evidence the criteria identified by Mr Justice Lewison (as he then was) in *Painter v Hutchinson* (as summarised by HHJ Richard Williams in *Singh v Singh*) are to be applied.

Mr Jafar – general demeanour and credibility

351. Mr Jafar is clearly a sophisticated, experienced and successful senior businessman with an impressive record of achievement. He gave his evidence with assurance and conviction. His account in the witness box of what he said he had been told by Mr Naqvi and why he had acted in the way he had was robust, clear and often consistent (although, as I discuss below, there were significant inconsistencies in respect of part of his account between what he said during his cross examination and what he had previously said or what had previously been said on his behalf). He remained unruffled and stuck to his account even under some robust questioning by Mr Ayres and Mr Atherton. He generally gave his evidence in a slow and deliberate manner.

352. Mr Jafar demonstrated a firm focus on and good grasp of the business and financial issues as they related to the terms of the Loans (he acknowledged that he was good at maths although he considered that his son Badr was better). He appeared to have carefully considered and engaged with these aspects when having discussions with Mr Nerguizian and Mr Naqvi. He was obviously keenly interested in the substantial return that he was to receive as a result of the fees and interest payable in respect of the Loans.

353. But there was a sharp contrast in the attention he paid to other aspects of the Loan transactions. He repeatedly said that he considered it inappropriate (not his business) to ask Mr Naqvi to provide further details of or to clarify matters which he (Mr Naqvi) had only

explained briefly and at a high level of generality. When Mr Jafar did ask some questions, he appears to have accepted what he was told at face value. He failed to conduct any (or, if one labels as due diligence the call to Badr to ask Badr to confirm that he was unaware of problems at AH or other related Abraaj entities, only cursory) due diligence. He never emailed Mr Naqvi to set out and confirm the assurances that he said Mr Naqvi had given him or asked Mr Naqvi to confirm those assurances (only in May 2018 did he, via his legal adviser Mr Ernest, ask Mr Naqvi to sign an affidavit “*to finally settle the facts around the making of the Loans*”: see Mr Ernest’s email to Mr Naqvi dated 21 May 2018). He never followed up the offer that he said that Mr Naqvi had made to send him a copy of the Freshfields Opinion (and possibly the other documents that he said that Mr Naqvi had referred to or shown him). He never followed up with Mr Nerguizian or Mr Naqvi to press for the documentation, in particular the security documentation, that he said he had been told (and some of the documents executed at the time the Loans made stated) would be prepared and executed in early 2018. He did not obtain any legal advice at the time of the making of the Loans even though the context in which the Loans were sought and made was self-evidently unusual and gave rise to obvious concerns (and had caused ENBD to require the granting of an extensive security package and to impose strict terms on its offer of finance). He said that he had relied on Mr Nerguizian who was clearly a senior and experienced banker with experience of banking documentation but it appears that save for arranging for BOS to assume some of the risk and to give some high level advice on interest rates and fees, Mr Nerguizian’s role was largely administrative and facilitative, and to do Mr Jafar’s bidding. Mr Jafar asked Mr Nerguizian to review and comment on the terms offered to Mr Naqvi by ENBD but he appears never to have asked Mr Nerguizian to validate or verify any aspect of what they (Mr Jafar and Mr Nerguizian) say they were told by Mr Naqvi about ENBD’s attitude and position. There is no email exchange between Mr Jafar and Mr Nerguizian in which any reference is made to the assurances which Mr Jafar says he was given by Mr Naqvi (nor a reference to the documents which Mr Jafar says he was shown). Mr Nerguizian probably, although this was not clear, relied on in-house BOS bankers or lawyers to prepare drafts of the limited documentation that was used to record mainly the cheque discounting facility granted to Mr Jafar but no evidence has been adduced as to who if anyone assisted Mr Nerguizian or what they were told about the Loans. In the event, Mr Jafar was content to

advance very substantial sums without even the benefit of a loan agreement from the borrowers (which would have been the obvious place to record the assurances and representations which Mr Jafar says Mr Naqvi gave and made to him) and without there being any KYC and AML checks being conducted by BOS (a topic I discuss at length below).

354. This attitude and approach appears, in context, even taking into account the significant differences in business and legal culture between the UAE and the UK/Cayman Islands and between the approach of some senior businessmen when doing deals directly with other senior businessmen and the approach adopted by officers of major international financial institutions when entering into large loans, to be at best imprudent and at worst careless. It appears to be fundamentally inconsistent with a careful business-like approach that could be expected of a businessman of Mr Jafar's experience and sophistication entering into an arm's length loan (according to Mr Jafar his general practice was to adopt a careful business-like approach even though he was, as he said, used to making rapid business decisions when needed). This apparent inconsistency raises a major question-mark over Mr Jafar's account and whether he really was just an arm's length lender acting just on the basis of what Mr Naqvi had told him and in reliance on the assurances that he claimed Mr Naqvi had provided. The question arises as to whether it is credible that Mr Jafar would have adopted this approach if he had really been an arm's length lender with the limited understanding of the position at Abraaj and with the motivations he claimed? This was one of the challenges to Mr Jafar's account and his credibility that was made by the Fund Parties.
355. Mr Jafar's response was to say that he completely believed and trusted Mr Naqvi, that he (Mr Jafar) had asked the obvious questions (of Mr Naqvi and Badr) which needed to be raised to satisfy himself that there was a good and proper reason for the urgent need for the Loans and that he would be repaid when the Loans fell due, and had received credible and satisfactory explanations (and assurances) from Mr Naqvi which he had no reason to question or doubt. He said that having accepted that the funds were needed urgently, he needed to make a quick business decision and that there was no opportunity to undertake any further, let alone, detailed checking and due diligence. He said that the only reliable way

to have done this was by way of a forensic review, but it was clear that there was insufficient time for this. He saw a good low risk business opportunity and took it.

356. But what was curious, and difficult to justify and explain, was Mr Jafar's unquestioning attitude. On his account, he asked a few basic questions but then thought it was not his place or necessary to go any further (despite being a prospective lender for hundreds of millions of dollars who would not have the opportunity to do proper due diligence). For example, when Mr Jafar was asked about what Mr Naqvi had said about the purpose of the Third Loan (in circumstances where the loan was to be repaid in seven days) he said "*That was his business. I didn't ask*" (Day 6, page 144). He gave the same answer when asked whether he had inquired about the nature of the investments which he *assumed* were made by the Abraaj treasury with the Healthcare Investors' funds (see Day 5 page 120 where Mr Jafar said that he "*took [Mr Naqvi] to mean that the uninvested capital was invested in investments that could not be immediately cashed*"). Mr Jafar said that "*I didn't examine what the nature of those investments were, nor what other investments that are in the Abraaj treasury. I didn't feel it my business really to ask specifically, 'What did you invest in and why couldn't you immediately cash?'*" (Day 5, page 125). When asked about his question to Mr Naqvi as to whether the AH board had been told about the requests for repayment by the Healthcare Investors Mr Jafar said that he had only raised this issue "*out of curiosity*" (on Day 7, page 85 Mr Jafar said that he had asked Mr Naqvi "*as a matter of curiosity whether the board knew, and my son was on the board, and I hadn't checked, actually, obviously, I just wanted to know as a matter of curiosity*").

357. Mr Jafar appears to have been wholly uninterested in the detail or in seeking explanations below the surface level. When asked whether he had questioned Mr Naqvi and sought an explanation as to why investor demands had gone from US\$40 million to \$100 million in less than a week, Mr Jafar said that he had not examined the basis on which Mr Naqvi would need the additional amount (Day 6, pages 18-19). When asked whether on 26 December 2017 or at any other stage he had asked Mr Naqvi how much Uninvested Capital there was across the Abraaj entities which might not be available immediately to return to investors if demanded, what might be the maximum potential outflows in paying back uninvested

capital, why Mr Naqvi had thought that US\$40 million was sufficient to provide a liquidity cushion or how Mr Naqvi would meet any shortfall if that sum was insufficient, Mr Jafar simply said (point-blank) that he had not asked about these matters. Even on his own latest account, he had only looked cursorily at the KPMG financial statements that he said Mr Naqvi had brought to the First 20 December 2017 Meeting and had not thought it necessary to ask for copies to be sent to him for a more careful read and review (Mr Naqvi, according to Mr Jafar, had offered to send him copies of the documents but Mr Jafar had never required this to be done).

358. Nor, as I have said, was there any follow-up by Mr Jafar. It emerged during the hearing (from a response by Lord Falconer to a question raised by me) that Mr Jafar only received a copy of the Freshfields Opinion when a copy was produced by the AH JOLs by way of discovery in these proceedings.
359. In the Winding Up Affidavits, Mr Jafar said (at [22]-[23]) that he had asked Mr Nerguizian to be responsible for arranging for the Loans to be recorded in a more formal way, that he had called Mr Nerguizian a number of times after the New Year and that he had become unhappy with the failure to make progress. He said this:

“22. Whilst the cheques gave me some comfort regarding repayment because they were signed by Mr Naqvi and Mr Lakhani personally on the company’s behalf, I was keen to record the agreements regarding the loans in a more formal way, as we had agreed, and to have the collateral promised to me put in place. Given the extremely short time periods we were working to, and the time of year, we agreed that [BOS] would work with Mr Naqvi in the New Year to document our agreements more properly.

- 23. During January and February and 2018 [Mr Jafar] called Mr Nerguizian a number of times to check on the progress being made formally to document the loans and the related securities. [Mr Jafar] was not happy with the progress being made and [he] was also becoming concerned with articles that had begun to appear in the Wall Street Journal and elsewhere and so in mid-February [Mr Jafar] retained [his] own specialist lawyers in UAE to undertake the task of documenting the arrangements.”*

360. While there are parts of the Winding Up Affidavits which seem to me to contain more reliable accounts of what happened than Mr Jafar's evidence in these proceedings (having been prepared without the need to establish the facts on which his deceit claim was based) I find Mr Jafar's account of how he had asked Mr Nerguizian to arrange for the loans and the further security to be properly documented, had followed up with calls to Mr Nerguizian and then become dissatisfied with Mr Nerguizian's inaction unbelievable. There is no documentary evidence (for example emails) that Mr Jafar had given Mr Nerguizian instructions to record the Loans "*in a more formal way.*" It is unclear what Mr Jafar means by this in any event (was Mr Nerguizian instructed to prepare loan agreements, without legal advisers being involved)? There are no particulars of when Mr Jafar called Mr Nerguizian and how many times. There are no chasing emails or emails setting out Mr Jafar's dissatisfaction with Mr Nerguizian's activity (which if true and if Mr Nerguizian really had been so instructed and really failed to act as instructed probably caused Mr Jafar considerable losses). It is also inherently unlikely if it really was the case that Mr Jafar had been promised that the loans would be, and expected to have the loans, properly documented (and that security documents would be executed over all the assets of AH and AIML and of other Abraaj entities) that Mr Jafar would have allowed the whole of January to elapse without clearly and loudly putting this on record at least by email. It seems to me that in the Winding Up Proceedings, where Mr Jafar's (Auctus') status as a creditor was in issue or relevant he wanted to portray himself as having acted reasonably and as an arm's length lender who had been promised that the Loans would be properly documented but that the failure to do this had been the fault of others.

361. As regards the reasons for making the Loans, Mr Jafar, as I have said, sought to portray himself as an arm's length lender taking advantage of a commercially attractive business opportunity which he treated as being of low risk. He sought to portray his business (and personal) relationship with Mr Naqvi as historic and limited and to downplay Badr's involvement in the negotiations and decision-making process relating to the Loans. Mr Jafar also said that his investment in Abraaj was not a factor in his decision making (Day 6, page 150-151).

362. It is hard to accept that the approach that Mr Jafar says he adopted would have been the attitude of an arms' length lender in Mr Jafar's position. In responding to questions on these issues during his cross-examination, Mr Jafar was unabashed and did not seem to think that his unquestioning attitude and failure to probe any of the responses given by Mr Naqvi was either unusual or requiring of a full explanation. He said that he just believed and completely trusted Mr Naqvi and as a result it was both credible that he would have, and reasonable that he had, taken at face value everything that Mr Naqvi had told him. Mr Jafar said that he had *"asked a lot of pertinent questions and [that Mr Naqvi had given] a lot of pertinent answers"* (Day 5, page 122-123) but the problem, to my mind, is that having been given brief answers (in a short meeting which were not supplemented in the brief subsequent meeting), he was wholly uninterested in following-up, confirming or even clarifying what he was told. He just accepted what he was told without more (as he admitted, he *"didn't analyse further than the obvious"*: Day 5, page 123).
363. Mr Jafar agreed to lend huge sums at very short notice after only very brief discussions with Mr Naqvi and without any due diligence, without at least initially identifying the borrower, when told that the entities to whom funding would be advanced were facing a potentially existential liquidity crisis because of an ongoing dispute with the Healthcare Investors, and instantly needed substantial additional cash (above the sums needed to repay the Healthcare Investors) for liquidity needs which were not particularised or explained and which significantly increased during the short period of the loan negotiations, which problems, even based on the account which Mr Naqvi gave him (according to Mr Jafar) would not be instantly and definitively resolved, knowing that another reputable lender had only been prepared to lend a part of what Mr Jafar advanced if stringent conditions were satisfied. Of course, it is possible for someone to do this but absent some other explanation and motive, it seems to me to be inherently unlikely that Mr Jafar would have so acted (having regard to his own account of what had happened and to the context) if he were just an arm's length lender responding to and basing his lending decision on what he had been told by Mr Naqvi. For an arm's length lender to act in such a way would involve conduct that can only be characterised as gullible. It would involve a level of commercial naivety that seems to be wholly uncharacteristic for Mr Jafar or someone with his business expertise and experience.

It seems to me that the revealing contemporaneous WhatsApp messages between Badr and Mr Naqvi assist in piecing together, with other documentary evidence and the inherent probabilities, a complete account of what Mr Jafar's real motives and decision-making thought process were.

364. Mr Jafar did indicate that his willingness to accept at face value what he was told was based on Mr Naqvi's (and Abraaj's) reputation and the fact that a large number of "*big investors*" including financial institutions had invested and were satisfied with Abraaj, and they had "*armies of people that would do due diligence before they invest*" (see Day 5, page 124).
365. The first part of this account (Mr Jafar's relationship with Mr Naqvi being remote and historic) appears to me to be difficult to square with the context and the evidence. It seems to me to be at least likely that Mr Jafar had a reasonably close and cordial, continuing, relationship with Mr Naqvi, in view of Mr Jafar's role as a founding investor in Abraaj who retained a significant investment, and as a leading businessman in the UAE working within a relatively small local business community of business leaders, whose son was an active albeit non-executive member of the AH board and personally very close to Mr Naqvi. Mr Jafar had been a non-executive director of AH and had attended board meetings. He clearly retained relevant knowledge of the governance of AH and the Abraaj entities. So, for example, when asked by Mr Ayres about what Mr Naqvi had meant when he had referred to "*the board of Abraaj*" Mr Jafar responded that AH was the only board that had non-executive directors (Day 6, page 38).
366. There was also clearly a significant and probably strong link between the Crescent companies and Mr Naqvi and Abraaj. Mr Jafar during his cross examination sought to deny or minimise this (Day 5, page 56). He was shown a copy of the Crescent Enterprises Annual Report for 2013 which referred to that relationship as follows: "*As a Founding Shareholder and Limited Partner of Abraaj, Crescent Enterprises monitors the performance of all invested funds, and takes a keen interest in the strategic rationale employed by Abraaj on select investment decisions, including review of co-investment opportunities wherever possible. Crescent Enterprises also provides strategic guidance by means of representation*

on Abraaj's Board of Directors." Mr Jafar said that there was no "formal relationship" and that Badr's role as an AH board member had nothing to do with Crescent Enterprises ("*Badr's board membership was not on behalf of Crescent, it was a personal board ...board membership..... the reality is that Badr Jafar's membership of the board at Abraaj was not on behalf of Crescent Enterprises*"). Mr Jafar's Reply to Fund IV's defence included a denial that Crescent Enterprises provided strategic guidance to the Abraaj Group and the assertion that the inference to that effect could be made "*because of [based on] investments in Abraaj group entities as a shareholder/limited partner.*" However, it was not the mere holding of investments in AH or other Abraaj entities that was said to found the assertion that Crescent Enterprises provided strategic guidance to (and had a close relationship with) AH and Abraaj entities generally. It was the clear public statement and assertion to that effect and Badr's role. It seems to me that what is unjustified is Mr Jafar's attempt to distance Crescent Enterprises from Abraaj and Mr Naqvi. The Crescent companies are a family concern and Badr's involvement as a member of the board of the Abraaj holding company, presented by Crescent Enterprises as being for the purpose of giving strategic guidance and by inference of Crescent Enterprises assisting and supporting Abraaj, is indicative of an active, cooperative and close business relationship. I found Mr Jafar's denials of this and his somewhat legalistic characterisation of Badr's role (he was only as an individual a director of AH and not formally a representative of Crescent Enterprises) unconvincing. He was it seems to me focussing on technicalities and failing to acknowledge the clear substance of the relationship.

Mr Jafar's evidence as to the involvement and role of Badr

367. The second part of his account (Mr Jafar's evidence that he alone took the decisions in relation to the Loans and that Badr was merely a messenger who had overstated his role in his communications with Mr Naqvi) seems to me to be inconsistent with the evidence and the context (and the inherent probabilities). The contemporaneous WhatsApp messages between Badr and Mr Naqvi are very revealing and, in my view, the most reliable evidence of what was really going on and being said at the time the Loans were being negotiated. They reveal that Badr was very close to Mr Naqvi and passionately committed to helping his friend

in what they both acknowledged was a time of crisis. Mr Naqvi on 25 December 2017 (admittedly after the advance of the First Loan but indicative of Badr's relationship with Mr Naqvi) had said that (my underlining) "Now that lessons have been learnt and absorbed, we will never go to the brink again and I promise you, you will not be at risk for a second. You have given me more strength and purpose than you can imagine." On 27 December 2017 Mr Naqvi had said that "panic proportions are now epic!!!" On 25 December Badr had said: "Can say the Board was appalled at their behaviour and some members decided to step up in unwavering belief in the Company and its Founder. And it is clear to the Board who will ultimately lose out!" (it is not clear which board Badr was talking about – it could be the board of AH although the evidence was, as I have noted, that they had not been told of the problems with the Healthcare Investors or the discussions regarding emergency funding at the time and it sounds as though Badr was referring to discussions within Crescent and with Mr Jafar, and their support for Mr Naqvi).

368. It is also clear that Badr presented himself to Mr Naqvi as being a decision maker or at least able to procure a favourable outcome to the negotiations. Also, on 25 December 2017 Badr had reassured Mr Naqvi that "*don't worry Bro, you can count on the amount. Just need to pin down structure that works for all.*" Mr Jafar's explanation during his cross examination that Badr was seeking to endear himself to Mr Naqvi and overstating his role (Day 6 page 129) seems to me to be wholly unconvincing. It does not fit with the documents.
369. Furthermore, the emails and WhatsApp messages also show that Badr was in close and constant contact with Mr Jafar about the details of the Loans. Badr was copied on all the important emails and Mr Jafar repeatedly asked Badr for his input. He was clearly close to his father and in very close contact with him about the Loans. It seems to me from this evidence likely that Badr regularly and on a real-time basis discussed with Mr Jafar his (Badr's) discussions with Mr Naqvi and disclosed at least the main points and issues that Mr Naqvi had mentioned to him. There is no suggestion in any of the evidence that Badr withheld information from Mr Jafar or had any reason for doing so. Mr Jafar accepted that he was in close communication with Badr in December 2017 and all the time (Day 5 page 97-98). In view of Badr's relationship with Mr Naqvi and the extent of the problems facing

Mr Naqvi (it was an existential crisis) it seems to me probable, despite Mr Jafar's denials, that Badr was pressing Mr Jafar to make the Loans and to bail out and save Mr Naqvi from disaster. Badr was also clearly having discussions with Mr Nerguizian and it seems from the emails and context likely that he did so on occasions directly rather than only through Mr Jafar.

370. There also appeared to be gaps in Mr Jafar's account, particularly in relation to conversations involving and with Badr during the negotiations surrounding the Second Loan and the Third Loan. In Jafar 1, Mr Jafar did not refer to conversations with Badr or to the fact that Badr (and he) had had a call with Mr Naqvi on 25 December but Badr's WhatsApp messages showed that on 25 December Badr had exchanged a number of messages with Mr Naqvi that evidenced important discussions in which Mr Naqvi had been told that the further funding he had requested and desperately needed would be made available, in the sum of US\$250 million, and which must have involved discussions between Mr Jafar and Badr. Mr Jafar remained insistent during his cross examination that before 26 December Mr Naqvi had only been talking to him about him funding the US\$200 million that Mr Naqvi had hoped would be advanced by ENBD and not loans of US\$250 million even though that figure was clearly the amount which Badr had told Mr Naqvi had been agreed (in principle). I have already said that I have concluded that it is likely that Badr was providing Mr Jafar on a real-time basis updates (at least in headline terms) of what he was discussing with Mr Naqvi so it seems to me that Mr Jafar must have known about and the substance of these conversations even if and although he had not seen the texts of the WhatsApp messages.

371. These messages include the following exchanges (my underlining):

"Badr Jafar 25/12/2017, 09:21

Waiting to hear from Varouj (at Christmas lunch) on overnight rates to borrow against fixed deposits, but in principle between my father and I can do up to US250. What amount would you like?

Arif Naqvi 25/12/2017, 10:33

Jesus Christ!!!

Arif Naqvi 25/12/2017, 10:37

Pls call

Arif Naqvi 25/12/2017, 10:40

At this point, I am incapable of speech and may actually collapse under the weight of how much I am overcome by your family's support

Arif Naqvi 25/12/2017, 10:53

I am totally overcome and cannot stop my emotions from exploding.

Arif Naqvi 25/12/2017, 10:55

You have literally changed my view of decency Badr and I will never forget this and my children will never forget this...”

Arif Naqvi 25/12/2017, 10:56

Nothing in my life will give me greater pleasure than telling ENBD to fuck off

Arif Naqvi 25/12/2017, 10:56

Never felt so small and insignificant as they made me feel

Arif Naqvi 25/12/2017, 11:00

I would appreciate 250 MM, of which 50 will come back to you on January 7, 100 on January 31, and the balance on February 28. I would insist on giving you a charge over all my shares in Abraaj. I could pay an all-in interest rate of 5-6% pa calculated on a daily outstanding basis

Arif Naqvi 25/12/2017, 11:02

I am selling shares in 50 MM blocks to 7 investors at 1.30 per share and that more than covers all the repayments with identified buyers. KE is expected to pay us on or before Feb 15 as well as a backup for net receipts to us of 460 MM

Arif Naqvi 25/12/2017, 11:27

Now that lessons have been learnt and absorbed, we will never go to the brink again and I promise you, you will not be at risk for a second. You have given me more strength and purpose than you can imagine

Arif Naqvi 25/12/2017, 14:28

Bro?

Badr Jaffer 25/12/2017, 14:48

Have a call at 7pm my time - don't worry Bro, you can count on the amount. Just need to pin down structure that works for all.

Arif Naqvi 25/12/2017, 14:52

Shall I start becoming obstructive and stupid with ENBD in preparation to calling them Shylock and telling them to fuck off???!!!

Badr Jaffer 25/12/2017, 14:54

Yes!! On all our behalves [sic]”

Mr Jafar’s evidence as to the significance to his lending decision of his investment in Abraaj entities

372. It also seems to me that Mr Jafar sought to minimise (I would say downplay) the relevance to his decision to lend of his substantial investment in Abraaj entities (nearly US\$60 million at the time). Mr Jafar had addressed this issue at [128]-[130] of Jafar 1. There he had said that his investments in Abraaj had long been transferred to Crescent Enterprises and “*did not even cross my mind at the time.*” I do not find this credible. Mr Jafar said that since these investments had a total book value of US\$56 million (and had already generated a return of a similar amount such that Crescent Enterprises’ net investment was by then approximately zero) it would have made no sense to risk a further US\$350 million in order to protect such an investment (particularly if he had known that there was financial mismanagement and fraud within Abraaj). Mr Jafar confirmed this evidence during his cross examination by Mr Ayres. But it seems highly unlikely that Mr Jafar would have regarded the protection of this investment as *irrelevant*. The evidence established that Crescent Enterprises is a family company controlled and effectively owned by Mr Jafar. The investments were in substance Mr Jafar’s investments. Even though investments with a book value of US\$56 million would not, as matter of commercial or business logic, on their own justify the making of a further loan of US\$350 million when there was a real risk of the loan being lost, it is highly unlikely that the prospect of protecting such a substantial investment (substantial even to a wealthy man like Mr Jafar) would have been wholly irrelevant, as Mr Jafar claimed. The evidence,

which was put to Mr Jafar during his cross examination, also showed that these investments had been transferred back to Mr Jafar by Crescent Enterprises on 1 January 2018. Mr Jafar claimed not to recall anything about this retransfer (which had not been mentioned in Jafar 1). This seems hard to believe. Mr Jafar claimed to have been able to remember clearly and in detail the substance of what Mr Naqvi had said to him at the First 20 December 2017 Meeting because he had repeatedly reviewed and recited the circumstances surrounding the making of the Loans and his involvement in their attempted recovery since problems emerged in February/March 2018. It seems unlikely that he would have forgotten that his investments had been reacquired. Furthermore, the fact that the retransfer took place immediately after the Loans had been made suggests that the making of the Loans was the reason for the retransfer or at least that the reason for the retransfer was connected with the Loans. The timing suggests that the retransfer was significant. This makes it all the more surprising that Mr Jafar was unable to recall anything about the retransfer. He did though, even though he could not recall the reasons for or circumstances surrounding the retransfer, deny the hypothesis put to him by Mr Ayres that the retransfer had been made because he contemplated, in the event of a default by AH and AIML, being able to enforce the security granted by AE2L over 210 million AH shares so as to acquire those shares and combine them with the shares retransferred to him by Crescent Enterprises (so as to hold approximately 16.7% of AH's equity). It seems to me that Mr Ayres' hypothesis was speculative and improbable, and without any foundation in the facts. There is no suggestion that Mr Jafar was seeking to manoeuvre himself into a position where he would acquire control of AH and the Abraaj entities.

The credibility of Mr Jafar's account of what Mr Naqvi had said to him was undermined because he often was able to recollect clearly events that were helpful to his case but his memory often failed him or he was evasive in answering questions on issues that were damaging to his case

373. Mr Jafar's recollection of the parts of the discussion with Mr Naqvi (in particular at the First 20 December 2017 Meeting) which supported his case (at least as to the substance of what he had been told even though he acknowledged that he could not remember the exact words) was always clear and precise. He was emphatic about these matters during his cross examination. But it is concerning that his recollection of other parts of the discussion was

frequently poor and he often resorted to saying that he could not recall what had been said in relation to potentially damaging exchanges. For example, there had been two calls on 18 December. Mr Naqvi had first called Mr Jafar (in a call lasting 2 minutes 57 seconds) and then Mr Jafar had called Mr Naqvi straight back after a break in the call for some reason (in a second call lasting 3 minutes 48 seconds). Mr Jafar said that he had a clear recollection of what was discussed. He insisted that the call related to his introduction of Mr Tarek Salam to Mr Naqvi for a training job (I discuss the evidence concerning this call further below). But when asked about Badr's call to him the following day (on 19 December) at 21:28 that lasted 10 minutes he said that he did not have a clear memory of what was discussed. He was asked by Mr Ayres (Day 5 page 104-105) whether it was likely that in this call he had discussed with Badr the call from Mr Naqvi the previous day Mr Jafar said emphatically *"No, because it didn't concern Badr, so there's no way I would be discussing that with Badr."*

Mr Jafar's evidence changed on a number of important points

374. Mr Jafar's recollection of some important parts of his discussions with Mr Naqvi also changed. For example, Mr Jafar appeared eventually to accept that Mr Naqvi had referred to the Uninvested Capital having been used for the general business purposes of Abraaj entities.
375. There were also some significant inconsistencies and changes in Mr Jafar's account of events between his pleadings and his evidence in the witness box. For example, in his Response to request 310(d) in the GHF Parties' Pursued Requests for Further and Better Particulars (dated 20 August 2021) Mr Jafar had said categorically that Mr Naqvi had not provided him with a copy of the Freshfields Opinion at the First 20 December 2017 Meeting. That response stated that *"... Mr Naqvi informed Mr Jafar that a legal opinion from Freshfields ... confirmed the position stated by him... Mr Jafar was not provided with a copy of the actual Freshfields Opinion at the time... A copy of the Freshfields Opinion has since been disclosed ..."* Mr Jafar when shown this response by Mr Atherton said that it was wrong. It was certainly inconsistent with Mr Jafar's latest evidence in the witness box. The account given in Response 310(d) is consistent with what was pleaded in the Original Statement of Claim at [177] (10 September 2020) which merely said that Mr Naqvi had stated that a Freshfields

Opinion had confirmed that there was no contractual or legal basis for the Healthcare Investors' demand since the use of the uninvested capital for the Abraaj Group's general business purposes was permitted by the relevant contractual arrangements. It is also consistent with what was said at [12] in the draft Concise Statement of Claim in October 2021. In [20(3)] of the RRASOC (12 October 2023) it is also averred that Mr Naqvi did not provide Mr Jafar with a copy of the Freshfields Opinion. In Jafar 1 (21 July 2023) Mr Jafar also only said (at [30]) that Mr Naqvi had "*said that he had obtained an independent legal opinion from Freshfields Bruckhaus Deringer ... to that effect only a few days before.*"

The impact of the documentary evidence of the meetings that took place, the emails that were sent and the documents that were drafted in the period from February-May 2018

376. I now want to review the documentary evidence in the emails written and other documents produced in the period from early February to the end of May 2018 and to consider how they throw light on various issues in dispute. I refer to and quote extensively from these documents because they provide a documentary record of how, initially within just over a month after the Loans had been advanced, Mr Jafar understood, and the account he gave when setting out his position in adverse negotiations with Mr Naqvi, the AH board and their advisers as to, what had happened in December 2017. These documents are relevant to and throw a light on a number of the factual issues in dispute regarding Mr Jafar's and Mr Naqvi's understanding of the basis and terms on which the Loans were advanced. Some of them have to be carefully analysed because they were written and prepared for the purpose of negotiations and to set out a negotiating position and account needs to be taken of how long after the events of December 2017 particular emails and documents were prepared. Nonetheless, and being careful to keep these caveats in mind and to consider the appropriate weight to be given to particular emails and documents, it seems to me that the statements of Mr Jafar's position, his accounts of what he was told and thought had been agreed as well as Mr Naqvi's responses are revealing and helpful in testing Mr Jafar's and Mr Nerguizian's evidence and in forming a picture of what really happened during Mr Jafar's and Mr Naqvi's discussions.

377. In particular it is noteworthy that (a) none of the emails from Mr Jafar, Mr Ernest, Badr or Mr Nerguizian mention any assurances (or the falsity of or reliance by Mr Jafar on assurances) given by Mr Naqvi to Mr Jafar in December 2017; (b) they make clear that the Loans had not been recorded in the books of AH or AIML and that the AH board was unaware of the Loans, and furthermore that Badr had failed to disclose their existence to his fellow directors until the AH board meeting on 8 February 2018 (Mr Jafar had also failed to ensure that such a record had been made or to check that the AH board had been told of the Loans) and (c) Badr's comments to the AH board in early February 2018 indicate that he was aware at least by then that in December 2017 the Abraaj entities had faced an existential crisis and were "broke" and that at least some of the Uninvested Capital had been spent and paid away by AH/AIML and did not indicate that what he had learned was inconsistent with what he or his father had previously been told by Mr Naqvi.

The impact of the documentary evidence of what Badr told the AH board during its meetings in February 2018

378. I turn to review and consider the documents recording Badr's comments to the AH board during February 2018 when the board was considering what had happened to the Uninvested Capital and the Loans made by Mr Jafar and also those written and prepared by Mr Jafar and his legal team (Mr Jafar had instructed Mr Richard Ernest of Gibson Dunn to advise and assist him in relation to negotiations with Mr Naqvi) in the period between February and May 2018 after it became clear that the First Loan and the Second Loan would not be repaid on time.

379. As I have noted above, there were various AH Board meetings during February 2018 (starting on 3 February and including meetings on 8 and 12 February 2018) following the damaging press reports which alleged misconduct in Abraaj entities. The meetings were convened to consider how to respond to the press speculation and to the demands of Investors and the financial position of AH and the other Abraaj entities. As Mr Cleary noted in Cleary 1: "On 3 February 2018, the US press (specifically, the Wall Street Journal and the New York Times) published allegations that the Abraaj Group had been misusing GHF monies..... Also on 3 February 2018, Mr Naqvi sent an email to all Abraaj staff in relation to the media

release, setting out his version of events Subsequently on 3 February 2018, I attended a board meeting, hastily convened via conference call, in order to address the two articles that had been published....” At these meetings there were discussions as to the demands made by the Investors for the return of the Uninvested Capital, what had happened to the Uninvested Capital and the financial problems that had been faced by AH and the other Abraaj entities in December 2017 and which were by them coming to a head. Badr had made various comments and statements during these meetings on which the Fund Parties relied.

380. In addition, from mid-February 2018 discussions and negotiations had taken place between Mr Jafar and his advisers and Mr Naqvi and Abraaj’s advisers as to how to deal with the inability of, and impending failure by, AH and AIML to repay the Loans (Mr Jafar sent an email to Mr Nerguizian on 15 February 2018 saying that he was seeing Mr Naqvi that afternoon and asking for copies of the post-dated cheques and Mr Nerguizian had previously sent an email to Mr Jafar on 10 February 2018 stating that he hoped that Mr Naqvi would be able to procure the repayment of the US\$45 million owed to BOS and that if he did no further agreements would be necessary). Mr Ernest had various meetings with and sent emails and documents to Mr Naqvi. Mr Jafar and Mr Ernest were seeking to obtain information as to how the Loans had been recorded in the books of AH and AIML, to protect Mr Jafar’s position, to make and obtain proposals for the repayment of the Loans and the granting of security therefore in the meantime and to have AH and AIML execute documentation to regularise the position and set out the new terms and security for the Loans.

Did Badr and Mr Jafar know that Mr Naqvi had not told the AH board about the Loans and intended to hide their existence from the AH board?

381. It appears that the Loans had never been recorded in the books of AH or AIML and that Mr Jafar was told that this was the case (at the latest) in the Situation Analysis document (to which I have already referred) which had been sent to Mr Jafar by email on 27 February 2018 (copied to Mr Ernest). Mr Jafar and Mr Ernest had previously requested Mr Naqvi to provide a summary of the status of the Loans. The Situation Analysis stated, as noted above, that AMN [Mr Naqvi] borrowed \$ 300MM from HJ and issued cheques from AIML as a security because they were the only cheques that could be found at that time; Abraaj has no

other checking account in the UAE and AMN didn't have his cheque books in the office. The debt is not recorded in Abraaj books; to do so would bust every banking covenant, lead to enforcement and the whole business collapses from an unanticipated direction." There is no email or document that records Mr Jafar's (or Mr Nerguizian's) surprise at or objection to this failure to record properly the Loans or stating that the failure was a breach of and inconsistent with the arrangements discussed and made in December 2017. During his cross-examination, when the Situation Analysis was shown to him by Mr Ayres, Mr Jafar said that the statement that the Loans had not been recorded in the "*Abraaj books*" had come "*as a shock*" (Day 7, page 4) but, as I have said, there is no email or documentary record that this was the case. There is not even an email to Mr Nerguizian or Mr Ernest commenting on this failure (I can see no reason why any such email to Mr Ernest would have had to be withheld to preserve privilege). Nor does Jafar 1 record such shock and Nerguizian 1 also fails to mention that Mr Jafar had expressed any such shock. In the absence of any contemporary reference to such shock or objections I am unable to accept Mr Jafar's unsubstantiated assertion in the witness box. Mr Jafar had shown no interest at the time that the Loans were advanced in the documentation of the Loans (including obtaining any documents acknowledging the advances made and setting out the terms of the Loans or of obtaining a confirmation and written record from Mr Naqvi of the identity of the borrowers and obligors in respect of the Loans). He was prepared to accept the issue of the AIML cheques without more and never followed up subsequently to ensure that the Loans had been properly documented and recorded by AH or AIML.

382. Badr only disclosed the existence of the Loans to his fellow AH directors orally at the AH board meeting on 8 February 2108. Mr Cleary confirmed this at [82] of Cleary 1 when recording what had happened at the 8 February 2018 board meeting (my underlining):

"In the ensuing discussion, (the executive board directors having left the room) Mr Badr Jafar, who was connected via conference call, disclosed to the non-executive members of the board that his father, Hamid Jafar, had lent USD 300 million to Abraaj at Mr Naqvi's request, to fill shortfalls in Abraaj. The USD 300 million borrowed from Hamid Jafar to fill the shortfalls in the GHF and other parts of the Group had not been disclosed by Mr Naqvi, Mr Siddique or any other Abraaj executive board member whom I now know had knowledge of these shortfalls. Over time, it became clear that the arguments that all of Abraaj's actions "were believed to be in the interest of the

fund [i.e. AGHF]” (as per page 4, paragraph 7 of the minutes and paragraph 26 above), were invalid and calculated to mislead the non-executive members of the board. This position was, however, not apparent by 8 February 2018, given Mr Naqvi’s assurances during the board meeting held that day, and the opinions on the conduct of the Fund that had been provided by KPMG and Freshfields (and Mr Chvatal’s characterization of Maples’ advice).”

383. Mr Cleary said that “*the position*” was not apparent by (or before) 8 February because of Mr Naqvi’s assurances that the use of Investors’ funds and the actions of management had been lawful. However, had Badr ensured that the Loans had been properly recorded and disclosed by Mr Naqvi to the AH board (or at least its non-executive directors), or had he disclosed them himself if Mr Naqvi had refused to do so, shortly after they were made, then the AH board might have started to make further inquiries which would have revealed the precarious financial position of the Abraaj entities and even the deception being conducted by Mr Naqvi.
384. Badr’s failure to ensure that the Loans were properly recorded or disclosed to the AH board (in particular the other non-executive directors) before 8 February seems to me, in the absence of a proper explanation from him or Mr Jafar, unjustifiable. Why in any event did Badr not at least mention the Loans at the AH board meeting on 3 February 2018? The fact that the huge amounts owing under the Loans were falling due for repayment imminently was clearly of relevance to the board’s deliberations of its plan for managing the difficulties faced as a result of the demands from the Investors (the board was discussing the KPMG report and investigation into what has happened to the Uninvested Capital and allegations of misappropriation of funds, proper record keeping and governance). The need to repay the Loans in February was directly relevant to cashflow and the question of the funds available to the Abraaj entities to meet their liabilities.
385. It also appears that Badr had sought to mislead the AH board about his involvement in the negotiation and attempts to obtain payment of the Loans. As I have already noted, in the Badr 2018 Email on 5 May 2018 he told the other AH directors that (my underlining) “*[in relation to] the loan agreement between my Father and Abraaj: I am not, and have never been involved with any discussions in relation to this arrangement or its rescheduling post-*

default.” This is clearly untrue. He had, it is true, although belatedly, acknowledged the conflict of interest to which he was subject in relation to deliberations and decision making by the AH board as the son of a major unpaid (and unacknowledged) creditor of AH (and also of AIML) and the need for him to recuse himself from board discussions and decision making with respect to the Loans. He had also tried to reassure other board members that he had never sought to use his position as a director of AH to promote the interests of his father. This appears to have been true. But what was clearly inexcusable in my view was his failure, at the time or shortly after the Loans had been advanced, to check whether, and if necessary to ensure that, the AH board was aware of the Loans and the resulting interest he had in their repayment.

386. It appears that Badr and Mr Naqvi (together with Mr Siddique and the other executive directors involved in the process of obtaining the post-dated cheques issued by AIML) were the only directors of AH who knew about the Loans. Not only had Badr failed to ensure the proper disclosure to his fellow non-executive directors of the making, and his relationship to the provider of, crucial rescue loans to AH/AIML but he had failed to ensure that a very large liability of AH/AIML had been properly recorded in AH/AIML’s books. There is no suggestion in the evidence (including the hearing bundle) that Badr had taken any steps to check or ensure that the very substantial loans had been properly recorded in AH (or AIML’s) books. There is no suggestion that Badr thought that the liability resulting from the Loans had only be assumed by AIML and even if he had done so as a director (albeit a non-executive director) of AH, AIML’s parent, directly involved in the making of the Loans he could be expected, and was arguably duty-bound, armed with that knowledge, to check that the Loans had been properly recorded in AH consolidated accounts (and AIML’s records).
387. His explanation, as reported in the verbatim notes of the 12 February AH board meeting, of why he had reported the Loans to the AH board at the 8 February meeting (and not before) is curious. He told the board that it had been the case that “*for some time Abraaj*” had been facing a liquidity crisis that was so severe that at the end of 2017 the Abraaj entities were “*broke*.” He said that he was unaware of any “*deals or exits*” which had been done “*to change that*.” He then said “*Which is why [he had] reported... to the last board call that [Mr Naqvi]*

had asked the family to come to the company's rescue." The impression created by his statement to the AH board is that his family had been aware at the time that the rescue loans were made that the Abraaj entities were "*broke*" and that Badr was saying that he was not aware of any developments since then that had resolved the core financial problems that the Abraaj entities faced. He did not say that he had only just (or recently) learned of the nature and extent of the financial problems, and that was why he now felt the need to disclose the family loans, or that he had now discovered that the financial problems which had emerged by 8 February were different from those which had been disclosed in December 2017 or that the serious financial problems that were now apparent were a surprise to him or his father.

388. But in any event even if Badr had only recently been told by Mr Naqvi that the Uninvested Capital had been spent and of the full extent and nature of the financial difficulties now being experienced by AH and the other Abraaj entities, this does not explain (let alone justify) why Badr had not previously disclosed to his other non-executive directors the existence and making of the Loans. Mr Jafar argued, as I have explained, that it was to be inferred from the documentary evidence that 8 February 2018 (or the days shortly before that) represented a critical turning point since it was only then, knowing that the fraud he had perpetrated for so long was inevitably going to be discovered in the near future, that Mr Naqvi had changed his position and started to come clean. It was to be inferred, Mr Jafar argued, consistently with this that Mr Naqvi had also only told Badr about the fact that the Uninvested Capital had already been spent before the Loans were advanced and the full extent of the financial problems at the pre-meeting on 8 February. But even if this was the case, as I have explained, there was no excuse for Badr keeping the Loans secret and failing to take steps to ensure that his non-executive directors at least were aware of borrowings and the surrounding circumstances that were self-evidently important to AH and the other Abraaj entities.
389. In my view, the combination of these failures together with the misleading statements made in the Badr 2018 Email indicate (and appears to justify the inference) that Badr was deliberately seeking to hide the truth from the (non-executive directors of the) AH board. He did not, until the very last minute, want the non-executive directors to know about the Loans or his direct and close involvement in their negotiation. By the time of the 8 February 2018

board meeting it was clear that the investigations that were about to commence would reveal what had really happened. The existence of the Loans could no longer be hidden. But, as I have said, even then Badr sought to mislead the non-executive directors as to his prior involvement.

390. So, as I have said, Badr made the disclosure of the Loans only at the very last minute. He had failed to disclose the existence of the Loans earlier when it would have been material for the AH board to be aware of them. He made no earlier efforts to ensure that the existence of the Loans had been disclosed to other AH directors or properly recorded. He then sought to mislead the AH board as to the nature and extent of his involvement in the negotiation and making of the Loans. The question arises, “*why?*”. What was the reason for these failures? Why did he feel the need to keep the Loans and his involvement in their negotiation a secret? How did he benefit? The obvious inference is that Badr knew that Mr Naqvi did not want the existence of or circumstances surrounding the making of the Loans to be known to the non-executive directors (or to AH’s auditors) and was working with Mr Naqvi, or was at least content to allow Mr Naqvi, to avoid disclosing the Loans to the AH board. Badr’s failures and conduct suggest and appear to support an inference that he had been complicit in covering up (or was acquiescent in Mr Naqvi’s covering up) of the making of the Loans.
391. Badr’s statements at the AH board meetings on 8 and 12 February are also revealing as to the state of his knowledge about the nature and extent of the financial problems being faced by AH and the other Abraaj entities in December 2017.
392. In the Badr 8 February Statement Badr said to the AH board that “*Arif was in a bind approaching the end of last year with a liquidity crunch. Money came out of the fund was spent. After paying back the investors they didn’t have money to pay Jan salary. Important board knows this....”*). In the Badr 12 February Statement he had said that it was “*...clear that Abraaj is facing a liquidity crunch and it has been the case for some time. It was severe enough that at the end of the year they were broke. Living hand to mouth. Do not know of any deals that were done or exits made to change that. So have a major concern on this...*”

393. It appears that Badr had had separate meetings outside board meetings with Mr Naqvi during early February 2018. One meeting took place on 6 February 2018 (Mr Naqvi is recorded in the verbatim note of the 8 February meeting as having said “*On Tuesday I have been briefing Badr and Fadi [Ghandour]...*”). It was also clear that Badr had been spending a good deal of time with Mr Naqvi and Mr Ghandour. In the verbatim note of the 12 February board meeting Mr Casey is recorded as having noted that “*Badr and Fadi have spent significant time with the Dubai office in getting ... up to speed on the issues..*” and then that Badr said that he had met that day with Mr Naqvi, Mr Ghandour, Mr Casey and Mr De Boer. Of course, no evidence has been adduced as to what Badr was told in these meetings.
394. Lord Falconer, as I have noted earlier, argued (see Day 25 at page 56-69) that it was likely that Mr Naqvi had only become more forthcoming and started to reveal the truth, in particular as to the Uninvested Capital having been spent, even to Badr from between 6-8 February 2018. He said that by 5:00pm UAE time on 8 February Mr Naqvi knew that Ankura Consulting had been appointed by the Investors and were going to attend Abraaj’s office in four days’ time, and in the days before that he had seen that both the Investors and the Wall Street Journal were getting very close to finding out the truth of what had happened. He submitted that the evidence showed, or that at least it should be inferred, that it was on 8 February, and only then, or a few days before on 6 February, during Mr Naqvi’s discussions with Badr and Mr Ghandour in that period of time, that Mr Naqvi began to indicate what the true position was (because, to use Lord Falconer’s phrase, he knew that the sharks were circling and the truth was about to come out). Lord Falconer invited me to reject the Fund Parties’ claim (he called it speculation) that Mr Naqvi’s reference to “*general business purposes*” from 8 February onwards meant and was evidence that this phrase must have been used in December 2017. A proper analysis of the facts indicated that Mr Naqvi had only begun to refer to “*general business purposes*” once the game was up.
395. There are two particular difficulties with this. First, as I have noted, it appears that Badr was probably party to or complicit in Mr Naqvi’s cover-up of the Loans. Secondly, there is absolutely no evidence of Badr having said after the discussions on 6-8 February or in the discussions/negotiations with Mr Naqvi that followed (or in his emails to Mr Jafar or Mr

Nerguizian) that he had been misled by Mr Naqvi about the manner in which the Uninvested Capital had been held or used (or that he had been told or always understood that the Uninvested Capital had been retained in the form of temporary investments).

396. As regards the first difficulty, it seems to me to be reasonable to infer (in the absence of a contrary explanation and evidence from Badr) at least that Badr was aware and assumed or was told that Mr Naqvi needed to avoid disclosing (at least to the non-executive directors) the making and the terms of the Loans (including the context that he had been unable to obtain funding from normal external financial institution sources and the near chaos and desperation that had surrounded Mr Naqvi's pleas for funding) so as to avoid alerting the (non-executive) directors to the extent of the crisis. I say that I consider that on the evidence as adduced at trial and in the absence of a contrary explanation from Badr (or Mr Jafar) this *at least* can be inferred because it is also possible that Badr knew or assumed more than just that Mr Naqvi was desperate to buy more time and was acting in a *bona fide* attempt to resolve a genuine financial problem. However, I am reluctant in the absence of hearing from Badr and having the benefit of cross-examination to hold that Badr was aware of or complicit in Mr Naqvi's fraud and in the absence of clear documentary or witness evidence to this effect do not consider that I can or should go that far.

397. Badr took no steps to ensure that the Loans were properly recorded and that his fellow (non-executive) directors were aware of the Loans. It is conceivable that he could have asked Mr Naqvi and been told by him that the board had been made aware of the Loans but he could have checked with fellow directors. There is no evidence that he made any such inquiries. It seems to me to be likely (and in the absence of an explanation to the contrary it is to be inferred) that he must have known from an early stage that the Loans were not to be and had not been disclosed to the (non-executive) directors. If Badr was complicit in this way, he would have known that Mr Naqvi was withholding key information from the AH board and seeking to avoid the board (at least the non-executive directors) becoming aware of the extent, the nature of and the real reasons for the crisis which the Abraaj entities faced in December 2017, which the Loans (rescue loans) were designed to alleviate. The Loans gave Mr Naqvi (with the assistance of his associates) breathing space in which to find a solution.

It is reasonable to infer that Mr Naqvi withheld details of the Loans from the (non-executive) directors because he did not want them to start asking awkward questions.

398. The WhatsApp messages in December 2017 evidence a close and candid relationship between Badr and Mr Naqvi, as well as Badr's committed and almost fraternal support for Mr Naqvi. They reveal an awareness of the seriousness of the financial crisis being faced by the Abraaj entities (the Abraaj entities had been on "*the brink*" and facing the prospect of insolvency, although that term is not mentioned). They and the telephone records evidence a number of calls between Mr Naqvi and Badr and some quite lengthy discussions (for example, on 20 December Mr Naqvi and Badr spoke on the phone twice for a total of 35 minutes and it is clear from the WhatsApp messages that they must have been speaking about the urgent need for the emergency funding – for example, Badr's first WhatsApp message to Mr Naqvi, at 05.17, after messages in which Mr Naqvi requests a call, states "*Fine, let's do from HJ to Abraaj (as discussed on call)*"). It seems to me, in this context, and in the context of Mr Naqvi's desperate need for funding and to keep the extent of the funding crisis from at least the non-executive directors, likely that he would have disclosed to Badr that the financial problem was acute because some of the Uninvested Capital was no longer retained so that the relatively straightforward solution of waiting until the temporary investments or deposits matured (or even breaking the deposits to obtain the early return of the funds) was not available.
399. This conclusion is consistent with Mr Naqvi's efforts to reassure Badr that sufficient funds would be received and incoming from *other sources* in sufficient time to enable the Abraaj entities to survive. In his WhatsApp message on 25 December 2017 at 11:02am Mr Naqvi had told Badr that he was "*selling shares in 50 MM blocks to 7 investors at 1.30 per share and that more than covers all the repayments with identified buyers. KE is expected to pay us on or before Feb 15 as well as a backup for net receipts to us of 460 MM.*" Badr was aware that Mr Naqvi faced a desperate financial crisis and that desperate measures were needed to respond to it and to buy time in which to find a solution. But he was not told by Mr Naqvi of the wider fraud that he had been conducting or of its impact on the financial position and solvency of AH and the other Abraaj entities. He knew that the financial

difficulties were severe but was told and believed (as I discuss further below either in reliance on what he was told or because of what he assumed Mr Naqvi was capable of doing and hoped he would do) that there were possible ways of resolving the funding problems and that Mr Naqvi was likely to be able to obtain access to other funds and find a solution.

400. It is also consistent with the Year End Deposit Message. It was self-evident from that message that Mr Naqvi was looking for funds for presentation and optical purposes and not for genuine business purposes. Mr Naqvi had said (my underlining) that *“having healthy cash through the system as deposits shows the firm in a healthy light at end year and as the various reports go out, it is good to show cash, so if you want to place deposits over year end, and have them returned, unused immediately thereafter...”* Badr must have been aware that Mr Naqvi was intending to use the deposit to create a misleading impression. He probably, on my benign reading of the evidence and inferences to be made from it, thought that this was all part of the desperate measures needed to avoid the crisis becoming a collapse and to buy more time and was therefore justifiable (he may even have thought that this type of accounting manipulation was a legitimate technique for solvent businesses who just needed to time and position deposits and funding appropriately to present a good picture to investors and the outside world). I have not seen any evidence of that or justifying the inference that the Year End Deposit Message alerted Badr to the wider fraud being conducted by Mr Naqvi.

401. It is to be noted, as I have already recorded, that Mr Jafar had said in his oral evidence that he had been shocked when he received the Situation Analysis on 27 February 2018 to see the statement that the Loans had not been recorded in the Abraaj books. But it is clear from the documentary evidence that Badr was already aware before then that the AH board had not been told about the Loans. He had made his disclosure of the Loans to the AH board only at the 8 February meeting. If Badr knew, then Mr Jafar will have known also.

402. When would Mr Jafar have known? In my view, it is most likely that he would have known at the outset, in December 2017, before the Loans were advanced. I consider it to be likely, as I have said, that Mr Naqvi would have told Badr, when first discussing the urgent

requirement of emergency funding, of the need to keep the Loans under wraps at least in the short term and that Badr will have passed this on to Mr Jafar at that time. Mr Jafar said in his written evidence that he had asked Mr Naqvi whether Mr Naqvi had informed the AH board of the Abraaj entities' financial problems and difficulties with Investors and been told that he had not yet done so but would do so (see [37] of Jafar 1), suggesting that this was an issue of concern and that he had sought reassurance on the point. Despite this, Mr Jafar seems not to have bothered to deal with the issue of the AH board's knowledge and involvement in decision making in his call with Badr on 20 December 2017 after the First 20 December 2017 Meeting. In his oral evidence Mr Jafar said that he had not mentioned to Badr what Mr Naqvi had said about the state of the board's knowledge and that Mr Naqvi intended to inform the AH board "*in good time.*" (Day 6 pages 42-44). His answers to questions on this topic from Mr Ayres were evasive and unsatisfactory. His initial answers suggested that he had considered the issue of the AH board's knowledge and involvement to be material but thought that there was no need to raise the issue with Badr but when pressed he changed his tune:

Q. And you presumably mentioned to Badr that the rest of the board did not know?

A. No. He would have known that.

Q. How do you say he would have known that?

A. Well, he's part of the board.

Q. So how would he have known what other board members did or didn't know?

A. Okay, okay. Maybe I did not mention it to him.

Q. Let's focus on specifics. You say you didn't mention it to him. You didn't have a discussion with Badr about that during this phone call?

A. No."

403. Mr Jafar's answer to the question put to him by Mr Ayres as to why he had not regarded Mr Naqvi's disclosure that he had not informed the AH board of the liquidity crisis that had

caused him to ask Mr Jafar for the emergency loans was also unconvincing and revealed both inconsistencies in his account and a willingness to change or embellish his story when he felt it necessary to give credibility to what he was saying. At this point he seemed to say both that Mr Naqvi had in fact told the AH board and that he would do so at the appropriate time (underlining added):

“Q. And when he said that to you, surely the fact that the board did not yet know of an urgent need to raise US\$250 million in the next 11 days or so, surely that was a red flag to you?

A. No, because Mr Naqvi - first of all, that situation had just arisen very recently. Mr Naqvi was fully authorised, even during my days and beyond, to – as chief executive, to handle problems and not run crying to the board every time there was a problem. So that was understandable. It was just a question as to whether he had -- but when he came to see me, he had told the board, as a matter of information, and I fully expected him to do that at the appropriate time. I think I referred to that point last Friday also, when I said that I would expect the CEO, who is far less authorised in Dana Gas, public company, and certainly than in Crescent, that a problem of this nature doesn't come running to the board, or any nature, if the CEO can handle it and resolve it...”

404. One major difficulty with this explanation is that the problem that Mr Naqvi was facing was self-evidently not a run of the mill, ordinary business issue that it would be reasonable to expect the CEO to deal with without reference to the board. It was not of a kind that could realistically be covered by the phrase “*every time there was a [ordinary course of business] problem.*” And even if it was reasonable to believe, based on what was said to be only a recent development, that the AH board would be informed shortly at an appropriate time it would have been an obvious follow-up step for an arms’ length lender who genuinely expected the board to be informed to ask for confirmation that in fact the board had been informed and had approved the Loans.

405. But the documentary evidence suggests that Mr Jafar never appears to have checked whether the AH board had in fact been notified of the problems. It is possible that, despite on his own evidence, having raised the issue (and therefore having acknowledged that at the time he had

regarded the issue as sufficiently significant to do so), he subsequently did not consider the issue to be of sufficient significance to be worth raising again or merit a check as to whether Mr Naqvi had acted as he had said he would. However, it seems to me to be much more likely that the reason Mr Jafar did not follow up and seek further clarification and confirmation of what the AH board had been told was that he already knew, probably via Badr, that Mr Naqvi intended to keep knowledge of the difficulties and of the fact of the unusual and very expensive Loans to his inner circle while he manoeuvred to find a solution. This is not inconsistent with Mr Jafar's statement in Jafar 1 (at [37]) that he had asked Mr Naqvi whether the "*board of Abraaj*" (which I accept was a reference to the board of AH) knew about the serious problems flowing from the Healthcare Investors' demands (Mr Jafar had in unhelpfully unspecific terms said that he asked Mr Naqvi whether the board "*knew about all this*"). Mr Naqvi, according to Mr Jafar, had confirmed that they were unaware but would be informed "*in good time*." The AH board would be told what was happening, both as regards the liquidity crisis and Mr Jafar's rescue loans, when Mr Naqvi judged that the time was right and, I think it can be inferred, certainly not immediately. It would have been of no concern and in many ways convenient for Mr Jafar for the board not to be told because he was expecting that the Loans would be repaid rapidly (by the end of February) and board scrutiny of the terms and the difficulties being faced by the Abraaj entities might have raised unhelpful questions.

406. Even if I am wrong in my view that Badr will have known either from the outset or shortly after the Loans had been advanced that Mr Naqvi did not intend to disclose their existence to the (non-executive) directors, he knew of the non-disclosure not later than on or shortly before 8 February and in my view he is likely to have told Mr Jafar about this then.
407. Accordingly, it seems to me to be likely that Mr Jafar would have been aware before the receipt of the Situation Analysis that the AH board had not been told of the Loans and realised that there must have been a failure to record the Loans properly in AH's records. I therefore do not accept his evidence that he was shocked when he received the Situation Analysis. This conclusion is supported by the fact that he made no complaint to Mr Naqvi after receipt of the Situation Analysis of the failure to disclose and record the Loans (which

in my view he would have done had he discovered this for the first time on 27 February 2018) and by the fact that Mr Ernest makes no reference to Mr Jafar being shocked at this or complaint about the failure to disclose and record the Loans. It is to be inferred that this was not done because Mr Jafar was already aware of Mr Naqvi's intentions not to disclose and that had Mr Jafar protested Mr Naqvi would have been able to refer to such knowledge.

408. The documentary evidence includes an email from Badr to Mr Jafar dated 21 February 2018 in which (under the subject heading "*Abraaj Numbers*") Badr sets out in seven bullet points "*What I've been told.*" It evidences a lack of knowledge on Badr's part as to what Mr Naqvi had done with the Loans. Badr said:

"Abraaj paid health fund investors back about \$140MM at end Dec (begs question what he did with rest of money we gave him).

An amount of \$180MM was paid out of Abraaj's treasury in first 10 days of Jan - who did that go to?

Orascom deal completed last week (apparently at discount because of cash crunch) - see attached. Where did money go?

Spinneys deal completed few days ago and will generate \$50-60MM at holding level. Where will money go?

Arif confirmed to others that share sale to Thomas Schmidheiny of 50 million shares completed in January (not December). Also another block of 50 million shares completed. Where is money?

Abraaj owns Air Arabia shares worth \$40-50MM - must liquidate and give us proceeds.

Abraaj loan from Kuwait sovereign fund in region of \$150-200MM - to be paid back within next week or so."

409. This email indicates that Badr did not know how Mr Naqvi had used and spent the Loans. Mr Naqvi had not disclosed how the funds had been deployed. Badr had not been kept fully in the loop of what Mr Naqvi was doing *after the Loans had been made*. I accept that this strongly suggests that Mr Naqvi's relationship with Badr was not so close that he told Badr everything. But it does not undermine my conclusions as to what Mr Naqvi was likely to

have told Badr *before the Loans were made* about the seriousness and urgency of the financial problems he faced, that the liquidity crisis arose in part from the Uninvested Capital having been spent as well as demands from other pressing creditors and that he intended not to reveal the problems and the crisis, or the Loans, to the wider AH board.

The February-May 2018 documents and emails show that the Jafar-Naqvi discussions had not settled the critical question of who would be the borrower(s)/obligor(s) in respect of the Loans

410. On 22 February 2018 Mr Jafar sent an email to Mr Naqvi raising the seven questions that Badr had formulated. Mr Ernest had met with Mr Siddique the previous day and Mr Lakhani on that day to start obtaining the information requested and needed by Mr Jafar (and BOS). On 23 February Mr Naqvi sent an email to Mr Jafar attaching five schedules including certain documents and answers to Mr Jafar's questions. He provided a set of cashflows in response to Badr's and Mr Jafar's first question as to what had happened to the proceeds of the Loans, which he said detailed all receipts and payments out of Abraaj. He also said that the proceeds from the Spinneys deal would not be received until early March.

411. On 27 February 2018 Mr Jafar arranged to meet with Mr Ernest and Mr Naqvi (but without Badr) the following day and Mr Ernest sent an email to Mr Naqvi requesting "*just a little bit more information on*" certain matters which were set out in a table. Mr Naqvi provided Mr Jafar and Mr Ernest with the Situation Analysis on that day. Discussions were taking place between Mr Jafar and his legal adviser and Mr Naqvi and his advisers with a view to Mr Jafar setting out his requirements for the documentation of and the further terms for the Loans. There was a meeting on 28 February 2018 the main points of which were summarised by Mr Ernest in a document he sent to Mr Naqvi on 1 March 2018. A further discussion between Mr Ernest and Mr Naqvi (with Mr Naqvi's legal adviser, Mr Hickman of Addleshaws) took place, and on, 5 March Mr Ernest sent to Mr Naqvi by email an updated summary of issues (the **March 2018 Summary**) and proposed terms and a draft loan agreement (the **March 2018 Draft Loan Agreement**). In his email to Mr Naqvi, Mr Ernest said that "*The updated summary tries to give a snapshot of where things are. However, [Mr Jafar] wants this to move now to a long-form document that is signed and done in the next 2 days, please. The attached agreement documents these terms...*" The March 2018

Summary dealt with the uncertainty and apparent dispute as to the identity of the borrower of the Loans and with proposed new repayment dates and other terms together with an agreement by Mr Naqvi to provide full recourse to his personal assets, all in consideration of an agreement (by Mr Jafar and BOS) not to present the AIML cheques. Subsequently, on 12 March 2018 Mr Naqvi provided his response to and comments on the issues set out in the March 2018 Summary.

412. The March 2018 Summary stated that Mr Jafar's position was that the Loans were "*a liability of AIML, jointly owed to [Mr Jafar] and [BOS].*" Mr Naqvi's position is recorded in his annotation to the March 2018 Summary as being that he could not "*document [the Loans] as an AIML liability under any circumstance; not only were the funds paid to AH, at [his] request, [but] all AIML did [was] provide the cheques since there was no other checking-account available at the time... AIML has ZERO assets .. All assets are owned at AH and AH is leveraged and to a point that it cannot take on additional loans without triggering cross default... I was trying to get us to a win-win by undertaking personal liability not shielding the company...AIML/AH can simply not step up and an attempt to do so will cause the very collapse you are seeking to avoid...*". Mr Naqvi also said that he was unaware that "*any of the money that was lent to me/AH in December was a debt to BOS*" (my underlining).
413. The March 2018 Draft Loan Agreement was drafted as an agreement between Mr Naqvi, AIML, Mr Jafar and BOS. It included a clause (2.1) setting out certain confirmations of key points. These included the following:
- "(a) *AIML confirms it is liable for the entire amount of the [Loans] and all accrued interest thereon and all related fees and expenses. The total amount of the liability to [Mr Jafar and BOS] under and in respect of the [Loans] as at 28 February 2018 was AED [1,192,581,825].*
 - (b). *[Mr Jafar and BOS] are joint creditors in respect of the [Loans].*
 - (c). *On and from the Signing Date, the Parties agree that the terms of the Loan shall be governed by this Agreement..."*

414. The March 2018 Draft Loan Agreement also included representations and warranties to be given by Mr Naqvi and AIML. These were only standard obligor representations seen in loan agreements of this type dealing with good standing, authority to enter into the agreement, choice of law, the accuracy of information provided, title to assets and the absence of litigation and court orders.
415. Mr Naqvi's legal adviser (Mr Hickman) prepared and sent to Mr Naqvi on 8 March 2018 a revised draft of the March 2018 Draft Loan Agreement and noted that the agreement had been amended so that the only parties were Mr Jafar and Mr Naqvi. He commented that he had *"removed AIML from being a borrower under the Loan. We understand that AIML cannot act as borrower as to do so would breach existing financial covenants (the same reason why AIML was not borrower in the first place). Additionally, AIML has a separate and independent board who would need to carefully consider a direct role and this will require a significant amount of due diligence to be undertaken which will take time and create commercial, governance, director's duties and potentially regulatory hurdles."* This comment of course presupposes that AIML was not already the borrower and that the covenants referred to had not already been breached.
416. After receipt of Mr Naqvi's email of 12 March 2018 with his comments on the draft documents Mr Jafar responded on the same day to say that he would discuss Mr Naqvi's comments with Mr Ernest. He said that his *"immediate reading and comment is that we cannot change history. The current debts are what they are, and we certainly were not advised otherwise at the time"* (my underlining). Mr Naqvi's response, also on 12 March, was that *"I agree we cannot change history and there is no intention to; it is just that as we seek a resolution, it should be one that works for you most of all, but then for everyone else as well. If you see, I have given you almost everything you want, just not in the construct proposed by Richard, which doesn't work, with respect."* On 13 March 2018 Mr Jafar wrote to Mr Naqvi to respond and said (my underlining) that *"The [Loans are] owed today by AIML, this is nothing new, and the document from [Mr Ernest] is therefore just recording the history and facts. We are trying to work with you to set out that we will look to you first for the next two instalments (via your cheques), but, for us, that doesn't change the reality*

of who owes us the money, nor the fact that if you don't pay on these next dates, that AIML is still liable to repay the loans.” On 14 March 2018, Mr Naqvi replied and said that he had “asked [Mr Hickman] to prepare and send a draft today that uses [Mr Ernest’s] base, that reflects both what we talked about in December (no change in our commercial understanding) and that keeps AIML/AH away from an immediate default with its banks. [Mr Ernest] knows this, which is why his draft is perplexing; unless if he explains to [Mr Hickman] how his draft can help us avoid default in AIML/AH. The intent is to get you the money back on the 21st (on course, and I have managed to borrow the requisite amount), and the 6th (I am confident you will get this too, and the proof points for you are the payments on the 21st and 6th). If I don't pay, please encash the relevant AIML cheques” (once again, my underlining). On 16 March 2019 Mr Jafar emailed Mr Naqvi to say that “Talk of other factors such as default and an implied "commercial understanding" back in December that conflicts with the documented reality (and which, for the record, is denied) is doubly unhelpful” (underlining added). On 17 March 2018 Mr Naqvi emailed Mr Jafar and said that “I am not prevaricating, and neither do I have any interest in not QI fulfilling the repayment of the loan which you so kindly made available to me in December; but I cannot sign an agreement where the deal that is being requested requires AH/AIML to breach existing contractual obligations at the moment of signature.”

417. On 18 March 2018 Mr Hickman emailed Mr Ernest. He said that (my underlining):

“Our understanding is that there was never any suggestion when this loan was provided in December that both Arif and AIML would be borrowers. Based on this understanding, we are confused as to why the agreement that you have circulated now has Arif and AIML as joint borrowers. Please can you explain why this is the case? Please can you also explain why Bank of Sharjah is a party to the loan agreement when our understanding was that this was agreed as a personal loan between Hamid and Arif?”

Our client's view is that this either needs to be a loan to Arif or a loan to AIML and, if it is the latter, then please circulate a revised draft of the loan agreement which can be considered by AIML's board and removes any personal liability of Arif or any obligations on him in relation to the debt. Is this debt an AIML or an Arif obligation to repay? It seems to us that this can't possibly be both.”

418. Mr Ernest replied on the same day and said that (my underlining) “Removing personal liability for [Mr Naqvi] is for him to discuss with [Mr Jafar]. He has been offering to stand behind the AIML loan from the start.” Also on 18 March 2018 Mr Jafar emailed Mr Ernest to comment on Mr Hickman’s email and said that “*If [Mr Hickman] is serious, this poses an even more serious issue. I urge you to rectify before it gets out of hand. I am obliged to copy everyone including [Mr Nerguizian] as I am duty bound to do so.*” On 19 March 2018 Mr Hickman responded to Mr Ernest as follows (my underlining): “Once again, there appears to be a disconnect between our respective clients as to what was agreed at the time this loan was made and how events have subsequently been remembered. Given this disconnect, the questions we have raised below are legitimate and need to be addressed if we are to make progress and break the current impasse... Rest assured, what isn't in doubt is the repayment of the amount owing to Hamid and Arif's commitment to make the repayments. However, in documenting this arrangement what has been proposed in the Loan Agreement does not reflect Arif's understanding of what has been agreed previously.” Mr Ernest responded on the same day by saying that (my underlining) “*We cannot move forward without having agreement that the loan is owed by AIML. It's a binary question whether [Mr Naqvi] does or does not agree that.*” Mr Hickman’s response, also on 19 March, was that “*we are not aware of any agreement that this loan was jointly to [Mr Naqvi] and AIML and our understanding is that having joint borrowers was not contemplated at the time the loan was made in December or subsequently agreed to since. We have asked you (which you have not yet answered) as to whether the debt is to be owed by [Mr Naqvi] or AIML as there appears to be no basis for both to be jointly liable. If it is AIML, then please update the agreement accordingly removing [Mr Naqvi] from personal liability.*” Mr Ernest, once again on 19 March, responded by saying that (my underlining) “The [Loans are] a debt of AIML. The personal liability of Arif to support AIML’s loan was offered by him to [Mr Jafar] directly. Does [Mr Naqvi] now want to withdraw that?” On 20 March 2018 Mr Hickman replied by saying that “[Mr Naqvi’s] understanding is that this was never a loan to AIML...” which causes Mr Ernest some consternation. He responded on the same day in the following terms (my underlining): “*I’m a bit confused by your email. Yesterday you asked us to update the document to have AIML as sole debtor, but this morning you are disputing the loan is owed by that entity... Are you now saying that [Mr Naqvi] denies the [Loans were] made to AIML?*”

If so, this might need to force the submission of the AIML cheques to force the issue... ”. The negotiations continued and on 1 April 2018 Mr Naqvi emailed Mr Jafar and said that “Apologies for the delay in response; but I am doing all I can. I can only reiterate my sadness of having had you come into this turmoil, especially since you had committed the greatest act of generosity that I had ever experienced, and had acted as a white knight; and neither you, nor I in my wildest imagination could have foreseen what came to pass. Having said that, I am committed to resolving this for you, first and foremost, and then for Abraaj and myself in that order” (my underlining). A further call took place on 7 April 2018 and the discussions continued after that.

419. On Thursday 19 April 2018, ahead of a meeting to be held in Zurich Switzerland the following day (which, as I explain below, appears eventually to have occurred on 21 April), Mr Jafar sent an email to Mr Naqvi saying that (my underlining): “*in the absence of a satisfactory iron-clad scheduling agreement that provides firm assurances of all your promised securities and undertakings that we must have (and which has been promised by you, but thus far regretfully wholly lacking), I am compelled to send you the attached letter formally to preserve the rights that we currently have insofar recording liability and discharge of the outstanding overdue AIML/AH loan is concerned.” The attached letter (undated and unsigned in the form in the trial bundle) was addressed to the AIML board and only referred to liabilities being owed by AIML (my underlining):*

“I write to confirm certain liabilities owed to me by the Company, as described below.

I hereby notify you that no action should be taken by the Company, nor by any of its officers, directors, employees or affiliates, to directly or indirectly, by whatever means, structures or arrangements, dispose of any of its assets before these liabilities have been settled in full.

These liabilities were incurred by the Company on 21 December 2017 (in the principal amount of USD 100 million) and on 27 December 2017 (in the principal amount of USD 200 million).

At the request of the Company, AH and Mr Arif Naqvi, these amounts were paid by the Bank of Sharjah directly into bank accounts in the name of AH in UAE Dirhams. I can provide you with copies of the SWIFT transfers, if you require.

The Company issued three cheques to me at the time of these loans, each dated 28 February 2018, and this included a transaction fee of 6% and interest at the rate of 6% per annum. That date was the agreed date for settlement in full of both the principal sum of the loans, fee, and all accrued interest. I can provide you with copies of these cheques, if you require. They were signed by Mr Arif Naqvi and Mr Rafique Lakhani.

As at 13 April 2018, the total amount due to me (principal and interest) was AED 1,097,667,708.80. This reflects a partial settlement made on 21 and 22 March 2018. Interest at the agreed default rate of 12% per annum is accruing on the outstanding principal sum, in the amount of AED 365,889.24 per day since 13 April 2018.

I have sought to agree a re-profiling of these liabilities by way of extensive discussions with Mr Arif Naqvi during the past weeks, but without success. I therefore now require full and immediate settlement of these liabilities.”

420. On 20 April 2018 Mr Jafar sent another email to Mr Naqvi referring to his previous email and attaching a draft of another document called on the front page the ***Loan Rescheduling Agreement*** which he said was “*the agreement format that we have been in vain trying to put in place to reflect, among other things, the undertakings that you provided at our meeting at Crescent about a month ago, which regretfully have been caused to lay by the wayside.*”
421. The Gibson Dunn draft of the Loan Rescheduling Agreement dated 19 April 2018 was expressed to be between Mr Naqvi (referred to as AMN), Mr Jafar (referred to as the creditor) and AE2L (AE2L, AH and AIML were referred to as the Corporate Obligors and were together with Mr Naqvi referred to as the Obligors). In the recitals there was no explicit statement or confirmation as to who was regarded as the borrower in December 2017. The recitals simply stated that the Loans had been advanced “*for the benefit of AH*” and that AH was indebted to AIML. The recitals do refer to AIML’s cheques and I think that it is to be assumed that the implication of the drafting of the recitals is that AIML was understood to be the obligor in respect of the Loans by reason of the cheques and had borrowed the funds for AH’s benefit so that AH had a liability to indemnify AIML. But the recitals do not indicate that AH had any liability to Mr Jafar. But in the operative part of the Loan Rescheduling Agreement (in clause 2.1) Mr Naqvi confirmed that AIML was liable in respect of the Loans.

422. The recitals stated as follows (my underlining):

- “(A) In December 2017, cash advances were made by the Creditor for the benefit of AH under a discount facility in respect of the Corporate Cheques [defined as the cheques issued by AIML]. The principal amount of those advances are set out in paragraph (B) below. Each Corporate Cheque was issued in favour of the Creditor and was dated 28 February 2018.*
- (B) The cash proceeds of the Loan were paid, at the direction of [Mr Naqvi] and AIML, as follows (from the Creditor's accounts held with the Bank of Sharjah):*
- (i) in the amount of AED 376,300,000, to AH's bank account, on 21 December 2017;*
 - (ii) in the amount of AED 376,300,000, to AH's bank account with Commercial Bank of Dubai, account number AE120230000001001716552, on 27 December 2017; and*
 - (iii) in the amount of AED 376,300,000, to AH's bank account with First Abu Dhabi Bank, account number AE72027101 1201888783014, on 27 December 2017.*
- (C) As a result of the payments described in paragraph (B) above, AH owes AIML the principal amount of AED 1,128,900,000, together with related fees and accrued interest from time to time (the "Intercompany Loan").*
- (D) The Creditor has agreed (subject to the terms of this Agreement) to a new payment plan for the Loan, and, as consideration for the Creditor agreeing to the that plan, the Obligors have agreed (among other things) to do the following:*
- (i) provide (and ensure that each Security Provider provides) the Transaction Security;*
 - (ii) ensure that the Payment Instructions are given to the relevant banks to ensure that the applicable KE Proceeds are transferred directly to the Creditor on payment;*
 - (iii) issue personal cheques in AMN's name to the Creditor in the amount of each of the first two Repayment Instalments (plus the interest and other amounts payable in respect of each such Repayment Instalment), dated the applicable date of the relevant Repayment Instalment; and*
 - (iv) issue a cheque in the name of A2L to the Creditor in the amount of the third Repayment Instalment (plus the interest and other amounts payable in respect of each such Repayment Instalment), dated the applicable date of the relevant Repayment Instalment.*

(E) *The Creditor has also agreed not to present the Corporate Cheques for payment for so long as the Obligors are in compliance with the terms of this Agreement.”*

423. Clause 2.1(a) stated that (only) AIML was liable in respect of the Loans. That clause states that: *“AMN confirms and acknowledges that AIML is liable for the entire amount of the Loan and all accrued interest thereon and all related fees and expenses. The total amount of the liability to the Creditor under and in respect of the Loan (including accrued interest) as at 13 April 2018 was AED 1,097,667,708.80 (and interest on that amount accrues at the rate of AED 365,889.24 per day).”*
424. Schedule 2 of the Loan Rescheduling Agreement contained the standard representations to be given only by Mr Naqvi and AE2L. However, Mr Naqvi’s representations now included the following representation regarding the disclosure of the Loans to the AH and AIML boards: *“[Mr Naqvi] has disclosed (or has ensured the disclosure of) the Loan and all relevant details about it to the board of AH and AIML.”*
425. On 21 April 2018 Mr Hickman emailed Mr Naqvi to say that the draft Loan Rescheduling Agreement was one of the most provocative and one-sided agreements he had ever seen and that *“AIML [was] still repeatedly described as having liability to repay the loan. This [was] despite it being explained at length that was not possible without triggering defaults across the group and [Mr Naqvi] not having the right to bind AIML.”*
426. Mr Naqvi met with Mr Jafar in Zurich as anticipated on 21 April 2018. On 22 April 2018 Mr Siddique sent two “executed” agreements to Mr Jafar at Mr Naqvi’s request. On 23 April 2024, Mr Naqvi emailed Mr Jafar to say that these agreements gave him *“everything you sought by way of entering the tent and having a seat at the table whilst preserving the construct of not defaulting.”* On the same day, Mr Hickman emailed Mr Ernest and said as follows:

“As you may be aware, following a meeting which took place between Arif and Hamid on Saturday night, Arif/A2L executed the attached loan agreements last night.

The agreements have a Longstop Date of 30 April in order to put in place security documentation and other deliverables. This is a fairly tight deadline and so we will need to work together in order to achieve this. I have summarised the deliverables below: • granting of an equitable mortgage by A2L of its shares in AH - as lender's counsel, I assume you will want to take charge of this and so please could you share a copy of the agreement to be entered into? • assignment of carry interest by Arif - as lender's counsel, I assume you will want to take charge of this and so please could you share a copy of the agreement to be entered into? • granting of security interest over the following assets owned by Arif: o art collection; o yacht; and o EH villa, I understand that these assets are each owned by SPVs and so the shares in the SPV will need to be pledged. I have requested more information in respect of this and will update you as soon as possible. As lender's counsel, I assume you will want to take charge of this? • AH sign the AH Undertaking and deliver this to Hamid - we shall liaise with AH on this; • AH send the payment instruction - we shall liaise with AH on this; and • the AH Bank Summary - we are preparing this and shall circulate in due course. Happy to discuss if helpful."

427. It appears that Mr Naqvi sent to Mr Jafar (a) a revised draft of the Loan Rescheduling Agreement (the ***Revised Loan Rescheduling Agreement***) to which only Mr Naqvi and Mr Jafar were parties, which Mr Naqvi had signed (the trial bundle included a mark-up showing the changes to the draft Loan Rescheduling Agreement sent by Mr Jafar and prepared by Gibson Dunn, which mark-up and revisions I assume was prepared by Mr Hickman on Mr Naqvi's instructions) and (b) a loan agreement between Mr Naqvi, AE2L and Mr Jafar (the ***AE2L Loan Agreement***).

428. The Revised Loan Rescheduling Agreement contained recitals that said that the Loans had been made to Mr Naqvi:

"On 21 December 2017, cash advances were made by the Creditor as a loan to [Mr Naqvi]. The principal amount of those advances are set out in paragraph (B) below.

(B) The cash proceeds of the Loan were paid, at the direction of AMN as follows (from the Creditor's accounts held with the Bank of Sharjah): in the amount of AED 367,300,000, to AH's bank account, on 21 December 2017.

(C) As a result of the payments described in paragraph (B) above, AMN owed the Creditor the principal amount of AED 367,300,000, together with related fees and accrued interest from time to time.

(D) On March 21, 2018, AMN repaid AED 121,000,000 and the balance remains outstanding as of the date of this Agreement.

(E) The Creditor has agreed (subject to the terms of this Agreement) to a new payment plan for the Loan, and, as consideration for the Creditor agreeing to that plan, AMN has agreed (among other things) to do the following:

(i) grant security over his rights to carried interest; and

(ii) grant security over the Identified Assets consisting of an art collection valued by Sotheby's in February 2018 for an amount in excess of USD 40 million, a house in Emirates Hills (L24) expected to sell for USD 20 million and a 47 metre yacht in France expected to sell for USD 15 million; each of these assets are held by special purpose vehicles whose shares will be pledged to the Creditor with blank transfer forms in the event that title needs to pass."

429. The AE2L Loan Agreement contained a recital that (my underlining) *“on 27 December 2017 cash advances [the full amount of the Loans] were made to the order of [AE2L] by [Mr Jafar] for the ultimate benefit of the Abraaj Group under a discount facility in respect of the [cheques issued by AIML] with the objective of enabling [AE2L] to settle its intercompany liability to the AH Group.”* The AH Group was defined as *“the Abraaj Group including AH and its subsidiaries and controlled entities for the time being.”* In clause 2.1(a) Mr Naqvi confirmed that *“in the event that [AE2L] cannot meet its repayment obligations under the terms of this Agreement, AH Group shall become liable for the repayment of the entire amount of the Loan by extending an intercompany loan to A2L to enable it to extinguish its liabilities under this Agreement and all accrued interest thereon and all related fees and expenses and that he will use his powers and authority within the AH Group to ensure that it takes all necessary actions to enable this repayment to occur (my underlining).”*

430. On 27 April 2025 Mr Jafar wrote to Mr Naqvi to say that the documents sent *“do not do what I have been asking of you for many months now, nor do they give me what you have been promising to give; indeed quite the reverse: with time you continually erode what you promised as a basis for re-scheduling our loan. In fact, from what [Mr Nerguizian] and I hear, you are promising and planning to provide some of the same security to others. Unfortunately, we are now at the end of the road with discussions.”* On the same day Mr Naqvi responded and said that he was *“totally focussed on honouring my/our obligations to you.”* On 28 April 2018 Mr Ernest sent Mr Naqvi an email attaching letters to the AIML and AH boards (in, I believe, the same form). This version of the letters refers to the Loans

as being owed by both AH and AIML (while asserting that liabilities are owed by AIML the letter says that they were incurred by AH and does not explain how AIML is liable):

“I write to confirm certain liabilities owed to me by AH and AIML (the “Obligors”), as described below.

I hereby notify you that no action should be taken by the Obligors, nor by any of its officers, directors, employees or affiliates, to directly or indirectly, by whatever means, structures or arrangements, dispose of, pledge or otherwise alter any of its assets before these liabilities have been settled in full.

These liabilities were incurred by AH on 21 December 2017 (in the principal amount of USD 100 million) and on 27 December 2017 (in the principal amount of USD 200 million).

At the request of the Obligors and Mr Arif Naqvi, these amounts were paid by the Bank of Sharjah directly into bank accounts in the name of AH in UAE Dirhams. I can provide you with copies of the SWIFT transfers, if you require.

AIML issued three cheques to me at the time of these loans, each dated 28 February 2018, and this included a transaction fee of 6% and interest at the rate of 6% per annum. That date was the agreed date for settlement in full of both the principal sum of the loans, fee, and all accrued interest. I can provide you with copies of these cheques, if you require. They were signed by Mr Arif Naqvi and Mr Rafique Lakhani.

As at 13 April 2018, the total amount due to me (principal and interest) was AED 1,097,667,708.80. This reflects a partial settlement made on 21 and 22 March 2018. Interest at the agreed default rate of 12% per annum is accruing on the outstanding principal sum.

I have sought to agree a rescheduling of these liabilities by way of extensive discussions with Mr Arif Naqvi during the past weeks, but without success. I therefore now require full and immediate settlement of these liabilities.”

431. Despite these exchanges, the negotiations and discussions with Mr Naqvi continued and on 1 May 2018 Mr Ernest emailed Mr Reddy of Houlihan Lokey to say that following their meeting the day before he wished to confirm what Mr Jafar and BOS required “*from Mr Naqvi in order to continue to hold off from enforcing the aggregate \$300m loans made to Abraaj Holdings/AIML in December last year.*” They required Mr Jafar’s claim to be “*secured as promised by [Mr Naqvi] on 22 February [2018]*” and the first step was that a loan restructuring agreement must be signed by Mr Naqvi and “*the other Abraaj-related*

entities” the following day. Mr Ernest said that he would circulate the form of agreement later that day, but it would be in substantially the same form as previous drafts (most recently 29 April). On the same day Mr Ernest sent Mr Reddy a further draft agreement, called the ***Loan Restructuring Agreement***. The parties to the Loan Restructuring Agreement were now Mr Naqvi, AE2L, AH, AIML and Mr Jafar. This agreement contained similar recitals to the recitals in the Gibson Dunn draft Loan Rescheduling Agreement dated 19 April 2018 to the effect that in December 2017 cash advances had been made by Mr Jafar for the benefit of AH under a discount facility but removed the recital that had said that AH was liable to AIML in respect of the sums it had received. Furthermore, clause 2.1(a) was amended so that a confirmation was added from AH that it was liable for the entire amount of the Loans (and AIML confirmed that it was liable under the cheques that it had issued). This agreement retained the representation to be made by Mr Naqvi that he had disclosed (or had ensured the disclosure of) the Loans and all relevant details to the boards of AH and AIML.

432. On 5 May 2018 Mr Cleary wrote to members of the AH board and noted that on 2 May the AH board had “*addressed the need to clarify and address the shareholder loan advanced by [Mr Jafar] in December 2017.*” He said that the board had been advised on the issue by Freshfields and Houlihan Lokey who had said that the legal and factual position was still under review.
433. On 5 May 2018 the Loan Restructuring Agreement in the form provided by Mr Ernest on 1 May was executed by Mr Naqvi on behalf of himself and AH, AIML and AE2L. On 6 May it was sent by Mr Hickman to Mr Jafar (copied to Mr Naqvi). It was also signed by Mr Jafar. On 6 May Mr Naqvi asked whether the agreement was meant to be kept in a safe and whether only he and the Jafar family were to know that it had been signed. He also confirmed that he had not “*briefed the lawyers, and Freshfields*” but was planning to do so immediately. On the same day Mr Ernest sent a copy of the Loan Restructuring Agreement to Mr Akhtar of Freshfields and said that he had attached “*the document that we lawyers need to work on implementing in an appropriate manner.*”

434. On 6 May 2018 Mr Naqvi sent a memorandum to the AH board explaining that he had signed the Loan Restructuring Agreement and why he had done so. He said that (my underlining):

"I am writing to inform you of certain events that took place over the last 24 hours, which resulted in me signing the Loan Reconstruction Agreement (Agreement) delivered by lawyers (Gibson Dunn, or GD) on behalf of Mr. Hamid Jafar (Creditor) on May 1. I signed that Agreement late on Saturday evening (May 5) and this note is to fully brief the board members and to record the circumstances under which I signed that document.

To recap - as you all know from our last board meeting on May 2nd, 2018, HL received an email from GD on May 1, asking that the Agreement be signed by me before 4 pm DXB time on May 2, otherwise, the cheques signed by AIML in support of the loan taken in December would be presented for encashment.

At the same time, GD also wrote to the Board enclosing a letter from the Creditor to the Board documenting the circumstances behind the loan being granted and requiring immediate repayment. The Board decided to request Freshfields to look into the circumstances surrounding the loan and the options available to the Company in respect of that.

On May 3, we were informed that the cheques were indeed presented to Commercial Bank of Dubai, and were returned by the bank who noted that there were insufficient funds to proceed. Subsequent to that, we informed the banks and secured lenders of this development since a cheque that is returned unpaid constitutes an event of default. At the same time, since the default action had occurred already, my view was that we could enter into immediate and substantive documentation to record the loan as a liability of AH and also inform the banks of our intent to do so. A meeting of lenders was accordingly called for May 7 to discuss all these matters more fully...

My conclusion in reviewing the events that led to the cheques being presented was that the Creditor had acted consistently with the advance messaging conveyed by him in his communications to us through his lawyers. On May 5, I was again informed through exceedingly credible intermediaries that if I did not sign and return the Agreement by later the same evening, the Creditor would file proceedings in the UAE and in Cayman Islands on May 6 and 7...

...

At all times, I also believed that the Creditor was not doing these actions to damage AH or the platform, but consistently following legal advice to enhance his security and be recognized as a lender at the AH level, alongside getting a seat at the table in the resolution of our current difficulties. No act or action was done haphazardly or irrationally and there was a method to the solution that they had crafted to get the

Creditor's claims to be recognized in a more formal manner than the documentation that existed, which all parties agreed was inadequate and improper, given the incredibly supportive role the Creditor had played in resolving the issues faced by AH in December 2017. Hence I believed that the correct signal in reciprocity by us would be appreciated for what it was meant to convey, and we would resume the constructive dialogue that would lead to a satisfactory outcome...

435. On 7 May 2018 Mr Jafar emailed Mr Naqvi and said that *“the [presentation of the AIML cheques was] not meant to destabilize the Abraaj platform, but to ensure that my shareholder loan gets formal recognition in the books of Abraaj Holdings as a Creditor with all attaching rights that reflect the very supportive role that I have played in the growth of Abraaj since inception. Now that our respective lawyers are drafting a commercial agreement to reflect this reality, I am comfortable to confirm to you that we have no intention of proceeding with an enforcement of the cheques or taking any action that could cause reputational harm to you or to Abraaj.”*
436. In early May Mr Jafar was having discussions through Crescent with potential new investors in Abraaj as part of a possible rescue. On 9 May 2018 Mr Singhvi of Crescent emailed Mr Jafar regarding what Crescent should say regarding its objectives in participating in any rescue. Mr Singhvi suggested that these objectives included (and Mr Jafar, when on the following day approving Mr Singhvi's draft, did not amend this paragraph) the need to *“Protect our \$300m loan that we injected in December as part of our efforts at the time to address the problems that existed.”*
437. In a letter dated 13 May 2018 to the AH and AIML boards Mr Jafar said this (my underlining):

“My principal objective is to preserve the value of the Abraaj Group this value has been painstakingly built with the support of investors and creditors into the leading emerging markets private equity firm. In this spirit, and expressing my confidence in the inherent value and future of the platform, I extended a loan to AH and AIML of \$300 million at the time of crisis in December 2017 to address the issues that were described to me at the time, and reinstate confidence within the international investor community. Without that urgent rescue funding of \$300 million, the Abraaj Group would not, as I was advised, have survived beyond January 2018.”

438. On Thursday 17 May 2018 Mr Ernest sent an email to Mr Naqvi saying that he had just spoken to Mr Jafar who was “*most uncomfortable that the deliverables under [the Restructuring Loan Agreement] appear to be lying dormant*” and had directed Mr Ernest to set a deadline for the full implementation of these terms” by 10am UAE time on 20 May.
439. Also, on 17 May 2018 Mr Naqvi had emailed the potential new investor about the Loans (copied to Badr). He said this (my underlining and emphasis):

“I wanted to introduce you directly to Badr, a close friend, board member and shareholder of Abraaj; and also a major creditor of ours, whom you will recall I told you, was instrumental in saving our business in December when we really needed help and there was nobody else around who stepped up. We owe him and his family for enabling us to even get to the point where we are having a dialogue with you to take over AIML, and that was why I insisted on having the relevant clauses in our term sheet recognising the nature of our liability to them and the recognition of the creditor approvals before we move forward.”

440. On 21 May 2018 Mr Ernest sent an email to Mr Timchur of Allen and Overy asking about the treatment of the Loans. He said this (my underlining and emphasis):

“Can I please check they it's clear to everyone what is the position with the 300m Loans?

200m were lent to AH. 100m was lent to AIML. That is where the funds were sent in December. Waqar said this today and I've now checked the wire transfers.

Separately, AIML carries 300m by way of the cheques.

AH benefited from the 100 since it needed that cash to pay back to the healthcare fund investors.

Does this align to what the board understand?”

441. Also, on 21 May 2018 Mr Ernest sent a further email to Mr Naqvi and said that Mr Jafar had requested that Mr Naqvi “*sign an affidavit to finally settle the facts around the making of the loans in December.*” There is no draft of such an affidavit in the trial bundle. Mr Ernest also said that Mr Jafar (my underlining) was “*following up on Mr Naqvi’s offer to provide the*

Freshfields opinion that you told him that you had (again back in December) that related to the use of Funds' money by Abraaj Treasury [had requested Mr Naqvi to] let him have that."

442. Mr Ernest also emailed Mr Timchur of Allen & Overy and Mr Hickman on 22 May 2018 to say that Mr Jafar's position was that (a) the Loans had been advanced on the basis of collateral which was promised and agreed in December 2017 and documented in the 6 May 2018 Loan Restructuring Agreement and (b) any agreement to allow for any part of the Loans to be assumed by Mr Naqvi would be taken in the future and subject to conditions.
443. On 26 May 2018 Mr Ernest sent an email to Mr Timchur attaching a draft resolution to be passed by the AH board as a matter of urgency (the **May 2018 Draft Resolution**). The May 2018 Draft Resolution stated as follows (my underlining and emphasis):

"The Abraaj board has been apprised of the circumstances in which Mr. Hamid Jafar has provided a substantial Rescue Loan of \$300 million (Rescue Funds), and notes and acknowledges the following:

- a) That the Rescue Funds [the Loans] were indeed required to be secured by Abraaj on an urgent basis before 31/12/2017;
- b) That the Company had been given notice by various key investors in Fund VI (AGHF) to repay unutilized funds in an amount of approximately \$250m by year-end, failing which catastrophic reputational damage and insolvency would ensue; and that additional urgent funds up to \$50 million were required by the company before year-end 2017;
- c) That without the Rescue Funds being paid by the indicated critical time, the company would have indeed, as cited by [Mr Naqvi], suffered catastrophic reputational damage **and insolvency**;
- d) That the Founder & CEO, Arif Naqvi did in fact approach Mr Jafar among many others in late December to provide the said Rescue Funds;
- e) That no person or entity other than Mr Jafar was willing to provide such funds at the required short notice or at all;
- f) That Mr Jafar did indeed oblige **and very kindly and honourably** provide and pay the Rescue Funds to the Abraaj group in time prior to the end of December 2017, **based on a good faith provision of the Collateral**;

- g) *That Mr Naqvi did in fact make the indicated promises and undertakings for Abraaj to provide the indicated securities as collateral (Collateral) to the Rescue Loan;*
- h) *That the Board considers that the said promises and undertakings were entirely justified and reasonable;*
- i) *That although there may be technical legal arguments subsequently to renege, it would be dishonourable and a bad faith action to try and do so;*
- j) *That, only as a result of the support provided by Mr Jafar and his advisors in recent weeks, the company is able to consider a going concern plan that maximises recoveries for all creditors, when compared to any reasonable liquidation scenario or analysis in the interests of all stakeholders including creditors as a whole;*
- k) *That the documentation for these arrangements signed on 6 May 2018 is now being revised after consultation with the company's lawyers and is now in almost-final form;*
- l) *That Mr Jafar and his advisors are willing to work with the Secured Bank Group (SBG) to achieve a consensual deal regarding the allocation of securities and other matters for the broader benefit of creditors of the group as a whole;*
- m) *That the SBG has also confirmed its willingness to engage directly with Mr Jafar and his advisors on the same subject matter*

The Board:

- *recognises its obligation to prioritise the interests of all creditors, taken as a whole;*
- *recognises that the historic and current support of to Rescue Creditor is of central important to the business, and that only with this continued support can any reasonable plan that shows fair recoveries for the benefit of all creditors be achieved;*
- *approves the proposed direct discussions between Mr Jafar/his advisors and the SBG, and*
- *looks forward to receiving and considering any joint recommendations that they may reach;*
- *welcomes the fact that discussions on a complementary liquidity package with Colony NorthStar are proceeding, and confirms that these are, and will continue to be made, in close coordination with Mr Jafar and his advisors because any other liquidity package being discussed by Abraaj executives and advisers shall not include pledging of any security that has already been promised to Mr Jafar as per the security package referred to above;*

- acknowledges that any deal being discussed for the sale of AIML with any potential buyer should reflect that AIML cannot be acquired debt free and that any deal structure would have to include a mechanism for Mr Jafar's Rescue Loan repayment to be addressed by mutual agreement (noting further that the two signed term sheets from bidders address these issues in their drafting); and
- resolves to approve the entry into and execution of the Loan Restructuring Agreement, including the promised security embodied therein, to be granted to Mr Jafar, and to also avail of the liquidity facility that he has arranged, and authorises any member of the board individually or together with any other board member to finalise that documentation and execute it on behalf of the company.”

444. On 26 May 2018 Mr Jafar emailed Mr Cleary and made the following comments regarding the basis on which the Loans had been made (my underlining and emphasis):

“The \$300 million rescue loans that I personally provided (in utmost good faith and helpfulness, as everyone has acknowledged) to rescue the business in late December of last year, on a desperate urgent basis as pleaded at the time by Arif Naqvi, were based on a promise and undertaking by him as Founder & CEO to repay within 2 months and in the meantime provide collateral of the company's unencumbered assets. This was a commitment that I considered at the time, and still strongly do, which should be honoured with dignity by Abraaj, its board and all concerned, without having to elaborately consult external advisers and legal consultants and examine legal minutiae after the fact. Indeed this background alone wholly and unambiguously justifies and supports the board's urgent endorsement of the promised securities.

The straightforward questions before you are as follows:

" Were the \$300 million rescue funds injected at the end of December indeed funds urgently required to rescue the Abraaj group? The answer is unambiguously yes.

" Would an Abraaj collapse have resulted immediately after year-end 2017 without my Rescue Loan? Evidently yes.

" Would the board have consented at the time to provide the promised collateral as a condition to provision of the Rescue Loan? Again, the answer can only be yes.

" Were the Loan funds paid into the Abraaj group accounts as instructed by the Founder & CEO. Yes."

445. It appears that the AH board met on 27 May to consider the May 2018 Draft Resolution and on 28 May Ms Ahmed provided Mr Ernest with an extract from the minutes of that meeting which include the following (my underlining):

“The Board noted a Resolution (the Proposed Form) which had been received from Mr. Hamid Jafar (HJ) and which it had been asked to adopt. The Proposed Form is attached at Appendix A.

The Board wishes to place on record its sincere appreciation of HJ's crucial support for the Company since late in 2017.

The Board acknowledges that HJ lent the emergency funds to the Founder and CEO, Arif Naqvi, to avoid catastrophic reputational damage and insolvency at a time when the Founder was unable to secure alternative sources of funding on an expedited basis. Although the Board was not apprised of the loan at the time, it acknowledges that the loan was advanced on the basis of HJ's entirely justifiable and reasonable belief that collateral would be provided therefor.

The Board welcomes HJ's recognition of the Board's obligation to prioritise the interests of all creditors, taken as a whole; and the willingness of HJ and his advisers to work with the SBG to achieve a consensual arrangement regarding the allocation of securities and other matters for the broader benefit of creditors of the group as a whole.

The Board, taking notice of the Proposed Form:

- (a) recognises that the historic and current support of the Rescue Creditor is of central importance to the business, and that only with this continued support can any reasonable plan that shows fair recoveries for the benefit of all creditors be achieved;*
- (b) approves direct discussions between HJ/his advisers and the SBG, and looks forward to receiving and considering such joint recommendations as they may reach...”*

446. On 29 May 2018 a response was sent on behalf of Mr Jafar (presumably by Mr Ernest) which included the following (my underlining):

“Thank you for sending this to Mr Jafar. We are glad that the history of the three loans that he made to the business in December last year (as set out in Appendix A to this Board extract) has now been recorded.

More troubling for him, however, and the reason why he has asked me to respond on his behalf, are the continued apparent evasions and inaccuracies on certain matters of fact that, to his mind, seem likely to result in significant loss for him and the creditors as a whole. I shall clarify his views below, by reference to specific paragraphs of the Board extract.

The numbers below follow the paragraph sequence of the extract.

1. *The resolution that was sent to you was done so at the request of the chairman, and after much discussion between Mr Jafar's advisors and those of the Company, and sets out the factual background to the making of the three Rescue Loans in December 2017.*
2. *This is noted with thanks; however, this is just a sentiment, and it has been the lack of substantive action by the Board since they became aware of the Rescue Loans in February that has materially contributed to the that the group finds itself in now.*
3. *The Rescue Loans were made to AIML and AH, not as personal loans to the Founder. Mr Jafar's action was taken on behalf of and for the benefit of the business, and the funds that he arranged to be provided were paid directly into bank accounts of AIML and AH. It seems strange to Mr Jafar that neither the receiving banks nor any part of the financing function of the Group identified these as unusual payment inflows. These loans were then apparently used to repay to investors in AGHF amounts that they had advanced as capital but which had not been used (instead, they seem to have been paid to Abraaj Treasury and used for its general corporate purposes). Again, it seems strange that neither the remitting banks nor the Board (in reviewing the year-end accounts, for example) these transactions unusual, nor that the Board had any scrutiny over this nor raised questions about this.*

Mr Jafar's uncertainty and changing position as to the identity of the borrower

447. First, Mr Jafar's uncertainty and changing position as to the identity of the borrower (and therefore as to who would be liable as an obligor) in respect of the Loans (as well as but, for the reasons I explain below, to a lesser extent, Mr Naqvi's claims that he was the borrower) gives a clear indication of the tenor and nature of Mr Jafar's conversations with Mr Naqvi. In important respects they were high level and incomplete (imprecise and informal) and did not focus on or get into detail.

448. Mr Jafar's position as to the identity of the borrower (who would be liable as an obligor) in respect of the Loans kept changing during the discussions and negotiations in February-May 2018. Initially he claimed that AIML alone was liable and that he and BOS were joint creditors. Then he changed his mind and said that both AIML and AH were liable in respect of the Loans and that he was the sole creditor (to be fair to Mr Jafar he was always clear and maintained his position that the borrowers and the parties liable in respect of the Loans were

either AIML or AH). Mr Jafar's change of position is, in my view, indicative not only of his own uncertainty (and incomplete understanding) as to a critical component of and the outcome of his agreement with Mr Naqvi but also, and importantly, indicative and evidence of the fact that this critical issue was not settled and resolved during the oral discussions at the First 20 December 2017 Meeting and the Royal Mirage Meeting. There was a failure to deal with and pin down the identity of the borrower(s) during the discussions. This shows that those discussions were conducted at a high level of generality and were in important respects inconclusive. I will return shortly to the question of who, in light of all the evidence and in particular the relevant documents, is to be regarded as the obligor in respect of the Loans, despite the failure to deal with issue at the meetings and in the conversations.

Mr Naqvi's challenges to Mr Jafar's account of who was liable in respect of the Loans

449. The emails and documents during February-May 2018 show that Mr Jafar's confusion was matched by Mr Naqvi's challenges to Mr Jafar's account of who was liable in respect of the Loans. As I have said, Mr Naqvi disputed the identity of the borrower. He claimed that he was the borrower (either alone or with AH). However, while the failure of Mr Jafar and Mr Naqvi to reach a clear agreement in their conversations as to the identity of the obligors (and the failure to record the Loans as liabilities in the books of AIML/AH) gave Mr Naqvi the opportunity to make this argument, it was inconsistent with the contemporary documents and email exchanges that I have referred to which indicate, as I have said, that Mr Naqvi, Mr Jafar and Mr Nerguizian had it clearly in mind that cheques would be issued by AIML and that the borrower would be identified as and that funds would be advanced to AIML and AH. It is clear that Mr Naqvi had a motive and good reason for denying the existence of any corporate liability in early 2018. He was seeking to avoid acknowledging a corporate liability at that stage since, as he and others pointed out, to do so would have resulted in the acknowledgment by AH or AIML of additional previously undisclosed liabilities which were not permitted by and would give rise to a default under AIML and AH's credit facilities with third party financial institutions. Mr Jafar stuck to his guns that there was a corporate and not a personal liability but it is noteworthy that the AH board on 27 May 2018 (as recorded in the extract from the board minutes of the board meeting that day) maintained that the

Loans had been made to Mr Naqvi personally. They were no doubt influenced by Mr Naqvi and the need to avoid creating or acknowledging a default under the credit facilities but the board at that point was not simply doing Mr Naqvi's bidding and was acting to some extent independently and importantly on the basis of reputable independent advice. To my mind, the fact that the board felt able to and did say this reflects the uncertain position created by Mr Jafar and Mr Naqvi by and at the conclusion of their conversations and their lack of precision as to and failure to agree important details during them.

Who was agreed to be liable in respect of the Loans and how was their liability established?

450. So, who was liable in respect of the Loans and how was their liability established (I deal separately below with the related question of who was intended to be and became the creditor(s) in respect of the Loans)? Mr Jafar's pleaded case in the RRASOC (at [4]) is that the First Loan was made to AIML and that the Second Loan and Third Loan were made to AH.

451. This issue arises, of course, in the context and for the purpose of adjudicating on Mr Jafar's claims in tort (and unjust enrichment) against the Fund Parties. AH, although initially a party to the proceedings, did not participate in the trial and the claims against it were settled on a confidential basis. It may be that AH has accepted and acknowledged that it was (is) directly liable to Mr Jafar. Furthermore, Auctus presented its winding up petition against AH based on AH being liable to it in respect of the Second Loan (see [7] of the AH Winding Up Petition) and the AH Winding Up Petition averment at [12] that AIML's cheque in respect of the Second Loan was given "*to partially secure repayment*" of the Second Loan. It appears that AH did not dispute these averments and statements of fact in response to the AH Winding Up Petition (Mr Naqvi in his affidavit in the Winding Up Proceedings stated that "*The loans are currently treated as unsecured by the Company and the liability remains outstanding*"). What I say however as regards AH's liability in respect of the Loans is for the purpose of assessing and analysing the process by which liability for the Loans was negotiated and how that liability arose (in December 2017). This is relevant to an understanding of (and throws light on) what was discussed and agreed, or should be treated

as having been discussed and agreed, at the First 20 December 2017 Meeting because in my view it is clear that liability for the Loans was left open at and only agreed and established after the First 20 December 2017 Meeting. The identity of the obligor and liability was agreed by reason of and pursuant to the relevant documentation, the issue of the cheques and possibly by the making and acceptance of the advances.

452. The emails exchanged, and documents executed with respect to the First Loan and the Second Loan reveal that the identity of the obligors in respect of these two loans remained uncertain and under discussion until the point at which cheques were issued (by AIML) and delivered and the funds advanced (to AIML and AH via Mr Jafar) and in some material respects remained unsettled even thereafter. This uncertainty and the lack of a clear agreement between Mr Jafar and Mr Naqvi resulted in Mr Jafar and his legal advisers having to work out, when it became clear that the First Loan and the Second Loan may not be repaid, the legal effect of the advances that were made and the cheques that were issued and resulted in Mr Jafar, in the lengthy debate and multiple documents that were produced on his behalf, adopting different accounts and statements as to precisely who was liable to repay the Loans. As Mr Jafar acknowledged in the May 2018 Draft Resolution there were at least “*technical arguments*” that AH could rely on to deny any liability to Mr Jafar.

453. The identity of the obligor(s) appears not to have been a topic that Mr Jafar focussed on or was concerned about. It was not a subject that he asked Mr Naqvi about or to confirm or that was considered or discussed with any specificity during the First 20 December 2017 Meeting. Mr Naqvi had referred to “*Abraaj*” and Mr Jafar had not asked and Mr Naqvi had not said, precisely what this meant. In Mr Jafar’s cross-examination by Mr Ayres on Day 5 at pages 114-115 Mr Jafar said that neither AH nor AIML had been mentioned by Mr Naqvi but that Mr Naqvi had spoken about and Mr Jafar understood that he was being asked to lend to “*the Abraaj Group*.” Mr Ayres pressed Mr Jafar to accept that this must have been understood as a reference to AH, at least for the purpose of considering who would be the borrower since it made no sense and was incoherent to say that a group rather than entities within a group would be the borrowers. It was at this point that, following an intervention

by me, Mr Jafar accepted that in fact what Mr Naqvi had said was “*Abraaj*” and not “*the Abraaj Group*.”

454. But despite this denial in his cross-examination that he understood that Mr Naqvi was talking about loans being made to AH, Mr Jafar did not explain how it could have made sense for Mr Naqvi (and therefore how he could have believed or how it could have been reasonable for him or a prospective lender in his position to understand Mr Naqvi) to be suggesting a loan to, or which in some unspecified way would be the responsibility of, every entity covered by the unparticularised reference to Abraaj. In fact, Mr Jafar’s written evidence indicates that he seems to have assumed that Mr Naqvi was at least for some purposes using the term (Abraaj) as shorthand for AH, as when, on his account, he asked Mr Naqvi whether “*the Board of Abraaj*” knew about the financial problems that had generated the urgent need for the Loans (see Jafar 1 at [37]). That Mr Jafar and Mr Nerguizian had a common assumption that AH would be the obligor is also supported by the Post-Mirage Meeting Email (containing the draft email to Mr Naqvi which Mr Nerguizian asked Mr Jafar to approve) and the Loan Terms Email (sent to Mr Naqvi in a form approved by Mr Jafar), both of which were written on 20 December 2017 shortly after the Royal Mirage Meeting, in which Mr Nerguizian had raised the issue of the identity of the borrower and said: “*Abraaj Capital (I need the exact legal name and I need you to complete a KYC form that I will send you first thing in the morning)*.” As I have already noted, AH’s previous name was Abraaj Capital Holdings. In asking for “*the exact legal name*” it does not appear to me that Mr Nerguizian was asking who the borrower would be but rather what AH’s current corporate name was.

455. In his response, Mr Naqvi did not challenge the reference to Abraaj Capital but did say that Mr Lakhani would provide “*the exact legal name of the entity issuing the cheques and undertaking the repayment and terms*.” This strongly suggests that he regarded the identity of the obligor as not finally settled and something for him to address further. It also confirms that Mr Naqvi had in mind, and had expressed the proposition, that whoever issued the cheques would be the party “*undertaking the repayment*” obligation in respect of the Loans

or at the very least that if Mr Naqvi wished that some other entity would be so liable they would be identified and named.

456. It seems to me that the evidence establishes that there was no consensus as to or identification at the First 20 December 2017 Meeting (or at the Royal Mirage Meeting) or the related discussions before draft documents were prepared as to who would be the borrower(s) and liable in respect of the First Loan. It appears that Mr Jafar and Mr Nerguizian may well have adopted at least the working assumption that the First Loan would be made to AH, as the parent and key company, but that the issue remained undecided. There is certainly no evidence that Mr Naqvi and Mr Jafar identified any other Abraaj entity as being a borrower or liable in respect of the Loans.
457. The position changed once the draft documentation came to be prepared. The email exchanges on 20 December 2017 indicate that it had become clear by late in the evening on that day that the New Structure was going to be used (Mr Naqvi had emailed Mr Nerguizian asking why if cheques were being issued and used it remained necessary to continue discussing and for an application to be made for a facility from BOS) and all the documents prepared in respect of the First Loan then only referred to AIML. When Mr Nerguizian came to draft (or at least approve a draft prepared by his BOS colleagues) the 21 December BOS MOU, to which AIML was not a party, he included wording that confirmed that “[AIML] has requested a short term loan of USD One Hundred Million” and that Mr Jafar had “introduced [AIML] to [BOS] and requested [BOS] to organize the loan under [Mr Jafar’s] guarantee up to 55% of the exposure from time to time.” In Nerguizian 1 Mr Nerguizian said that the 21 December BOS MOU (and the other documentation entered into with Mr Jafar in respect of the First Loan) was prepared in parallel with his, and at around the same time as he had made a request to Mr Naqvi to provide the two cheques, which he had done early in the morning of 21 December 2017. I therefore take it that the 21 December BOS MOU was prepared late in the evening of 20 December or early in the morning of 21 December, at a time when it was anticipated that the cheque discounting facility would be used. When on 21 December Mr Lakhani provided the requisite cheques (in the Lakhani Investment

Letter) he requested that the advances be paid into an AIML account. The cheques drawn by AIML. Neither Mr Jafar nor Badr raised any issues or objections to the use of AIML cheques.

458. As regards the Second Loan, the 27 December MOA, which was signed by Mr Naqvi on behalf of AIML, recorded that Mr Jafar had requested BOS, and BOS had agreed, to assist AIML with its financial requirements and arrangements and that AIML would issue the requisite cheque. Mr Jafar's letter of pledge, and Mr Jafar's and his wife's letter of pledge, both of that date also referred to cheques being issued by AIML. Furthermore, the cheque issued in respect of the Second Loan in the sum of AED798,928,000 was issued by AIML. However, Mr Jafar's 27 December Letter of Instruction instructed BOS to transfer the proceeds of the cheque discounting that had been paid into Mr Jafar's account to AH. In addition, the AE2L Pledge Letter referred to AH as having sought a short-term borrowing of US\$200 million and was signed on behalf of both AE2L and AH. I would also note that in the Winding Up Affidavit at [18] Mr Jafar had said that, when Mr Naqvi had discussed his taking over the lending that Mr Naqvi had been discussing with ENBD Mr Naqvi had talked about Mr Jafar making loans to AH.
459. In relation to the Third Loan, as I have previously noted, AIML also issued a post-dated cheque, this time dated 4 January 2018 and the proceeds of the discounting of the cheques were paid into Mr Jafar's account and then from there to AH. No equivalents to the memoranda signed in relation to the First Loan and the Second Loans were signed (although Mr Jafar did sign a payment instruction and the Crescent Pledge).
460. It seems to me that in the absence of an agreement between Mr Jafar and Mr Naqvi at the First 20 December 2017 Meeting (or at the subsequent meetings and in the subsequent conversations) the starting point in the analysis is, and great weight must be given to, the documents that the parties used and signed.
461. The cheques are an important part of the documentary record. AIML drew cheques in respect of all the Loans (and it is against AIML that Mr Jafar has presented the cheques for collection). The cheques represent an unconditional order to pay the total amounts of the

Loans. As drawer of the cheques, AIML is clearly liable in the event that the cheques are not paid on presentation. That liability cannot be ignored.

462. All the documents relating to the First Loan referred to or assumed that the borrowing would be made by AIML and the funds were advanced to AIML. In my view it is clear that it was agreed that AIML (and only AIML) would be liable in respect of the First Loan.
463. The position in relation to the Second Loan is more difficult because funds were advanced (at Mr Naqvi's request) to AH and one of the contemporary documents referred to the Second Loan having been sought by AH. There is no doubt that the payment and acceptance of funds in circumstances where an intention to lend and borrow can be inferred and the context otherwise permits will result in an agreement by the recipient to be liable to the lender. The question arises as to whether the fact that the Second Loan and the Third Loan were advanced on Mr Jafar's instructions to AH (and the terms of the AE2L Pledge) justifies and requires the inference that it was agreed that AH would be the obligor and liable to repay such loans.
464. If all that had happened was that funds were advanced by Mr Jafar to AH, I would be satisfied that AH was intended and agreed to be the borrower. But this is not what happened. There are documents which evidence AIML's liability and an agreement that it would be liable for the Second Loan (in particular the 27 December MOA and the cheques) and nothing which states that any such liability would only be secondary to AH's primary liability.
465. There is some evidence that the only reason why AIML was selected by Mr Naqvi as the party to be named in the documents and to issue the cheques was that it had a cheque book (and an account with CBD which entitled it to issue cheques) whereas AH did not. In an email from Mr Lakhani to Mr Naqvi in the evening on 20 December 2017, written at a time when Mr Naqvi and he were aware that the New Structure would be used although Mr Lakhani was still looking at the facility application documents that Mr Nerguizian had sent to Mr Naqvi, Mr Lakhani had said that he had (my underlining) *"filled up forms for both AIML and AH. Some items such as purpose of loan etc require your input. We also need to discuss which from to provide as only AIML has the cheque book and we always share AH*

financial statements for Bank financing purposes.” In addition, Mr Naqvi’s later annotations to the March 2018 Summary, as I have noted, stated that “*not only were the funds [in respect of the Second Loan and the Third Loan] paid to AH, at [Mr Naqvi’s] request, [but] all AIML did [was] provide the cheques since there was no other checking-account available at the time*”. If AIML was in fact only used and only issued the cheques because AH, the intended and agreed borrower, was unable to draw the required cheques so that AIML’s role was to that extent ministerial and on behalf of AH, it could be said that AIML was acting as agent for and the party liable was AH (or possibly that AIML’s liability was secondary as guarantor of AH).

466. Mr Jafar dealt with this issue in the Winding Up Affidavits. He said that AIML rather than AH was selected to be the party to issue the cheques because AH did not have an account with a cheque payment facility. The consequence of AH not having such an account was that Mr Naqvi asked Mr Jafar and Mr Jafar agreed to make the First Loan to AIML. When describing his discussions with Mr Naqvi in relation to the First Loan Mr Jafar stated (at [14]) that originally Mr Nerguizian had suggested asking that AH issue the cheques (as partial security for the First Loan) but (at [16]) that during the 20 December Naqvi Call, Mr Naqvi had said that “*AH did not have a checking account and asked whether I would make the loan to AIML instead and accept post-dated cheques issued by AIML. ... I agreed to this proposal ...*”. In relation to the Second Loan, Mr Jafar said (at [18]) that Mr Naqvi had asked whether he might lend AH the sums that he had hoped would be advanced by ENBD and that ([20]) he subsequently “*agreed to make the further loan to AH on the same terms and structure as the [First Loan]...*”. He said (at [21]) that he “*therefore arranged for two payments*” to be made to AH’s bank accounts at CBD and that “*As immediate “security” Mr Naqvi gave [him] a third cheque... drawn on the [CBD] on an account in the name of AIML.*”

467. There are also references in various affidavits (including Mr Naqvi’s affidavit in the Winding Up Proceedings) to Mr Naqvi describing the cheques as being issued or offered “*as a security*.” I take this primarily to mean that they were issued to create, in the UAE, criminal liability for non-payment and not that the liability of AIML which they created could be

treated as secondary or in some way qualified. There is also an exchange of emails on 27 December 2017 between Mr Nerguizian and Mr Naqvi regarding the cheque for the Second Loan in which after Mr Nerguizian told Mr Naqvi that he needed a cheque for AED 184,184,000 due 4 January 2018 made payable to the order of Mr Jafar (whereafter “we” – BOS – would transfer funds to “your” – AH’s – account) Mr Naqvi asked, “*what will be the mechanism to get [the cheque] back when the money is returned?*” Mr Nerguizian replied, “*You have two options ...you keep balance in your account and the check is encashed or you arrange transfer for the same amount and we will return the check. Best is the check to be encashed it will be automatic with no further handling by us.*” Mr Conway (in Conway 1 at [284]) by reference to and based on this email exchange said that “*[n]o security was provided for the loans, but Mr Naqvi provided Mr Jafar with three signed post-dated cheques drawn on AIML's bank account, on the understanding that the cheques could be cashed if the loans were not repaid on or before 28 February 2018.*” It seems to me that Mr Nerguizian was simply pointing out that it would always be open to the borrower to repay the Loans without the cheques being presented and cashed but it was clear that the cheques would be cashed unless some other method of payment was made and Mr Nerguizian had made it clear that he anticipated that it would be simplest to allow BOS to present the cheques without further reference to Mr Naqvi or AIML. But these discussions do not in my view support the view that AIML’s liability was only to be assumed as security (as a guarantee) for AH’s primary liability. The discussions do not address the identity of the borrower.

468. There is no contemporaneous documentary evidence that despite AIML issuing the cheques in respect of the Second Loan AH was to assume a (primary) liability to repay the Second Loan. The advances were agreed to be made to AH but nothing in the contemporary emails and documents dealt with the relationship between AH’s liability, if it was to be liable to Mr Jafar, and AIML’s liability (pursuant to the cheques). There is nothing that shows that it was understood or agreed that AIML was only acting on behalf of AH (or as its guarantor). Mr Jafar did in his written evidence talk about the cheques being given as security, but his evidence failed to address what the relationship between AIML’s and AH’s liabilities would be. This could, had it been agreed, have been mentioned and set out in the contemporary loan documents (and of course for the Second Loan AIML was the party to the 27 December

MOA and AH was not a party). Certainly, in March 2018 Mr Jafar's understanding (as set out by his legal advisers) was that only AIML was liable for the Second Loan.

469. The difficulty with the view that the advances to AH showed that AH was intended to be the borrower and liable for the Second Loan is that, as I have said, AIML had clearly and separately (already) assumed a liability in respect of the Second Loan (and the Third Loan) by drawing the cheques. Secondly, the 27 December MOA stated that the Second Loan would be paid to AIML's accounts with CBD and FADB. Thirdly, the mere advancing of funds is not by itself evidence that AH agreed to be the borrower and liable in respect of the Second Loan (and the Third Loan). The payment of the loan proceeds to AH is also consistent with a loan to AIML followed by an inter-company loan by AIML to AH. AIML is liable to the lender and AH is liable to AIML (I note that the Gibson Dunn 19 April 2018 draft Loan Rescheduling Agreement reflected precisely this structure by stating that AIML was the party liable and including a recital recording AH's liability to AIML: "*a result of the payments described in paragraph (B) above, AH owes AIML the principal amount of AED 1,128,900,000, together with related fees and accrued interest from time to time (the "Intercompany Loan")*"). This construction is also supported by the fact that save for the AE2L Pledge the contemporaneous documents relating to the Second Loan all referred to the financing being requested by and for AIML.

470. It seems to me that Mr Jafar and Mr Naqvi may well initially have contemplated that AH would be the borrower in respect of the Second Loan. It was to be the borrower under the proposed ENBD facility and as I have said Mr Jafar probably had it mind during the discussions at the First 20 December 2017 Meeting that AH was probably going to be the borrower (as the parent and lead company) in respect of the First Loan. But I do not consider that the evidence goes so far as to establish that there was a consensus and a final understanding before the documents came to be prepared and were executed that AH would be the borrower. As those documents came to be drawn up, following, as agreed, the structure and terms of the First Loan, AIML was once again introduced and recorded as the party liable and the party for whom facilities were being arranged and it, and not AH, signed the 27 December MOA. In the absence of sufficient documentary evidence that AH was

intended to be the primary obligor and that AIML's liability was to be secondary (indeed in the absence of any evidence of the relationship between AIML's and AH's possible liability) and in view of the fact that there are contemporary documents (including the key documents relating to the Second Loan, namely the 27 December MOA, having referred to and been signed by AIML without AH even being a party), in circumstances where the receipt of the advances by AH can be regarded as evidence of and resulting in AH having received an inter-company loan from AIML, and where even Mr Jafar in March 2018 understood AIML to be liable (and had prepared documents to that effect and recording AH's liability to AIML), it seems to me that right conclusion is that AIML is to be treated as the party liable to the lender to repay the Second Loan and that AH assumed and became liable to reimburse and pay AIML an equivalent amount. It does not seem to me that the references to AH in the AE2L Pledge, nor the later references in the documents prepared on behalf of Mr Jafar during February-May 2018 to the First Loan and the Second Loan being for AH's benefit and to AH's liability therefor (for example in the Loan Restructuring Agreement) are sufficient to displace this conclusion.

471. There was no equivalent to the 27 December MOA in relation to the Third Loan. There was therefore no document stating that the Third Loan was to be a financing for and to be made to AIML. But AIML did draw a cheque in the amount of and is therefore clearly liable to the lender in respect of the Third Loan. Furthermore, as Mr Jafar confirmed in his evidence, the Third Loan was repaid by AIML. The repayment by AIML is a clear indication that AIML accepted that it was liable to do so. I do not consider that the fact that the proceeds of the Third Loan were paid to AH is sufficient to negate the clear inference that AIML was the borrower and liable in respect of the Third Loan to be derived from the fact that AIML issued the cheque and repaid the loan.

The impact of the evidence as to the high level and general nature of the discussions at the First 20 December 2017 Meeting on the assessment of what Mr Naqvi is to be understood as having said at that meeting as to the capacity in which he was acting

472. The failure of Mr Jafar and Mr Naqvi to identify and agree the identity of the borrower during their conversations is relevant to the assessment of what Mr Naqvi is likely to have said and

of what a reasonable prospective lender in Mr Jafar's position would have understood Mr Naqvi to be saying as to the capacity in which he was acting. It is linked because the issue of capacity is relevant and relates to the assumption of legal liability. The issue of capacity relates to capacity to create legal relations and binding obligations. The binding obligations under discussion were those of the borrower of the loans. If it is right to say that Mr Jafar's and Mr Naqvi's conversations did not focus on or settle the identity of the borrower it is likely that they also did not focus on or address precisely who Mr Naqvi was purporting to represent in relation to the borrowing he sought.

473. If these conversations left open critical details and terms and were only of a general nature and did not focus on or settle the key question of who would be liable in respect of the Loans it is also at least likely (subject of course to an assessment of the evidence as to precisely what was said) that other details of legal significance were also not discussed, focused on or settled during the conversations. They too fall to be resolved as a matter of implication from the key post-conversation facts and conduct of Mr Naqvi and Mr Jafar. And it seems to me that in these circumstances it is the same key facts and conduct (those relevant to the determination of who was intended to be liable and who assumed liability in respect of the Loans) that are relevant to the other and related issue as to the capacity in which Mr Naqvi was acting when negotiating and entering into the agreements to borrow the Loans. In the absence of a clear indication from Mr Naqvi, by a clear statement or conduct, that he was intending not just to talk about the wider Abraaj group of entities but to enter into legally binding relations on their behalf, it seems to me that he is to be treated as only having intended to bind and create legal relations affecting the entities who became liable in respect of the Loans. The capacity in which he was acting when making statements or taking steps which were intended to create legal relations and binding obligations was as representative of the borrowers/obligors. Mr Naqvi was meeting with Mr Jafar to solicit the loan on behalf of whichever entity was agreed to be and became the borrower and not on behalf of others for whose benefit the funds advanced might ultimately be received and who would be paid sums in at that point undefined ways. For those purposes he is to be treated as having acted only on behalf of those who assumed a liability to Mr Jafar (in respect of the Loans). If Mr Jafar had formed the view (and thought it important) that Mr Naqvi was formally negotiating,

giving assurances intended to be relied on and soliciting the Loans on behalf of other specific entities whose identity was either not mentioned or was mentioned not in the context of being borrowers but as needing funding, Mr Jafar could have raised the issue with Mr Naqvi and sought his confirmation (as to the assurances being given and) as to the capacity in which he was acting and have ensured that the conversation moved from the high level generalities regarding “*Abraaj*” to particulars and specifics as to which entities Mr Naqvi was talking about.

474. If Mr Naqvi did not clearly indicate during the conversations that he was acting for and on behalf of Abraaj entities other than those who would enter in a legal relationship with Mr Jafar as borrowers (and be responsible in law for repaying the Loans) it is hard to see how it would be reasonable for Mr Jafar (or anyone in his position) to treat Mr Naqvi as giving formal, specific and binding assurances which were to have (and understood as intended to have) legal force and consequences. He was conducting the negotiations for the purpose of borrowing money. In the absence of a sufficient (and I would say in the circumstances a clear) indication to the contrary, the natural inference would be that liabilities would only be assumed by those entities that became liable as borrowers. Becoming a borrower was the way in which binding legal relations and liabilities were understood to and would arise. The borrowing was the act giving rise to liability. For Mr Naqvi’s statements and conduct to be treated as intended to have been made and reasonably understood as having been made on behalf of other Abraaj entities would, in my view require a clear statement (or conduct indicating) that Mr Naqvi was acting on their behalf and intending to give formal assurances for which they were responsible and which could result in such entities assuming a formal liability. In my view, as I explain below, I do not consider that Mr Jafar has established that Mr Naqvi did so. The fact that he had said that most of the borrowing was needed to enable AGHF to return the Uninvested Capital was insufficient to indicate that he intended that liabilities flowing from the negotiation of and the advance of the sums borrowed would be assumed by AGHF. But this was only part of the need for the borrowing (and in the end very substantial additional sums were needed and advanced) and it was clear that the funds needed by AGHF would be borrowed by another entity. In my view, the reasonable lender (representee) in Mr Jafar’s position would only have assumed and been entitled to

understand Mr Naqvi as holding himself out as conducting negotiations on behalf of and creating liabilities for the borrower(s). The liabilities associated with borrowing the money and liabilities derived directly from entering into legally binding obligations with respect to the Loans are the only legally binding commitments, and assurances to be given by the borrower(s), that can reasonably be treated as having been under consideration and intended to be given and assumed. If Mr Jafar had wished to have the benefit of assurances and commitments from and to hold responsible for what Mr Naqvi had said the indirect recipients of the Loans (and not just the borrower(s)) he could have made this clear and asked Mr Naqvi to confirm this but of course he did not do so. It seems to me that for Mr Jafar to establish what I would call an out of the ordinary feature of negotiations between a lender and borrower, namely that parties other than the borrower were intended to assume and were understood to be assuming responsibility for statements made to induce and during negotiations for, and in respect of liabilities relating to, the advance of the loans he needs to be able to point to a statement or conduct which clearly indicates that this exceptional result was intended and understood. And in my view he has failed to do so.

The failure of Mr Jafar or his advisers to mention the assurances from Mr Naqvi on which he now relies

475. Thirdly, it is noticeable and in my view, significant that at no point in the multitude of communications sent and documents prepared (including the draft loan documents or the May 2018 Draft Resolution) between February and May 2018 did Mr Jafar or Mr Ernest refer to the assurances that Mr Jafar has said he was given and which were critical to his lending decision. It seems to me to be likely that if Mr Jafar really had been given the clear assurances that he now says Mr Naqvi provided to him and he relied on, he would have referred to these in this critical period, at a time when the basis on which he had made the Loans was being scrutinised and directly challenged and when he was putting his case to Mr Naqvi and his advisers and to the other members of the AH Board as to why he was entitled to have his status as a creditor properly recognised. Surely this was the time to refer to how he had been induced to advance the Loans and to complain, loudly and clearly, that he had been misled, that what he had been assured was the financial position of AH and the other Abraaj entities was untrue and that, if he had really believed this to be the case, that he had

at the time understood Mr Naqvi to be speaking for and acting on behalf of the Funds (and all other Abraaj entities). But there is no mention of these assurances. There were plenty of opportunities to have done so. For example:

- (a). The drafts prepared by Mr Ernest of the March 2018 Draft Loan Agreement, the Loan Rescheduling Agreement and the Loan Restructuring Agreement contained recitals and (in the operative parts of the draft agreements) confirmations and representations which could easily have confirmed the assurances and representations that Mr Jafar says he understood had been made and the capacity in which Mr Naqvi had been acting, but do not.
- (b). In the letters that Mr Jafar wrote to the AH and AIML boards he said that the Loans had been made “*At the request of the Obligors and Mr Arif Naqvi...*”. While this language addressed the issue of who would be paid the advances made by Mr Jafar, if Mr Jafar had understood that Mr Naqvi had been acting and requested the Loans for, and given assurances on behalf of, all the Abraaj entities including the Funds surely this wording would have been different and reflected that (or the point made elsewhere in the letters).
- (c). In these letters Mr Jafar also said that by advancing the Loans he had preserved the value of the “*Abraaj Group*” and “*[expressed his] confidence in the inherent value and future of the platform.*” He did not say that he had been given clear assurances as to the viability, solvency and soundness of the Abraaj entities. The implication of his statement is that he should be given credit for the faith he showed in the Abraaj entities in the face of what he had been told was a very serious and precarious financial crisis.
- (d). The May 2018 Draft Resolution deals with and refers to the assurances and representations said to have been made by Mr Naqvi that induced Mr Jafar to make the Loans but does not mention the assurances (and representations) that Mr Jafar now says that Mr Naqvi gave him (and made to him) as pleaded in the RRASOC. The May 2018 Draft Resolution states that “*Mr Jafar did indeed oblige and very kindly and*

honourably provide and pay the Rescue Funds to the Abraaj group in time prior to the end of December 2017, based on a good faith provision of the Collateral” and that *“Mr Naqvi did in fact make the indicated promises and undertakings for Abraaj to provide the indicated securities as collateral (Collateral) to the Rescue Loan.”* There is no statement that Mr Jafar was induced to advance the Loans by and relied on the other matters covered by the Representations. The position was the same in Mr Jafar’s email to Mr Cleary dated 28 May 2018.

476. It seems to me that these omissions are evidence of the fact and support the conclusion that Mr Jafar did not understand at the time that the Loans were made that Mr Naqvi was making representations to him on behalf of the Funds. The radio silence is significant. Mr Jafar in his evidence, as I have discussed, sought to distance himself from and to claim that he was not responsible for the correspondence sent and documents prepared by his advisers including Mr Ernest (so that they could not be relied on against him). I do not accept that evidence or claim. It is clear from the documentary evidence that Mr Jafar worked closely with and was in regular contact with (and gave instructions to) Mr Ernest and I do not accept that Mr Jafar failed to give Mr Ernest proper instructions and tell him about the Statements and Representations (this is unlikely and in my view incredible if the Statements and Representations were as clear and important to him as he now says) nor do I accept that Mr Jafar was unaware of or failed to understand what was being said in these emails and documents on his behalf. It is possible that Mr Ernest did not consider that it was appropriate to refer to the Statements and Representations and Mr Jafar’s understanding that Mr Naqvi was acting and making these on behalf of, *inter alia*, the Funds because the primary purpose of the communications was to focus on AH (and AIML) and have them acknowledge a liability to Mr Jafar. But this seems, in context, improbable. If Mr Jafar had understood in December 2017 that he was being given assurances on behalf of all the Abraaj entities (including the Funds) he (and his advisers) would have appreciated that this was an important point to make at this stage in his negotiations with the AH board not only because it needed to be made to set out his position clearly and comprehensively but also since doing so would have established that Mr Jafar had claims against other asset rich entities (even if Mr Jafar was unaware at that stage that AH and AIML were insolvent and which entities and Funds

were solvent) and therefore significantly increased his leverage. One reason, of course, why Mr Jafar may not have wished to mention this was to avoid the risk (or because he knew) that Mr Naqvi would deny that he (Mr Naqvi) had said what Mr Jafar had alleged.

What is indicated as to Mr Naqvi's demeanour and the tone and tenor of his conversations with Mr Jafar at the First 20 December 2017 Meeting?

477. The February-May 2018 emails and documents support the inference and a finding that even when Mr Naqvi first approached Mr Jafar in December 2017 he was in a state of crisis and desperate (panicking and pleading) and that Mr Jafar appreciated this. This does not fit with Mr Jafar's account of Mr Naqvi's demeanour or the tone and tenor of his conversations with Mr Naqvi. Mr Jafar's account does acknowledge that Mr Naqvi had said that there was an urgent need for funding because the Healthcare Investors had demanded the return of their Uninvested Capital within a week and was facing a liquidity crisis but Mr Jafar gives the impression that Mr Naqvi's approach and manner were measured and reassuring. Even recognising Mr Naqvi's apparent talents at deception, the acknowledgment that Mr Jafar viewed Mr Naqvi as pleading strongly suggests that Mr Naqvi had made it clear or his demeanour evidenced that the situation was far from being under control and instantly containable. It was clear, as I discuss further below, that there was a significant and immediate additional funding need beyond the sums required to repay the Uninvested Capital and that it seems to me to be likely that Mr Naqvi did not say or confirm that these sums were only needed in case other investors came forward asking for the return of uninvested capital. Mr Jafar's evidence was not that he asked for details of which other investors might come forward, how much other uninvested capital was held and might have to be returned and within what timeframe. His evidence was that there was no discussion of such details. In those circumstances and in the context established by the other emails and documents it seems to me likely that while Mr Naqvi had described and based the bulk of the immediate funding request on the Healthcare Investors' demands he had also indicated that the immediate liquidity crisis extended to other business liabilities which Mr Naqvi and AH (and possibly other unspecified Abraaj entities) were currently unable to pay. It was also clear, as I also discuss further below, that there remained material uncertainties as to the source of funds that would be used to repay Mr Jafar. While Mr Jafar says that Mr Naqvi

identified various different sources and, as I explain below, I accept that Mr Naqvi probably did so in general terms, there was no precise or guaranteed source identified and the details remained unsettled. Mr Jafar must have been aware therefore that he was assuming a material risk in making the Loans even if, as it seems to me is likely (again as explained below) he was prepared to believe and assume that Mr Naqvi would be able to and would sort matters out in one way or another and ensure that the Loans were repaid.

478. It is noticeable that in these emails and documents Mr Jafar frequently referred to and acknowledged that the Loans were made at a time when the position of AH was (and the other Abraaj entities were) “*desperate*” and in crisis and on the verge of insolvency. In his email to Mr Cleary of 26 May 2018 he referred to Mr Naqvi as having “*pleaded*” for the rescue loans “*on a desperate urgent basis.*” Mr Jafar was also acknowledged to be the lender of last resort. Mr Naqvi had acknowledged this in his email of 17 May 2018 when he had told a prospective new investor that Mr Jafar had been “*instrumental in saving our business in December when we really needed help and there was nobody else around who stepped up*” and the same point had been made by the AH board in its response to the May 2018 Draft Resolution. These repeated references to the extreme existential crisis being faced by Mr Naqvi and his desperation are consistent with the WhatsApp messages sent by Mr Naqvi to Badr, to which I have already referred. The references to Mr Jafar as the lender of last resort suggest, as in any event seems to be very likely in context, that the decision to reject ENBD’s offer was not based on it being unreasonable and there being some animus between Mr Naqvi and the ENBD management but because Mr Naqvi was unable to satisfy the conditions. It seems to me, as I discuss below, that no reasonable banker could have, in the circumstances and context, have concluded that ENBD’s offer was unreasonable or a positive sign by being evidence of a willingness to lend to the Abraaj entities. There is no suggestion in these emails and documents that Mr Jafar denied knowing or appreciating in December 2017 that he was the lender of last resort.

The references to Mr Jafar having acted honourably

479. It is also noticeable and curious that Mr Jafar is described in the May 2018 Draft Resolution as having acted “*very kindly and honourably*” and that Mr Jafar referred to himself in his email to Mr Cleary dated 26 May 2018 as having made the Loans “*in utmost good faith and helpfulness*” to rescue AH. Of course, Mr Jafar was seeking to gain the sympathy and support of the AH board including Mr Cleary but the impression that these statements make is of a lender who was offering support and financial assistance not simply for commercial reasons but, for example, because of a relationship with and desire to help out a friend in need. Mr Naqvi had acknowledged the closeness of his relationship with Badr in his email of 17 May 2018 and the WhatsApp messages with Badr confirm Badr’s closeness to and family feeling (sense of loyalty and support) for Mr Naqvi and Mr Naqvi’s reciprocation of these feelings and his immense gratitude to the Jafar family for their support. I do not place much reliance on these statements but they do support the view that, as I discuss below, part of Mr Jafar’s thinking and motivation was the desire to save a close friend of Badr from disaster.

The role, position and rights of BOS and the relationship between Mr Jafar, BOS and AIML

480. The terms and legal effect of the agreements between BOS and Mr Jafar need to be considered for the purpose of testing Mr Jafar’s and Mr Nerguizian’s evidence as to their understanding of what was discussed and agreed in December 2017 as well as for the purpose of reviewing the challenge to their credibility made by the Fund Parties in connection with alleged failures to comply with AML/KYC regulations and the alleged creation of a false document trail to cover up and prevent disclosure to BOS’ internal compliance team or its auditors of the nature of BOS’ true exposure to AIML. The action taken by Mr Nerguizian and Mr Jafar, if the Fund Parties’ account is accepted, will support the claim that there was a wider, collective, cover up of the (emergency) Loans because Mr Naqvi wished to avoid them being disclosed to AH’s non-executive directors and Mr Nerguizian needed and wished to avoid the fact that BOS was exposed to substantial AIML risk without the proper checks having been made or documents prepared (and the impending default by AIML) being disclosed to BOS’ internal compliance team or its auditors.

481. It therefore becomes necessary to assess and analyse the effect of the cheque discounting facility and the Jafar-BOS loss sharing arrangements on Mr Jafar's and BOS's rights against AIML. Since Mr Jafar's cause of action is in deceit (I deal with the unjust enrichment claim separately below) the issue of whether he or BOS had direct rights of action and standing to bring proceedings against AIML (in contract as loan creditors or as holders or transferees of the cheques) does not directly arise because it is clear that, by reason of Mr Jafar's liability to BOS, he will suffer a loss by reason of AIML's (or if AH were also liable) inability to repay the Loans in full. There is a live dispute about the effect of the loss sharing arrangements on the quantification of Mr Jafar's loss and the issue of whether Mr Jafar or BOS was the lender in respect of the Loans was raised by the parties in that context (see for example the comments made by Mr Jafar at [61] of Jafar 1) although the Fund Parties focussed their challenge on the quantum of loss point in their written closing submissions (namely their submission that in view of the loss sharing agreements with BOS, Mr Jafar's loss has to be measured by reference to his net position and reduced exposure after having taken into account BOS' agreement to assume AIML – or AH – risk).
482. The cheque discounting facility documents, the cheques and the effect of their transfer or discounting are presumably governed by UAE law (or the law of the relevant Emirates). However, none of the parties sought to argue for the application of such foreign law or adduced expert evidence of foreign law on these issues. I therefore proceed on the basis either that the parties have assented to these matters being resolved by reference to the law of the Cayman Islands or that the presumption of similarity applies (namely that in the absence of evidence to the contrary foreign law is presumed to be the same as the law of the Cayman Islands). I therefore review the effects of the cheque discounting facility documents, the cheques and their transfer or discounting by reference to Cayman Islands law (and the terms of the documents themselves).
483. Mr Ayres raised with Mr Nerguizian the issue of whether he understood and accepted that BOS was directly exposed to Abraaj risk (Day 12, page 94) (my underlining):

- Q. We know that Abraaj, let's say Abraaj in general terms is going to be the borrower. You accept, do you, that BOS was in that sense directly exposed to Abraaj if Abraaj didn't pay back the US\$45 million?
- A. Not directly, because we were coming behind Mr Jafar. So legally it's Mr Jafar lending to Abraaj and we are taking a risk participation. I am not - that is why at one stage we dealt with Mr Jafar in the follow-up of this whole affair, because we have legally no right to go against Abraaj.
- Q. The reason I say it's direct exposure is that if Abraaj –
- A. You mean direct risk?
- Q. I'm saying it's direct risk in the sense if Abraaj didn't pay the US\$45 million, BOS wouldn't get paid?
- A. Yes, in principle.
- Q. Not in principle, in reality; yes?
- A. It depends what you understand by "in principle".
- Q. If you mean by in principle that that is the logical consequence of what I'm saying, then I –
- A. I don't know the legal -... ”

484. I had sought at the end of Mr Nerguizian's cross examination to clarify and confirm his evidence as to his understanding of the legal effect of, and also how BOS had booked and recorded, the cheque discounting facility and the loss sharing agreements between BOS and Mr Jafar. The following exchanges took place with Mr Nerguizian (Day 13, pages 162-165) (my underlining and emphasis):

“JUSTICE SEGAL: Counsel may be on top of the issues that Mr Nerguizian was referring to, regarding how [Mr Nerguizian] booked within Bank of Sharjah the loans made by Mr Jafar. But can I just ask you, perhaps you can help me just ensure that I at least have your evidence as to how the arrangements were booked. The way I have understood your evidence earlier and the way I have understood the arrangements from the documents is that AIML issues cheques to Mr Jafar?

A. Yes.

JUSTICE SEGAL: *Those cheques are discounted by him to you, so the steps would be the cheques which we have seen are delivered to Mr Jafar and are made payable to him. Just let me follow this through and see whether this is right. He then discounts and effectively transfers those cheques to the Bank of Sharjah. You then advance him the value of the cheques. He effectively – you then become the holder of the cheques because they are discounted to you. But he assumes a liability to you so that if the cheques are not paid, he is liable to Bank of Sharjah for the full amount of the cheques. The funds which he has received from the Bank of Sharjah pursuant to the discounting of the cheques, he then uses, they are credited to his account, but then they are advanced by him to AIML/AH. Is that [right]?*

A. Yes.

JUSTICE SEGAL: *Then the issue that arises, as you explained, is if that is the legal arrangement, you have to think about how you record your participation or sub-participation because if you identify the steps that I have just gone through, that they result in Mr Jafar having a liability to you for the full value of the cheques and the sums that you advanced to him to purchase the cheques, that in fact the agreement that you have agreed for participation, that you have agreed, in substance means that instead of him having a liability to [BOS] for the full amount, you have effectively and separately agreed with him that his exposure or his liability to [BOS] is the amount that you advanced less US\$45 million?*

A. 45 per cent.

JUSTICE SEGAL: *Exactly. I think you were saying that the way in which you have recorded or the way in which you recorded the effect of the participation and what is in substance a reduction or a limit on Mr Jafar's liability to you, because the Bank of Sharjah has agreed to assume a part of the risk, the way you have recorded that in your books is through the sub-accounts that you mentioned earlier. Now, is that a fair summary?*

A. Yes, the liability remains in the name of Mr Jafar.

JUSTICE SEGAL: Yes.

A. And we have an agreement between us that we, in case of non-payment, [BOS] will bear 45% of the \$100 million.

JUSTICE SEGAL: Which technically means that his liability to you is reduced. When you say - because under the arrangements as we have just outlined, he has assumed a liability to the Bank of Sharjah for the full amount and when you say you will bear the risk for part of that exposure, as between you and Mr Jafar that means that if he doesn't get paid, his liability to you, if he is not repaid by AIML or AH, the participation works by way of a reduction of his liability to you.

A. Yes, 45%.

JUSTICE SEGAL: Yes. Good.

A. That was the arrangement."

.....

JUSTICE SEGAL Can I ask you what you meant -- I don't think this was explored or fully explored in the cross-examination -- when you say at the end "We do not even have a proper account opening documentation", can you just explain what you meant by that?

A. We could not open an account in the name of Abraaj, so when the account opening was being considered on 20th or 21st, we could not and thereafter also we never considered the opening of Abraaj account because it was not possible because of the structure of Cayman Islands, et cetera.

JUSTICE SEGAL: But the way this reads suggests that [you had] an anxiety that [you would not be] repaid and that somehow the failure to have proper account opening documentation [was] going to prejudice [BOS] or be an embarrassment...

A. on 28 February it is not paid and we have to take over - something we did later on, of course, we have to take over the liability, we don't have an account in the name of any entity of Abraaj to debit and say we want to claim. That is what we meant. The liability has to remain in the name of Mr Jafar, with us guaranteeing 45%, subject to the dates that changed and ultimately taking into account the potential 15% of ...

JUSTICE SEGAL: *So this is a response to .. and deals with the possibility that in the event of non-payment, BOS would have a problem in becoming the creditor of the Abraaj entities because –*

A. *That is true. But the real problem is somewhere technically we don't have documentation to open an account in the name of Abraaj, while we will be having a liability from Abraaj.*

JUSTICE SEGAL: *... what I didn't understand was why that was [not] an issue when the New Structure had been put in place in February 2018 what you were just discussing is the risk of non-payment by Abraaj to Mr Jafar, [with] you not being a direct creditor [because] the [Initial Structure had] been dropped, why was it in your mind at that stage to express a worry about there being no proper account opening documents?*

A. *I don't know at that stage. But for me probably I was concerned that if there is a delay and if we have to take on us the booking, we have no account opening documentation. Something, at the end, it did not happen, it remained in the name of the Jafars until the end, until when we took over the liability and we somehow had to provide for.*

485. I will return shortly to the issue concerning the failure to obtain proper account opening documents, although it seems to me that it is connected with Mr Nerguizian's understanding and the proper analysis of BOS' relationship with AIML.

486. Mr Nerguizian referred to BOS's interest in the First Loan as a participation (and I picked this up in my questions to him). A loan participation arises where a party (P) agrees to indemnify a lender (L) in respect of the lender's loan to a borrower (B). A silent participation involves only an agreement between P and L which does not affect L's rights against or give P direct rights and claims against B. P pays to L the amount (or part of the amount) of the loan and L agrees to pay over sums received from B. Mr Nerguizian seems to have thought that BOS had entered into a silent participation with Mr Jafar as to 45% of the First Loan (on terms that if AIML did not repay Mr Jafar that part of the First Loan Mr Jafar did not have to make any payment to BOS under the participation). The problem with this analysis is that it fails to take into account and is inconsistent with a cheque discounting facility and the documents that Mr Jafar and BOS signed in relation to BOS's cheque discounting

facility. The cheques issued by AIML were discounted (that means negotiated, to the extent that under applicable law the cheques were negotiable or transferred to BOS) so that BOS had the right to present and collect the cheques and have payment made to it. It thereby became the holder or transferee of a cheque with direct rights against AIML (and it seems the cheque discounting documentation envisaged that BOS would be paid and then credit Mr Jafar's accounts held with it). It is interesting to note that when the Addendum came to be drafted under which Mr Jafar agreed to assume full risk in relation to the First Loan, the AIML cheques were excluded so that BOS remained the transferee and holder of the cheques, and they were never transferred back to Mr Jafar.

487. It is necessary to consider the position of Mr Jafar, BOS and AIML after the issue and delivery of the cheques, the execution on 21 December 2017 of the documentation between Mr Jafar and BOS and the transfer of the funds from BOS to Mr Jafar's BOS account and from there to AIML's account with CBD.
488. As I have noted, the cheque discounting form that was in BOS's standard form and signed by Mr Jafar stated that Mr Jafar requested BOS to discount the two AIML cheques "*under [his] full guarantee and responsibility,*" that the transaction would be governed by the BOS' terms and conditions (which were not referred to in the evidence or submissions) and that "*BOS was authorised to cover the amount of the cheques if returned unpaid by debiting Mr Jafar's accounts*". This indicated that it was contemplated and agreed that BOS could present and collect the cheques to ensure that BOS was repaid. The 21 December BOS MOU stated that Mr Jafar had requested BOS to organise the loan to AIML "*under [his] guarantee up to 55% of the exposure from time to time*" with the "*remaining 45% exposure [being] assumed by BOS*" and that BOS' approval of the cheque discounting facility was subject to receiving Mr Jafar's personal guarantee up to 55% of that exposure and security over Mr Jafar's deposits with BOS for 55% of the total exposure. This wording indicated that Mr Jafar was *not* assuming any obligation to BOS in respect of the 45% of the First Loan for which liability was being assumed by BOS. To the extent that there was a conflict between the 21 December BOS MOU and the standard form cheque discounting form it is likely that the former would prevail.

489. It appears that it was contemplated and agreed that Mr Jafar would lend the First Loan to AIML and that AIML would acknowledge and confirm its liability to repay the First Loan by issuing the related cheques, and that the funds to be advanced by Mr Jafar would be raised by his discounting and transferring his rights in respect of the cheques to BOS. The cheques would be issued, delivered by Mr Jafar to BOS and BOS would then credit Mr Jafar's account with the net amount of the cheques (as payment for the cheques so transferred and discounted). The combined effect of these arrangements was that Mr Jafar assigned and transferred his right to collect the cheques to BOS in return for receipt of the funds and assumed a liability to BOS to pay 55% of the First Loan if, when BOS sought payment from AIML by presenting the cheques for payment, the full liability under the cheques was not discharged.
490. I can see that might be said that as a matter of commercial substance the New Structure involved back-to-back loans with BOS advancing funds to Mr Jafar and Mr Jafar advancing funds to AIML, with Mr Jafar transferring the cheques to BOS only as security for his own obligations. But this construction sits uneasily with the documents. As I have said, they contemplate payment being made by AIML on presentation of the cheques and significantly Mr Jafar was only obligated to repay BOS for part of the First Loan. BOS needed to be given its own and not just a security interest in the cheques in order to be able to recover the part of the First Loan for which Mr Jafar was not responsible. As I explain below, if Mr Jafar was to be treated as having assumed an obligation to repay the full amount of BOS's payment to him for the cheques, with his obligation in respect of the 45% of the First Loan being conditional upon receipt of payment from AIML, then a different construction would be appropriate and BOS could be seen as having only a security interest in the cheques and a right to present them and claim against AIML only in the event of a default by Mr Jafar in paying the 45% share. But in the absence of such an arrangement being spelled out in the documents (and even taking into account the fact that the documents may not have been drafted with the benefit of legal advice), it seems to me that the fact that Mr Jafar is expressed to be liable (guaranteeing) for 55% of the First Loan, that the cheques are discounted and

BOS apparently given the unconditional right to collect them, the better construction is the one I have set out above.

491. The cheques were not payable to order (just to the payee named in the cheque or to bearer) and were crossed and marked “*A/C Payee Only*.” But it was not suggested that this prevented the cheques at least being transferable to BOS (leaving aside the question whether the cheques were also negotiable). BOS would, as result of the transfer of the cheques, it appears, have the right to collect payment in respect of the cheques (although it could if it wished authorise Mr Jafar to do so on its behalf). In view of what I have concluded above, namely that AIML was the party liable in respect of all the Loans (and the significance of the cheques in evidencing AIML’s liability and giving rise to its liability as drawer) it seems likely that the transfer of the cheques also resulted in a transfer of the related rights in respect of the Loans. BOS also had a direct claim against and exposure to AIML as transferee and holder of the cheques.
492. I do not need to consider the extent to which Mr Jafar retained a right to sue AIML without a retransfer of the cheques. As the July Letter makes clear, the cheques were presented for payment by AIML and I assume that they were presented by BOS, but that is not clear. In any event, it may be that under the applicable law Mr Jafar as transferor and assignor had standing under applicable law to claim and bring proceedings for repayment of the Loans with BOS’ consent (and it may be that it was for this reason and BOS’ position as assignee, and Mr Jafar’s position as assignor, of the cheques and the Loans that resulted in the March 2018 Summary and the March 2018 Draft Loan Agreement describing Mr Jafar and BOS as joint creditors).
493. This analysis indicates that BOS acquired a direct claim, as holder and transferee of the cheques, against AIML (it was in any event indirectly exposed insofar as Mr Jafar had only agreed to reimburse it for part of the First Loan). BOS was given, under its agreement with Mr Jafar, the primary right to present and collect the cheques and to use the proceeds of collection to discharge Mr Jafar’s liability to it (by crediting relevant BOS accounts in the name of Mr Jafar) but also, critically, to discharge the part of the First Loan which Mr Jafar

was not liable to BOS for (the BOS Part). It was contemplated that AIML would pay BOS and BOS would then use the proceeds to discharge what Mr Jafar owed it and the BOS Part. In these circumstances the transfer or negotiation of the cheques to BOS is likely to have involved an assignment of the BOS Part of the First Loan and so BOS became a creditor of AIML. It might be said that Mr Jafar remained the creditor in respect of all the First Loan with an obligation to collect the BOS Part and account to BOS for what he recovered but that seems to me to be inconsistent with the documents.

494. I would note that this interpretation fits with the approach taken by Mr Jafar and his advisers in March 2018. Mr Jafar attempted to have Mr Naqvi and AIML (AH) acknowledge that both he and BOS were joint creditors. Mr Jafar at least initially wanted (in March 2018) the new loan documentation (that he proposed be signed) to record that the Loans had been made both by himself and BOS. Both the March 2018 Summary and the March 2018 Draft Loan Agreement, prepared on behalf of Mr Jafar, stated that Mr Jafar and BOS were to be treated as joint creditors in respect of the Loans (although Mr Naqvi denied in the emails that he was aware that any liabilities were owed directly to BOS and Mr Jafar's position subsequently was that he was the sole creditor).
495. Mr Nerguizian's answers during his cross-examination revealed that he had appreciated that BOS had taken on AIML risk. Despite trying to avoid doing so, he did when pressed accept that he understood that BOS had assumed a "*direct [AIML] risk in the sense [that] if [AIML] didn't pay the US\$45 million, BOS wouldn't get paid.*" He tried to avoid acknowledging that the risk was direct in this sense but was forced to concede that it was "*in principle.*" He also acknowledged at that BOS "*[had] a liability from Abraaj.*"
496. At the same time he also said that BOS was "*coming behind Mr Jafar. So legally it's Mr Jafar lending to Abraaj and we are taking a risk participation ... because we have legally no right to go against Abraaj.*" He started to say at one point that he was not clear as to the legal position but had previously described what he said the legal position to be. Mr Nerguizian did not say that he had obtained and relied on any legal advice and of course he is not legally qualified. Nonetheless, he is a senior banker who can be taken to have had

sufficient experience to know what the effects of discounting cheques is. And he did, as I have said, purport to address and understand the legal position.

497. But, as I have explained, it seems to me that Mr Nerguizian just ignored the cheques. I note that the cheques were excluded from the Addendum and unaffected by Mr Jafar's purported assumption of BOS's exposure effected thereby, so that BOS retained the cheques and the right to present them. This may just be because even though BOS no longer had an exposure to AIML, Mr Jafar was then liable to reimburse BOS in respect of the full amount of the Loans and BOS wished to hold and retain its rights against AIML as protection or it might support Mr Jafar's evidence, which I discuss below, that the Addendum was never intended to be binding.
498. Ignoring and leaving out of account the effect of the cheques, it has to be said, was convenient for Mr Nerguizian since it made it easier to avoid having to acknowledge and record BOS's exposure to AIML. To have acknowledged this openly and clearly made it more difficult to explain why AML and KYC checks had not been done and explain how BOS could have avoided recording in its books a liability owed to it by AIML or to have acknowledged its exposure to AIML risk.

How BOS had accounted for and recorded its exposure to AIML

499. Mr Nerguizian when discussing how BOS had recorded the First Loan in its books adopted an explanation that was consistent with his risk participation approach. But he acknowledged the tensions and difficulties which that approach gave rise. He said that BOS only opened accounts in the name of Mr Jafar. But, as he said, BOS had a liability from Abraaj but did not have an account in the name of any entity of Abraaj to debit. He seemed to regard this as a conundrum which had not been satisfactorily addressed and exposed BOS to a risk and problem if the First Loan (and ultimately all the Loans in respect of which BOS ultimately assumed as exposure) were not repaid (so that BOS would have to account for its loss).

500. As I have noted above I raised this issue (together with the evidence of BOS's internal approval process) with Mr Nerguizian at the end of his cross-examination (Day 13, pages 165-167). I asked him what he had meant by the statement in his email to Mr Jafar dated 15 February 2018, in which he had expressed concerns about BOS not being repaid, that "*We do not even have a proper account opening documentation.*" I have extracted the exchange above.
501. It appears that Mr Nerguizian had considered in February 2018 and, in light of that acknowledgement, accepted in his evidence that BOS had failed to do something which was required of it and that it should have done. It should have had certain account opening forms but did not.
502. If as appears to be the case BOS only had accounts recording Mr Jafar's liability to it, how would payments received from AIML in respect of the cheques have been accounted for? If and when the cheques were paid to BOS, it needed an account with a debit balance which could be credited with the part of the repayment for which Mr Jafar was not liable to BOS. Mr Nerguizian talked about having sub-accounts in the name of Mr Jafar and I took him to mean that this had been BOS's way of dealing with this issue.
503. While Mr Nerguizian was unable to explain clearly how BOS had accounted for the First Loan, I believe that the approach he outlined involved BOS opening and debiting a sub-account in Mr Jafar's name in respect of the 45% share of the First Loan. This would be justifiable if (a) Mr Jafar had assumed an obligation to reimburse BOS in respect of the full amount paid by it to Mr Jafar in return for the cheques; (b) this sub-account would be credited if AIML repaid the 45% share of the First Loan (either upon payment of the cheques direct to BOS or upon Mr Jafar being paid and handing over the 45% to BOS) and (c) it was agreed that the debit balance would be removed and extinguished if AIML failed to repay the 45% share of the First Loan (so that Mr Jafar was treated as having a conditional repayment obligation in respect of that part of the First Loan which was discharged by non-payment by AIML). But as I have already said, this approach appears to be inconsistent with the cheque discounting documents.

504. Since the repayment of the 45% share of the First Loan depended on AIML making payments it seems to me to be likely that BOS should have recorded its exposure to AIML in some way or other. I accept that I do not have the benefit of expert evidence as to the proper way for a Sharjah bank in BOS's position to record such an exposure, but it seems to me that Mr Nerguizian accepted that the approach which BOS had adopted was non-compliant and deficient.
505. It seems to me that Mr Nerguizian had recognised that BOS had failed to account properly for and record in an appropriate manner its exposure to AIML. But his evidence, as it seems to me, was not as candid and clear as it could and should have been. Irrespective of any doubts and complexities as to how the cheque discounting facility documents should, as a matter of law, be interpreted, Mr Nerguizian should have known, as the senior banker with responsibility for the cheque discounting facility about, (he purported to have knowledge of the accounts which BOS had opened) and been able to explain clearly and directly, how BOS had accounted for and recorded its exposure to AIML. It seems to me that his rambling account and evasive answers was a way of evading having to give a straight answer and admit openly to this failure and difficulty.
506. It appears that Mr Nerguizian not only failed to ensure that BOS had the proper account opening documents but he and Mr Jafar had failed to consider and think through other aspects of the Jafar-BOS loss sharing arrangements. As Mr Nerguizian admitted during his cross-examination that he (and Mr Jafar) had never thought about how repayments from AIML would be allocated and appropriated as between the parts of the First Loan which were Mr Jafar's risk and the parts that were BOS's risk, and as between the Loans (if a payment was not appropriated to a particular Loan). He said this (my underlining):

“When we started receiving the funds and the money went to our account, the share of BOS visually, we realised that if you do not split it pro rata, it creates some sort of imbalance in the claim. So we went and we agreed to the unicity of the loan, to say, okay, we are together, whatever we receive we split pro rata and then we go and claim and whatever we receive thereafter, BOS will take a loss, if there is a loss, of 45% or

whatever. This is - we never thought about all these details, you know, when we gave the loan.

507. Other parts of Mr Nerguizian's evidence indicated a failure in approach more generally to completing all the requisite paperwork and complying with all the requisite internal procedures, Mr Nerguizian's evidence indicated a failure to pay attention to a number of important matters and to important details. The impression he gave was of a failure to consider carefully the implications of the cheque discounting facility, of cutting corners and incomplete compliance. For example, when cross-examined by Mr Atherton and asked about why BOS had not obtained financial statements for the relevant Abraaj entities Mr Nerguizian said this (Day 13, page 63) (my underlining):

"If we had opened an account in the name of Abraaj and did the structuring in the name of Abraaj by the cheques of Abraaj, we would have requested it. That's a requirement. In that case it becomes automatically a requirement. The moment we shifted to a discount of cheques in favour of Mr Jafar, unfortunately that requirement somehow disappeared from the game."

Did Mr Nerguizian deliberately ignore or evade AML and KYC regulations?

508. The issue of the nature and characterisation of BOS's exposure to AIML is also relevant, as I have said, to an assessment of whether Mr Nerguizian's conduct in relation to (and his decision to do no) AML/KYC checks was appropriate and justifiable or whether it evidences an intention to evade these important requirements.

509. It is clear that Mr Jafar and Mr Nerguizian understood (and it seems likely that Mr Naqvi was also aware – during his cross-examination by Mr Ayres Mr Jafar said that he had initially told Mr Naqvi that the lender of the First Loan might formally be BOS and that if he decided to proceed that he would support BOS in providing the loan) that the effect of the BOS-Jafar agreement to share the risk exposure to AIML/AH (initially in respect of the First Loan) was that BOS took on AIML/AH credit risk. Mr Nerguizian accepted in his evidence that if BOS had advanced a loan directly to AIML (or another Abraaj entity) it would have been necessary for AML/KYC checks to have been completed and that BOS was exposed to AIML risk. Mr Jafar and Mr Nerguizian are also to be taken to have understood (because

this is what was said in the documents they signed) that the AIML cheques were being discounted (that is negotiated or transferred) to BOS and that BOS was given the right to present and collect payment from AIML under the cheques. Mr Nerguizian therefore knew enough to appreciate that careful consideration had to be given to whether the cheque discounting facility in relation to the First Loan meant that BOS had a sufficient relationship with AIML to engage the AML/KYC regulations.

510. The evidence indicates that Mr Nerguizian either misunderstood when AML and KYC checks were needed (he said at one point that they were not relevant because he was satisfied as to the source of repayment of the Loans) or conveniently decided that they could be ignored. I consider that the former view is highly unlikely in view of the fact that Mr Nerguizian is a senior and experienced banker. I consider that the latter view is likely since it was critical to the New Structure and for the facilitation of the First Loan (and the other Loans) that Mr Jafar and Mr Naqvi were desperate for that no such checks be done. There was insufficient time for the checks to be done so they had to be dispensed with. The fact that BOS would not be lending directly to or opening an account in the name of AIML gave cover for and provided an excuse for dispensing with the checks.

511. When cross-examined by Mr Ayres (Day 13 pages 97-99) Mr Nerguizian said this (my underlining):

“Q.

I had the preamble to the question, the importance of KYC, the importance of AML, direct risk exposure as between BOS and Abraaj. And the question was: did you at the time feel uncomfortable that BOS was in effect lending to Abraaj without going through all the necessary KYC and AML checks?

A.

Your Lordship, what does it mean, KYC and AML? We are saying BOS, Mr Jafar, are giving our money to Abraaj. Our money is clean. It's not the source - the source of our money is not something fishy. So we are giving them clean money so they transfer to it to the investors and we are expecting that clean money will come back to us. There is no KYC concern, the way you would like to put it. It's very simple. My money was clean, Mr Jafar's money was clean, we club them together, we sent

them to Abraaj, they sent it to whoever they were promising to send and the money came back clean. There is no issue of being dirty money there. The concern that you seem to want to raise is not there, that is no way.

Q. I understand your assertions about the money being clean. But were you concerned that you were putting in place an alternative structure which was designed to avoid all the important checks which are part of KYC and anti-money laundering?

A. The checks that we are trying to avoid, as Mr Ayres is saying, is we could have done them all but it would have taken time. The structure of Abraaj, whatever it was, board member, shareholder, et cetera, these are known individuals, that we had to investigate one by one. And Abraaj had probably - not probably certainly – had other accounts with other banks who have already investigated all this prior to opening accounts. So I'm not the banker that suddenly is opening the first account of Abraaj. Abraaj is a company that exists and it was existing for a long time, reputable. They had bank accounts with other banks and when it came to our turn, we had to do the KYC, we could not do it on time, but had we had the luxury of saying we had 15 days or two months to deploy this facility, we would have opened the account and done the KYC normally and naturally.

512. Mr Ayres had fairly and precisely raised with Mr Nerguizian the question of the impact of BOS taking on and having a credit risk to AIML (Abraaj entities). Mr Nerguizian completely failed to deal with that issue. His response was evasive. His initial answer suggested remarkably that AML and KYC checks were only relevant to sources of repayment so that in this case AML/KYC issues did not and could not arise. But he separately (and inconsistently) accepted that if loans were being made directly to AIML these checks would have been needed (irrespective of whether the source of repayment was clean funds). When pressed he appears to have acknowledged that since there was no time, any checks just had to be avoided.

513. When I asked him about this issue the following exchange took place (my underlining):

“JUSTICE SEGAL: Just picking up a follow-on question from the questions you were asked about the AML KYC terrorist funding checks, you indicated in your evidence that you had concluded that they were of no practical concern or relevance because you had expected or understood or agreed with Mr Naqvi and Mr Jafar had agreed that the loans would be repaid out of funds reinvested by investors in January?

A. Yes.

JUSTICE SEGAL: Two issues just to ask you about: one, am I right that had BOS ended up lending directly to one of the Abraaj entities, you would have had to -

A. We never had an account, even when we took the liability, we never had an account. It went to a suspense provided account.

JUSTICE SEGAL: My question is: when you loaned to - if you had loaned directly to AIML, would you have had to have concluded and run and completed [the KYC checks]?

A. Yes, of course. There are processes to open the account and to deploy.

JUSTICE SEGAL: So one of the consequences of using the structure that was adopted [as you understood it] was to avoid the need for AML KYC terrorist funding checks to be conducted?

A. Indirectly, yes.”

514. So, as I have said, Mr Nerguizian accepted that if BOS had advanced funds directly to AIML AML and KYC checks would have been needed. He never explained or justified how he was able to conclude that they were needed under the New Structure or that he had checked and been told that they were not needed. He just conveniently decided that they could be ignored.

515. As I have also said, I can see that Mr Nerguizian could justify dispensing with and ignoring the need for these checks if he could show that he considered (and perhaps obtained internal advice on) the scope of the relevant rules and was able to provide a coherent explanation of why he concluded and considered that the checks were not needed in the circumstances. But he was unable to do so.

516. I can also see that it might be said that there was some uncertainty as to whether AML and KYC checks were required in view of the cheque discounting facility and loss sharing arrangements that BOS and Mr Jafar entered into and the resulting BOS-AIML relationship. But Mr Nerguizian never said that this was a grey area or that there were any doubts as to the scope and effect of the applicable rules.
517. No expert evidence was adduced as to the scope and content of the applicable AML/KYC rules and so I am not in a position to decide whether the cheque discounting facility was covered and whether BOS in fact breached the rules in failing in the circumstances to do the checks. But I do not need to reach that conclusion to find that the evidence indicates that it was likely that Mr Nerguizian's conduct in relation to AML/KYC checks was likely to have involved either a deliberate failure to satisfy himself that these checks were not required or a deliberate evasion of the applicable AML/KYC rules, and that he had not given honest and full answers during his cross-examination on these issues.
518. The Fund Parties submitted that the evidence showed that Mr Nerguizian had proposed the New Structure in order to evade AML and KYC requirements and that he cannot have believed that there was no need for such checks and must have appreciated that what he was doing was improper (so that he was not acting in an honest and open manner).
519. It seems to me that it is likely and I find that Mr Nerguizian appreciated *at least* that AML/KYC checks were probably or could well be required under the New Structure but deliberately failed to make proper inquiries to satisfy himself as to the correct position and ignored his responsibility to ensure that the relevant AML/KYC rules were complied with. It was imperative that AML/KYC checks be avoided and Mr Nerguizian conveniently decided that they could be ignored. The New Structure was proposed because of the need to avoid AML/KYC checks but the evidence indicates that Mr Nerguizian did not have a genuine belief that there was a proper basis for concluding that there was no need to undertake AML/KYC checks.

520. It was, as I have said, critical to the New Structure and for the facilitation of the First Loan (and the other Loans that no such checks be done. There was insufficient time for the checks to be done so they had to be dispensed with. The fact that BOS would not be lending directly to or opening an account in the name of AIML gave cover for and provided an excuse for dispensing with the checks.
521. Crucially to my mind, had Mr Nerguizian really considered the need for these checks when suggesting the New Structure and genuinely believed that they were not needed he would have been able to confirm when and how the question of whether (and how) the AML/KYC rules applied to the cheque discounting facility had been considered and importantly to provide a coherent and credible explanation of as to why these checks were in his view not needed. His failure to do so indicates to me that he had not turned his mind to this issue and had no such genuine belief.
522. It could, I think, reasonably be expected that BOS, as a regulated financial institution, would have made and retained some documentary record of its decision as to the application of the AML/KYC rules, even if only a brief note. But Mr Nerguizian did not indicate that there was or produce one.
523. Mr Nerguizian was clearly very familiar with cheque discounting facilities as he had rapidly proposed the New Structure when confronted by the need for speed and specifically to avoid the delays associated with completing these checks. He also acknowledged that the AML and KYC regulations were seen as important in the local market and for BOS (in his cross-examination – Day 12, page 91 - he had said that “*BOS as a small bank cannot afford to have issues with money laundering*”). He had no excuse or proper basis for being unable to explain how and why he had concluded and was satisfied that all checks could be dispensed with.

Mr Nerguizian's evidence regarding obtaining internal approvals

524. I must also say that I found Mr Nerguizian's evidence as to the internal approval process that was followed opaque and unclear. Mr Nerguizian said during his cross-examination that *"The members of the committee were notified that this is the transaction, the chairman was informed and thereafter the Board Credit Committee was informed"* but he failed to provide any documentary evidence of what the Chairman or Committee had been told and what issues had been considered. When pressed about this by Mr Ayres during his cross-examination (Day 12, pages 21-24 and 67-72), Mr Nerguizian confirmed that he had sent an email on the night of 20 December 2017 to the members of the Management Committee and the treasurer with a description of the transaction. A copy of that email was not in evidence. Mr Nerguizian also said that he had approached the Board Committee after the First Loan had been advanced and *"revalidated"* the decision to approve BOS' taking on the related exposure. There is no document in evidence relating to this application and approval. When asked about what documents had been produced internally for the purpose of seeking and confirming the internal approvals Mr Nerguizian was evasive and only focussed on the documentation entered into with Mr Jafar (as an experienced banker I take it that he was fully aware of the difference between internal documents and the loan documents with a customer/borrower). When Mr Ayres then followed on and put to Mr Nerguizian (in the context of his questions relating to the internal approvals that had been sought) that BOS was committing to US\$45 million of unsecured lending (in twenty-four hours) and therefore a substantial exposure Mr Nerguizian gave a very curious response, as follows (my underlining):

"Yes. Happens. See, we were - your Lordship, it's a very important question. We were not looking at Mr Naqvi as a risk. It was a zero risk situation. Mr Naqvi, with all his reputation, the Abraaj Group, et cetera, was having a short-term liquidity squeeze and there was an opportunity for us to participate, like a syndication, to participate in a transaction and to make some extra money. That was the whole objective. But at no time we doubted, or else why would we deploy the loan? We wouldn't."

525. I shall return to this answer and Mr Nerguizian's evidence as to what he was relying on when approving BOS' taking on of its exposure to AIML, but for present purposes I just want to note that in the context of a line of questions concerning how BOS came to approve the cheque discounting facility and arrangements that would involve it becoming exposed to

AIML (or Abraaj) risk it is extraordinary that he felt it appropriate to say that he treated BOS as being in a zero-risk situation. Even accepting that Mr Nerguizian was saying that because of Mr Naqvi's and the Abraaj entities' stellar reputation he assumed that there was no risk of default, and therefore that it was reasonable for BOS to take on Abraaj exposure without any due diligence and at very short notice, he cannot as an experienced banker have thought that for regulatory, risk management and internal approval purposes, BOS could be treated as having assumed no risks or exposure.

526. I also found Mr Jafar and Mr Nerguizian's explanations as to why and when Mr Jafar and BOS had sought to amend their loss sharing arrangements opaque and unconvincing. There were two relevant agreements and documents. These were, as I have explained, the Addendum and the July Letter. Under the Addendum Mr Jafar agreed, apparently at the end of February 2018, when he was engaged in negotiations to have the Loans recognised as liabilities of AIML and/or AH, to become liable to BOS for the full amounts owed by AIML if the cheques were not paid in full. Under the July Letter, just four months later, after the commencement of AH's and AIML's winding up, the arrangement in the Addendum was reversed and BOS once again agreed that Mr Jafar's liability would be limited. The limit was set out by reference to both the First Loan and the Second Loan as US\$255 million - under the 21 December MOU Mr Jafar was liable to reimburse BOS for the full amount of the Second Loan, US\$200 million, but only 55% (US\$55 million) of the First Loan.

Were the Addendum and the July Letter intended to be binding and did Mr Nerguizian with Mr Jafar's knowledge and assistance seek to conceal BOS' exposure to AIML?

527. The Addendum was headed in typed letters "Sharjah 28 February 2018" and (after reciting the 21 December MOU and the 27 December MOA, BOS' agreement in [3] of the 21 December MOU to "assume 45% of the exposure under [the First Loan]" and that the Second Loan had been advanced by BOS to AIML) stated that BOS and Mr Jafar agreed that "Mr Jafar will assume with effect from 28 February 2018 100% of the liability and all benefits related to the short term loans thereafter will be due and payable to [Mr Jafar] from such date. All other conditions of the loans remain unchanged." The effect of the Addendum was therefore to vary the 21 December MOU to remove the limit on Mr Jafar's obligation to

reimburse BOS in the event that the cheques were not paid on presentation. A copy of the Addendum signed by Mr Jafar and Mr Nerguizian but without the date included in manuscript was adduced in evidence but, as I have explained, there was a dispute as to when the Addendum was signed.

528. The July Letter was written by BOS to Mr Jafar and was dated in typed letters 1 July 2018. The copy adduced in evidence was signed by Mr Nerguizian and countersigned by Mr Jafar. The July Letter stated as follows (my underlining):

“We [BOS] refer to [the Addendum] dated 28 February 2018; and the fact that all related checks [the numbers of the three AIML cheques in respect of the First Loan and the Second Loan are quoted] ... have only received partial cover [being the amount of the Third Loan that had by then been repaid] and that upon the subsequent presentation of the checks they have been returned unpaid;

We further refer to the various legal actions that you have initiated in various jurisdictions to protect our joint interests and the various remedial actions that you are considering;

Pursuant to the above, we [BOS] wish to confirm our undertaking that (despite anything to the contrary in previous correspondence between us) should you fail to recover all the amounts due under the above checks (plus legal and other charges in connection therewith) [BOS agrees] that [it] will bear BOS’s fifteen per cent proportionate share (being 45/300) of any eventual losses.”

529. Two issues arise. First, were the Addendum and the July Letter genuine agreements? Secondly, when were they signed.
530. I agree with the Fund Parties' submissions that Mr Jafar's evidence and explanations as to why the Addendum and the July Letter were entered into were wholly unconvincing.
531. Mr Jafar, when asked by Mr Ayres why he had entered into the Addendum (and assumed the full exposure in respect of the First Loan and the Second Loan) gave a vague and confusing response. He said that he had done so “*as a favour for Mr Nerguizian, and I can't remember why I asked for it at the time. I was certainly going to lead the - all the efforts to - towards recovery. And other than that I don't recall exactly what the purpose of that was*”

(Day 7 page 42). Shortly after that Mr Jafar supplemented and modified his earlier answer and said (at Day 7, page 43) that “...*I think the rationale for [the Addendum] was as the media was ... as a lot of attention was - negative publicity was coming out in the media, [Mr Nerguizian] didn't want [BOS's] name to be in the media. And now I certainly remember that. Whether that agreement was to enable them to do that, I can't remember. But it could well have been... Sorry, in terms of denying it, I guess, because he was getting a lot of calls and there was - in the media, the name of [BOS] had come out, as well as Crescent Petroleum, that I remember. And this loan was not Crescent Petroleum's loan.*”

532. When asked by Mr Ayres about the July Letter, and why BOS would have been willing to limit his liability and once again assume an exposure to AIML when it had the benefit of the Addendum, Mr Jafar had said (Day 7, page 45) that since the Addendum “*was just a gentleman's agreement in terms of - for whatever he was trying to - and I think it was publicity, and that time had gone, and so the ... actual situation that reverted, except rather than BOS sharing only in the first loan, then to share in the totality, so that we would not have division and - of what amounts were received for what loan and all of that.*” When Mr Ayres asked whether the Addendum was intended to be properly operated between Mr Jafar and BOS “*according to its terms or [whether it was] a fake agreement for publicity purposes*” Mr Jafar said that: “*Take it as you want. I mean, the understanding was that whatever - the publicity issue or recovery would apply. The \$45 million - the \$45 million liability would still apply to BOS, that was the gentleman's agreement. So yes, take it as you wish.*”

533. Mr Nerguizian's evidence as to why the Addendum had been needed and signed was also because of concerns that publicity as to BOS's exposure to AIML (Abraaj entities) was becoming damaging. He also implied that because at the end of February 2018 there was no perceived risk of non-payment (only a delay in payment) it was reasonable for Mr Jafar to assume the full exposure to AIML. He said during his cross-examination by Mr Ayres (Day 13, pages 18-19) that in February 2018 “*we [he and Mr Jafar I assume] were not considering that we would not be paid. It was a matter of delay only*” and that: “*we [BOS] were worrying that this publicity is hurting the Bank's image. Normally when you have bad debts it does*

not become public, in this case it was becoming some sort of public information and we wanted to get out of it and Mr Jafar accepted to sign that document.” When asked about the purpose of the July Letter, Mr Nerguizian said that (Day 13, pages 21-22) in July 2018 “we are now at the context where we have evidence that the loan is not being paid on time, we don't know if it will be ever repaid, so Mr Jafar contacted us, saying, Varouj, I took over the loan hoping that it would be paid in the process. Now that it is not, I think it is not fair that [BOS] gets out of the deal and you have to come back. So we restructured the loss in the manner that the documentation, that we would share a percentage of the loss... It is a typical obligation between us and the customer. The customer, the same way he took over the loan hoping it would be repaid, once it was not repaid, the customer requested BOS to go back to the initial stage and we had to comply somehow morally. These are situations where you have to act as a responsible banker.”

534. In my view, Mr Jafar’s and Mr Nerguizian’s accounts of the purpose of the Addendum and the July Letter were disingenuous, misleading and unbelievable.
535. Mr Jafar’s almost immediate change to his initial explanation as to the purpose of the Addendum undermined the credibility of his evidence. His evidence was evasive and at times downright unhelpful. I find it surprising and ultimately incredible that Mr Jafar was unable to remember with greater clarity the reason for the Addendum and the July Letter which were two important documents dealing with issues of real significance to him. However, taken together and looking at the substance of what he said, it seems to me that Mr Jafar’s account of the purpose and desired effect of the Addendum and the July Letter confirm that as far as he was concerned they were intended only to have an optical and not a legal effect. Mr Jafar in effect admitted that the Addendum was a sham. Mr Nerguizian’s evidence was also unconvincing. It was inconsistent with the documentary record and evidence as to the level of concerns at the end of February 2018 as to AIML’s ability and willingness to repay the First Loan and the Second Loan, both of which were due for repayment on 28 February 2018. It is very unlikely that, as his account suggested, just before the likely and impending AIML default Mr Jafar would have been prepared to take on additional AIML exposure just

to assist BOS's publicity concerns. His account, insofar as he said that the Addendum and the July Letter were intended to have legal effect, was inconsistent with Mr Jafar's evidence.

536. It seems to me that Mr Jafar's initial answer as to the purpose of the Addendum was the real reason for its execution. Mr Nerguizian had requested that the Addendum be signed. This was because he was facing some severe internal problems which required that BOS' exposure to AIML be removed from its records, at least for a period. The Fund Parties suggested that the problem was associated with BOS' annual audit and the need to avoid disclosing the exposure to AIML to its auditors. There is no evidence linking the Addendum to a BOS audit so that I am unable to make that specific finding but I do accept that it is likely that the Addendum was needed by Mr Nerguizian for the purpose of giving the impression that BOS had not *defaulted* exposure to AIML. The critical event that was just about to take place on 28 February 2018 was a payment default by AIML. That was the due date for the cheques. It is well known that for risk capital and other purposes there is a significant difference for a bank between a performing credit and a credit in default. It seems to me to be very likely that Mr Nerguizian was under considerable internal pressure to avoid having to account for and deal with the consequences of its exposure to AIML (however that was being accounted for internally) marked and categorised in default. This is why Mr Nerguizian had emailed Mr Naqvi on 21 February (with the subject line stating "*Maturity of 28 February 2018*") after having been "*appraised yesterday about the situation by [Mr Jafar]*" and said that (my underlining) he "*cannot express enough the criticality of the situation and wish to clarify that no extension can be considered. It is paramount that you arrange payment in order not to fall into the default status you wished to avoid end 2017.*" Mr Jafar was persuaded to assist Mr Nerguizian in what was, as the Fund Parties characterised it, the creation of a false document trail, because he did not believe that the Addendum would affect his legal position. It was pure optics or even if it would have some effect it would only be a temporary effect because it was clear that BOS intended and would retain its share of the exposure to AIML.

537. As regards the second issue, namely when were the Addendum and the July Letter signed, it seems to me on balance likely that at least the Addendum was signed on 28 February 2018.

As I have said, it appears that Mr Nerguizian had a real need to be able to show by the date of AIML's default that BOS was not carrying a defaulted exposure on its books. He therefore had an incentive to have the letter signed by that date. It is likely however that the July Letter was only signed in September. Mr Jafar will have wanted once enforcement action became necessary to get the record straight and to have a document which evidenced that the Addendum was of no effect and confirmed BOS's agreement to limit his exposure. This may have taken some time to finalise and deal with. Mr Jafar's email to Mr Nerguizian dated 30 September 2018 referred to amendments proposed by Mr Jafar to documents he attached, and these documents included an unsigned draft of the Addendum with metadata showing that a mark-up had been prepared by Mr Singhvi of Crescent Petroleum earlier in September 2018, and of the July Letter. This is consistent with Mr Jafar proposing some tidying up to the Addendum at the point when the form of the July Letter was still under discussion. But even if the Addendum had not been signed in February 2018 and left to be completed until Mr Jafar and Mr Nerguizian and their advisers got round to tidying up the written record, it seems to me clear from the 28 February 2018 date on the Addendum and the other evidence I have discussed that the Addendum was needed and designed to deal with Mr Nerguizian's need to get the defaulted AIML exposure off BOS's books but that it was always agreed and understood between Mr Nerguizian and Mr Jafar that BOS's acceptance of its share of the exposure to AIML would continue and be unaffected. The July Letter once signed did have the helpful effect of dealing with the impact of separate recoveries in respect of the First Loan and the Second Loan. Originally, BOS's exposure was only in relation to the First Loan. If BOS was able to appropriate recoveries first to repayment of the First Loan, that would reduce its exposure and leave Mr Jafar with his liability in respect of the Second Loan. The July Letter appears to require that recoveries be appropriated and applied equally or pro rata across the First Loan and the Second Loan.

Auctus

538. While dealing with the issue of the nature and extent of, and transfers of, Mr Jafar's rights as a creditor of AIML it is worth dealing with the issues raised by the Fund Parties in respect of Mr Jafar's transaction with Auctus.

539. On 30 May 2018, as I have noted, Mr Jafar executed the Auctus Assignment. He says that the effect of the Auctus Assignment was to transfer legal title to the First Loan and the Second Loan (referred to as the Rescue Loans) to Auctus.

540. Under the Auctus Assignment Mr Jafar as assignor “*assigns absolutely all his right, title and interest from time to time in and to the Loan Assets.*” “*Loan Assets*” are defined as meaning (my underlining) “*any and all moneys, liabilities and obligations (whether actual or contingent, whether now existing or hereafter arising, whether or not for the payment of money and including any obligation or liability to pay damages) from time to time owed or owing to [Mr Jafar] under or in relation to the Rescue Loans (including, without limitation, fees, interest and the benefit (through [Mr Jafar], as its agent) of all of [Mr Jafar’s] rights under any credit support arrangement or other loss-sharing arrangements relating to the Rescue Loans), but, in each case (including with regard to security) excluding the Assignor’s rights under or in relation to the Cheques.*” The Rescue Loans are defined as being:

“*the three loans that were made by [Mr Jafar] as follows:*

- (a) *in the amount of AED 376,300,000, to AH’s bank account with [CBD] on 27 December 2017;*
- (b) *in the amount of AED 376,300,000, to AH’s bank account with [FDB] on 27 December 2017; and*
- (c) *in the amount of AED 376,300,000, to AIML’s bank account with [CBD] on 21 December 2017.”*

541. Auctus agreed to pay Mr Jafar the face value of these loans subject to an important qualification. Auctus only had to make payments following and in the amount of any Remittance and its liability was to be reduced to zero on the Termination Date. The Termination Date was the earlier of “*the date on which all of the liabilities of AH and AIML under or in respect of the Rescue Loans have been fully and finally discharged in full ... and (ii) the date on which any final distribution is paid to the Assignee by any liquidator or equivalent of or relating to AIML and AH.*” “Remittance” was defined as meaning “*any and all amounts received or receivable in respect of or in connection with the Loan Assets at any*

time, including (without limitation) any distribution (in cash or in kind) by any liquidator or equivalent of either of AIML or AH.”

542. So, the Auctus Assignment acknowledges the uncertainty as the identity of the borrowers under the First Loan and the Second Loan and assumes that both AIML and AH are liable in respect of them without stating who was liable in relation to which loan. The Auctus Assignment also acknowledges the Mr Jafar was unable to transfer rights in respect of the cheques (at least without the consent of BOS which was not a party) because these had been negotiated or transferred to BOS. The Auctus Assignment therefore assumed that Mr Jafar had retained rights as a creditor against whichever of AIML and AH was liable in respect of these loans despite and after the negotiation and transfer of the cheques and could assign these rights without also procuring the transfer of the cheques. It seems to me that this assumption was unjustified. Could it really have been intended that AIML was under a liability both to BOS as holder or transferee of the cheques and Mr Jafar as the original lender? Its obligation was to pay BOS on the cheques and if it did so its liability would be discharged. Furthermore, AIML would not get a good discharge by paying Mr Jafar while the cheques remained outstanding. So at best the rights acquired by Auctus were subject to the rights of BOS under and in respect of the cheques and therefore limited.
543. Auctus’ rights were also limited, as the Fund Parties argued, because it was obliged in any event to pay over to Mr Jafar a sum equal to any amounts it received in respect of the Loan Assets. To that extent, as the Fund Parties claimed, the economic interest in the Rescue Loans remained with Mr Jafar (who also had the right to require the re-assignment of the Rescue Loans on five days’ notice).
544. The Fund Parties complained that Mr Jafar’s evidence in the Winding Up Proceedings was deliberately misleading. They referred to [56] of the Winding Up Affidavit sworn by Mr Jafar and Mr Jafar’s statement that he had “*transferred the ownership of the loans to an independent and unrelated credit fund.*” They said that the impression given to anyone reading that statement was misleading since it suggested that Mr Jafar was not the decision-maker in respect of the Rescue Loans and merely a collection agent. They submitted that Mr

Jafar had failed to comply with this obligation of full and frank disclosure. They also criticised Mr Jafar's responses in his cross-examination about this as being evasive and less than frank. Mr Jafar had refused to accept that his statement had failed to give an accurate and honest account of the position because it failed to set out the true effect of the Auctus Assignment. He had said that the reference to "*independent and unrelated*" was solely concerned with ownership structure and insisting that it was "*technically*" correct (Day 5, page 44-46).

545. It seems to me that the criticism of Mr Jafar on this count is exaggerated. Mr Jafar was clearly under obligation to give full and frank disclosure and to ensure that his statements were accurate and not misleading and I agree that the statement he made that he had transferred the Rescue Loans to "*an independent and unrelated credit fund*" was incomplete because he failed to mention that he retained the economic interest in the Rescue Loans and had the right to obtain a re-assignment at any time. But I do not see this omission as anything more than a misdemeanour because the Court did not need to know this further detail. Mr Jafar's relationship with Auctus was not an issue in the Winding Up Petitions. The Auctus Assignment was in many respects a footnote to the Winding Up Affidavit and was not a material point which would affect the Court's deliberations and decision on the Winding Up Petitions.

Mr Nerguizian's evidence – general demeanour and credibility

546. Mr Nerguizian is clearly an experienced banker and a senior member of the BOS management in Sharjah. He demonstrated a familiarity with local banking practice and lending structures. He is also a loyal and faithful relationship banker to Mr Jafar who was clearly a very important customer of BOS and client of Mr Nerguizian (indeed Mr Nerguizian referred to him as a friend). Mr Nerguizian sought during December 2017 diligently to promote and protect Mr Jafar's interests and worked hard under considerable time and other pressures to facilitate the lending that Mr Jafar urgently wanted to be made. For this reason, and also because of BOS's own financial interest, Mr Nerguizian is not an impartial and independent witness. These connections require that Mr Nerguizian's evidence

be carefully scrutinised and tested (in particular against the contemporaneous documents and inherent probabilities) and its weight appropriately adjusted.

547. But, beyond this, as will already be apparent from my discussion of his evidence regarding the way that BOS booked and accounted for its AIML exposure, the AML and KYC issues, the reasons for his request to Mr Jafar that the parties sign the Addendum and the BOS internal approval process for the cheque discounting facility, I have to say that I found much of Mr Nerguizian's evidence to be evasive or contrived. I have formed the firm view that Mr Nerguizian's loyalty to this important customer and client resulted on numerous occasions in his giving evidence that was clearly designed to support Mr Jafar's account of his meetings with Mr Naqvi and Mr Jafar's case and had also caused him, when the Loans were being structured and made, to cut corners and cover up the existence of BOS's exposure to AIML (Abraaj entity) risk (as I have already said, I consider it likely that he created a false paper trail to hide BOS's exposure from internal or external scrutiny).
548. Mr Nerguizian's role was to facilitate whatever Mr Jafar required, principally but crucially by securing the BOS funding of the Loans (when Mr Jafar was entirely dependent on BOS as he did not have the cash to fund the Loans himself) and did not involve the exercise of any independent professional judgment. Mr Jafar referred to him as his trusted adviser but it does not seem that he sought or obtained Mr Nerguizian's independent advice save in relation to the core financial terms and the structuring of the Loans. Mr Jafar did ask him to assess the reasonableness and implications of the ENBD term sheet but as I explain below Mr Nerguizian's response seems to me to have been contrived to support the conclusion that Mr Naqvi had reasonable grounds for treating ENBD's terms as unduly onerous and to allow ENBD's clear view (as a real prospective arm's length lender) that lending US\$200 million to AH at the time was a high risk proposition to be discounted and ignored. I consider that he reached a view which no reasonable banker could have reached or justified in the circumstances.
549. Mr Nerguizian also kept no contemporaneous records of his discussions with Mr Jafar or Mr Naqvi and was unable to produce or refer to the documents that were prepared for the

purpose of obtaining internal credit approval for BOS's involvement in and taking on of a substantial exposure pursuant to the cheque discounting facility. Even though most of BOS' exposure was within the limit of his own lending authority, it is to be expected that a regulated credit institution and an experienced banker would have maintained and been able to produce at least some of these records. And even if it was reasonable for Mr Jafar (operating businessman to businessman and within a business culture that favoured informality) it seems to me to be less reasonable that a senior banker in a major local financial institution would have considered it to be acceptable to operate on what appears in substance to have been a record free basis (unless there was a desire to keep certain aspects of the transaction under the radar screen).

550. I have already noted that GP8 argued that Mr Nerguizian was an unsatisfactory and evasive witness and that his evidence should be given no weight. The GHF Parties submitted that Mr Nerguizian's evidence should be given very little weight. While I accept many of the challenges and criticisms of Mr Nerguizian's evidence which GP8 and the GHF Parties made, it seems to me that the GHF Parties approach is the right one. It would be wrong and unjustified to ignore and give no weight to any of Mr Nerguizian's evidence. His evidence on each issue needed to be carefully scrutinised and tested (in particular against the contemporaneous documents and inherent probabilities) and then given an appropriate weight. As I shall explain, I consider that on some issues Mr Nerguizian gave a candid account of (I would characterise him as having let slip an unvarnished insight into) his and Mr Jafar's motivations and true attitude, when the question put to him in cross-examination induced him to be expansive about why he and Mr Jafar had decided to accede to Mr Naqvi's request for urgent funding.

551. As regards these challenges and criticisms I have already discussed many of them. I deal with Mr Nerguizian's evidence in relation to the Year-End Deposit Message and the Post-Mirage Email separately below.

552. But some parts of his evidence appear to me to be revealing. Mr Nerguizian sought, when pressed during his cross-examination, to explain why he and Mr Jafar had been prepared to

act in (as it was put to him) such a precipitate and apparently careless manner and lend huge amounts at very short notice and without (the opportunity for or) undertaking proper due diligence. His answers revealed the extent to which he (and as he understood it, Mr Jafar) were influenced by and relied on the reputation of Mr Naqvi and the Abraaj entities. The following extracts from his responses set out his evidence (my underlining and emphasis):

(a). Day 12 pages 71-77:

“Q. But this is committing BOS to potentially US\$45 million of unsecured lending in 24 hours?”

A. Yes. Happens. See, we were - your Lordship, it's a very important question. We were not looking at Mr Naqvi as a risk. It was a zero-risk situation. Mr Naqvi, with all his reputation, the Abraaj Group, et cetera, was having a short-term liquidity squeeze and there was an opportunity for us to participate, like a syndication, to participate in a transaction and to make some extra money. That was the whole objective. But at no time we doubted, or else why would we deploy the loan? We wouldn't.

Q. You talk about a zero-risk situation and Mr Naqvi with all his reputation, the Abraaj Group, et cetera. Is that what you and Mr Jafar were relying on in making these loans?

A. I was relying. But then, of course, we had the fact that Badr Jafar was a board member, so we contacted Badr and I asked him specifically if he was aware if there was any problem. He said no, he was not aware. So a board member is not aware, Arif Naqvi with his reputation, comes to Mr Jafar, Mr Jafar proposes that we share it, we do the sharing, we produce the documentation, we accelerate the process, yes, but then we deploy the money. At no time at this stage there was a doubt that the money would not come back. That's why we did it. But then we respected the whole process. The members of the committee were notified that this is the transaction, the chairman was informed and thereafter the Board Credit Committee was informed.

Q. You said "I was relying", but as far as you understood it, Mr Jafar was also relying?

A. Yes, I'm sure he was.

Q. We went through the items, I put to you what you said, the zero risk, all the reputation of Mr Naqvi and the Abraaj Group, et cetera, and you added to that the fact that Badr Jafar was a board member and he wasn't aware of any problems in Abraaj. So would it be fair to say that those are the universe of

things that you were relying on, you and Mr Jafar, for the purposes of this transaction?

A. At that time, yes. The honesty, the perceived honesty of Mr Arif Naqvi, the fact that Badr was a board member and he was not aware of any problem at Abraaj and that Hamid was willing to advance US\$45 million, thereafter US\$55 million, we decided, yes, it was a good opportunity to make some money before the end of the year.”

...

Q. And we are still on this phone call with Badr. You and Mr Hamid Jafar are together, you are talking about Badr on the phone, and I assume you discussed with Badr where the healthcare investors' money, which was being demanded to be returned, where that was?

A. No, we did not. The only thing we asked Badr was, is there a problem at the level of Abraaj that we should be worrying about? And he said, no, up to his knowledge there was nothing. We did not go into specific details.

Q. So in considering whether to proceed and go ahead and make this loan, would it be fair to say that what you were - you and Mr Hamid Jafar were worried about was the overall financial position of Abraaj Holdings?

A. When anybody asks you for a facility for a loan, your Lordship, the first question is, will you be – get repaid or not? So in this situation, Arif Naqvi had explained to Mr Jafar the situation, we contacted Badr, who was a board member, to see whether Badr was aware of any problem with Abraaj. He said that he was not aware. **And that's it.** Thereafter we deployed the facility.”

Q. You say, if I may say so, I wholeheartedly agree, you say, when anybody asks you for a facility for a loan, the first question is, will you get repaid or not? That's absolutely right. But in that context did you have a discussion with Badr Jafar on the telephone as to the sources of repayment of the loan?

A. No, we just asked, I just specifically asked whether he knew if there was any problem at the level of Abraaj. **That's it. We did not discuss the specifics of the sort of repayment or the source.**

Q. What didn't you talk about specifics? Because it's one thing for a company or a group to have a net asset value of hundreds of millions, it's quite another thing for them to actually have the cash to repay you?

A. **We did not ask.** I'm really sorry, at that time we did not ask.

Q. Is it right that you didn't have a conversation with Badr Jafar about the sources of repayment because you knew you were going to get repaid from the health investor cash calls?

A. Basically, the first question that was of interest was by asking Badr, was whether Abraaj had any problems. How we would be paid from which source, et cetera, I did not cross into the discussion with Badr. Our assumption was, as I explained earlier, money is going to be sent to the investors and come back. As far as we were concerned, that money would be able to repay us and he was later on saying that he has a lot of sources of other revenues that would repay us anyhow.

(b). Day 12, page 166

"At no time, your Lordship, during this period of 20 to 28 or 29 January or end of the year -- of December, sorry - we were, myself or I think Mr Jafar, was considering the possibility of nonpayment. We are within a context of the same context that we started with on 20 December, we have a serious person, a huge private equity fund, trying to amass a small short-term facility that would be repaid end of January or maximum end of February. This is the mindset, this is the context. Whether I thought or I did not think, at that time it did not cross our mind that there would be an issue like this, or else probably, not myself nor Mr Jafar would have advanced any penny. Why would we do that? ..."

(c). Day 13, pages 53-54:

"Q. And then you also refer, by reference to what occurred during the course of the conversation you had with Mr Naqvi and Mr Jafar, to there being other sources of possible repayment; correct?

A. Yes. He was mentioning the Karachi Electric.

Q. For example. My first point on this is would it not be the most obvious thing for you as an experienced banker to ask about the nature of the deployment of undeployed funds into Abraaj's treasury?

A. Today, after five years, when you ask me that question, I would say yes. But at that time, and again I'm going to repeat what I said probably yesterday, we meet a gentleman on the 20th in the afternoon, first on the call and then in the afternoon at the Royal Mirage and the next day we were deploying funds. At no moment we, myself, or I guess Mr Jafar, we had the impression that there was something funny and it would not come back, it would not be paid, et cetera. Today, after five years when you are asking me the question, the answer is, because we know that there was a fraud, yes. But at that time, we did not think about that. The fact that this was a clean, a very respectable gentleman, having

the biggest private equity fund coming and requesting from us the \$90 million or thereafter \$100 million, did not trigger the type of questions you want me to say "yes" today. Unfortunately, at that time I did not ask him. I did not ask."

(d). Day 13, page 71:

“Q. As far as you are concerned, Abraaj is a successful, highly reputable business; yes?”

A. That's the media hype.

Q. That's what you are referring to when you refer to the media hype?

A. Yes, at that time.

Q. But in fact you are, to use the phrase, buying into that media hype because you are saying that profile gave you comfort in terms of the willingness for you to lend money to Abraaj, correct?

A. Yes.

Q. So you are relying on that hype?

A. Yes, at that time.”

(e). Day 13, page 75:

“.... But at that time, I am repeating again, we are facing a gentleman we know to be a very reputable person, head of the biggest private equity fund, coming from Mr Jafar, requesting from him \$90 million, where we decide to participate 50%, based on his credibility. Thereafter the credibility of Badr Jafar, who was a board member, and then, an additional comfort came when ENBD jumped in and he said, oh, ENBD is giving us \$200 million. So all these three additional events are comfort, it was not a subject of concern....”

(f). Day 13, page 80:

“we knew Arif Naqvi by repute, we knew the private equity Abraaj Group, \$90 million, he wanted to go for it, 45 for himself, 45 for us. Yes, let's do it, we will make some money toward the end of year.”

553. I asked Mr Nerguizian about this evidence after his cross-examination (and before his re-examination by Lord Falconer). This is what he said (Day 13, pages 169-170) (my underlining):

“JUSTICE SEGAL: *My understanding of your evidence on this. Would it be fair to say that from your point of view, you and Mr Jafar made what might be said to be a commercial assessment as to where the funds needed by Abraaj to repay you would come from and you assumed that if investors reinvested in January 2018, that would result in sufficient funds being available to pay you, without you doing a careful detailed analysis? Let me just put this to you and then see whether you can comment and agree: is it also fair to say that you and Mr Jafar made a broadly based commercial assessment as to whether to advance the loans. As you said a number of times in your evidence, you saw Mr Naqvi as the great guru of private equity in the region and his reputation preceded him, I think is the way you put it, and you checked with Badr whether he was aware of any problems at Abraaj. You took comfort from the fact that ENBD was willing to lend to Abraaj. And as I have suggested, you formed the view at a high level that there would be funds available after the reinvestment by investors or otherwise generally from Abraaj’s perceived abundance of resources, including cash and investments held in treasury, that the loans could be and would be repaid. So is it fair to characterise what you have said in those terms, namely that the assessment you made of sources of repayment was a high level broadly based one and your assessment as to whether to advance the loans was equally a broadly based high level commercial assessment based on the factors that I think you identified in your evidence on a number of occasions and I have just sought to summarise. Is that a fair summary and characterisation of what you said?*

A. *I would say, yes, we relied on a number of events or assumptions or confirmations that were made to us and we decided to, each within his share of the risk, we remained at 45 and Mr Jafar continued further.*”

554. Mr Nerguizian repeatedly delivered the same core message. He (and so far as he was aware Mr Jafar) placed heavy reliance on what he (they) knew (or assumed) about Mr Naqvi’s enormous financial wealth and success and his high standing in the local business community (as a private equity superstar and subject of the media hype). They took the view

(and assumed) that Mr Naqvi would be able to manage the acute crisis in which he found himself and somehow arrange for the Loans to be repaid. This was why they did not pay attention to the details of the lending and the arrangements, feel the need for asset security or the need to check whether what Mr Naqvi had said was in fact true and could be verified. Their perception of Mr Naqvi (and the Abraaj entities) produced in them (it might be said seduced them into) an attitude of unquestioning belief in his ability to manage the mess he was in and to find a way of getting them repaid (in what they assumed would be the very short duration of the Loans). As Mr Nerguizian said, “[t]he fact that this was a clean, a very respectable gentleman, having the biggest private equity fund coming and requesting from us the \$90 million or thereafter \$100 million, did not trigger the type of questions you want me to say “yes” today. Unfortunately, at that time I did not ask him. I did not ask” ... “have a serious person, a huge private equity fund, trying to amass a small short-term facility that would be repaid end of January or maximum end of February. This is the mindset we decide[d] to participate 50%, based on his credibility.”

555. Mr Nerguizian did give weight to the call to Badr. But his evidence shows that even on his account the discussion was both brief and narrow. When asked whether he and Mr Jafar had discussed with Badr whether he knew how the Uninvested Capital was held (and the implication of the questions was whether they had discussed the issues with the Healthcare Investors) Mr Nerguizian said (my underlining) “No, we did not. The only thing we asked Badr was, is there a problem at the level of Abraaj that we should be worrying about? And he said, no, up to his knowledge there was nothing. We did not go into specific details.” So even on Mr Nerguizian’s (and Mr Jafar’s account) the discussion with Badr covered little territory and was very high level and based on what Badr is supposed to have said and can have given only a limited level of comfort. In any event, they did not (on this account of what was said) tell Badr (in detail or at all) about Mr Naqvi’s apparently critical assurances or ask Badr to comment on or to make inquiries to check them.

556. But I have to say that I find it unlikely that Mr Nerguizian and Mr Jafar were calling Badr in order to undertake (cursory) due diligence. It seems to me much more likely that they called to update Badr on the call from Mr Naqvi and to discuss the arrangements that needed to be

made as a matter of urgency in connection with the First Loan. In view of Badr's intimate relationship with Mr Naqvi, as shown by the documents, it is likely that Mr Naqvi would have spoken first with Badr so that Badr was already aware that Mr Naqvi would be seeking urgent financial support. It seems to me probable that Mr Naqvi would have asked Badr for the Jafar family's help with the crisis he faced. It is likely that he would have told Badr that he (the Abraaj entities) faced an immediate substantial cash need and that no-one else was prepared to lend, so that, without his friend's support Mr Naqvi (and the Abraaj entities – in which the Jafar family had invested substantial sums and with which Badr was closely associated and connected) were doomed and faced disaster (this extreme language is consistent with the tone and tenor of the WhatsApp messages). It is likely that Badr would have alerted his father immediately and in advance of Mr Naqvi's call to the fact that Mr Naqvi would be approaching the family for this assistance. Accordingly I conclude that while Mr Nerguizian and Mr Jafar will have briefly discussed with Badr the financial position and prospects of and the problems faced by AH (and the other Abraaj entities) this would have been done within the context of their collective awareness of the major liquidity crisis that Mr Naqvi had explained to them required an exceptional and immediate response, so that it is inconceivable that the discussion could have gone in the way described by Mr Jafar and Mr Nerguizian – with Badr denying any knowledge of any problems that should cause concerns to the two prospective lenders and giving AH a clean bill of health.

557. Mr Nerguizian did also mention what Mr Naqvi had said to Mr Jafar (*“Arif Naqvi had explained to Mr Jafar the situation”*) but it is in my view significant that in all these answers (in which he summarised and sought to capture the key components of what was behind and influenced his decision making) he never said that Mr Naqvi had given specific assurances that he (and Mr Jafar) regarded as important. He had every opportunity to do so but repeatedly emphasised that it was reputational factors that were critical. What Mr Naqvi had said was hardly touched on and treated as of minor significance. I appreciate that elsewhere Mr Nerguizian had sought to corroborate Mr Jafar's account but the answers I have set out above seem to be a candid account of how he and Mr Jafar really approached the decision to accede to Mr Naqvi's unusual request.

The Post-Mirage Email

558. As I have noted, GP8 argued that Mr Nerguizian's statement in the Post-Mirage Meeting Email regarding Badr's participation in the First Loan (*"if Badr participates directly it might be disclosed by the auditor as a related party transaction. So maybe it should be in the name of one party from Jafar group to be specified. The rest would be internal between you thereafter"*) showed that Mr Nerguizian was advising Mr Jafar to structure the First Loan so as to disguise Badr's participation and thereby avoid the obligation to disclose the First Loan to AIML's auditors. Mr Nerguizian when questioned about this by Mr Ayres (Day 12, pages 107-109) said that he had simply been drawing to Mr Jafar's attention the fact that Badr's participation would trigger a disclosure obligation which Mr Jafar might wish to avoid.
559. Mr Nerguizian had said that if Badr participated directly (my underlining) *"it might be disclosed by the auditor as a related party transaction."* It is not clear to me whether Mr Nerguizian was saying that Badr's participation as a lender would require the auditors to disclose in the relevant Abraaj entity's financial statements that Badr, a director, was a lender to the relevant entity (and to categorise the First Loan as a related party transaction) or that Badr's participation as a lender would require disclosure of the First Loan to the auditors. It is not clear what *"it"* refers to. But the fact that Mr Nerguizian referred to disclosure *"by the auditor"* strongly suggests that the former construction is the right one. But if that is so, it is not clear why such a disclosure would be a concern to Mr Jafar if the fact that he was a lender was in any event going to be disclosed to the auditors and in the financial statements. It is possible I suppose that related party transactions would need to be separately identified in the financial statements thereby making public that Mr Jafar was a lender whereas the First Loan, if not made by a related party, would not be separately disclosed and Mr Jafar's position as a lender would not be made public. It is also not clear that a loan by the father of a director would not require disclosure (let alone one in respect of which the director has assumed some form of liability – I assume that Mr Nerguizian had in mind an indemnity arrangement between Mr Jafar as lender and Badr).

560. It seems to me that precisely what Mr Nerguizian was suggesting is not clear and it is unclear whether Mr Nerguizian was proposing an approach that he knew to be wrongful. The Post-Mirage Meeting Email only makes a high-level point before any particular arrangement had been settled. In my view, this particular ground for challenging Mr Nerguizian's integrity has too limited a foundation to justify drawing the conclusion argued for by GP8. However, I would note that the email does evidence some sensitivity about disclosures in respect of the First Loan and might be seen as some support for the inference that Mr Jafar was aware that Mr Naqvi wanted to keep the existence of the First Loan under wraps but since the email seems to be about public disclosures and does not mention (the risk of and need to avoid) disclosure to the AH board, I do not think that it can be given any weight on that issue.

The Year End Deposit Message

561. In my view, the Fund Parties are right to say that the Year End Deposit Message made it clear that Mr Naqvi wanted the US\$50 million in order to create a false impression and artificially to improve the financial position of AIML/AH (or other Abraaj entities) as presented and appearing in AH's consolidated accounts. I accept the Fund Parties' submissions that the Year End Deposit Message could not be read, as Mr Jafar suggested, as proposing a regular and legitimate treasury management transaction. The funds were to be "...returned, unused immediately." This, to my mind, must be taken as raising a large red flag, particularly in context, where Mr Naqvi had disclosed his concerns about the risk of adverse investor and market perceptions. There was to be *an obligation* to repay the deposit immediately after the end of the accounting year and it was not suggested that the deposit would just be repayable on demand thereafter. If properly accounted for this arrangement could not have been presented as adding to the cash balances or assets of the relevant recipient. I cannot see how a deposit that had to be repaid immediately after the accounting date could properly be included as an asset at that date without at least a note explaining that the asset was bound instantly to disappear.
562. I also accept the Fund Parties' submission that Badr would have told Mr Jafar about the Year End Deposit Message and what Mr Naqvi had said in it about the purpose of the Third Loan,

and that Mr Naqvi expected Badr to do so. I accept, as the Fund Parties submitted, that the evidence shows (or it can be inferred) that Badr and his father were working in tandem and regularly sharing all information received from Mr Naqvi. There is no evidence or suggestion that anything was withheld by Badr from Mr Jafar. I reject Mr Jafar's evidence that he was unaware of and had not been told by Badr about the Year End Deposit Message.

563. I therefore accept that Mr Jafar knew about the Year End Deposit Message and I also accept what was said in it about the purpose of the Third Loan. The Fund Parties invited the Court to reject Mr Jafar's evidence in cross-examination that he did not ask about the purpose of a US\$50 million loan referring to his answer during his cross-examination that “[t]hat was [Mr Naqvi's] business. I didn't ask” (Day 6 pages 143-144). It is important I think to consider that evidence in the context of the various related questions that Mr Ayres asked Mr Jafar (my underlining):

“Q. Worry about my suggestion to you that you understood at the time that Mr Naqvi was going to be able to repay you the \$50 million because the funds were not going to be used for anything; that's how you knew you were going to be repaid? That's correct, isn't it?

A. I've already said no.

Q. And you also knew that there was no legitimate business purpose for the advance of those funds?

A. No.

Q. Can you explain to the court what legitimate business purpose Mr Naqvi could have had for obtaining \$50 million simply in order to return it seven days later, after year end?

A. That was his business. I didn't ask.”

564. I certainly reject Mr Jafar's evidence that he was unaware that the proceeds of the Third Loan were going to be returned unused. The Year End Deposit Message made it clear that

they would be (“... so if you want to place deposits over year end, and have them returned, unused immediately...”).

565. But I think that Mr Jafar’s evidence as to whether he had formed a view as to whether Mr Naqvi had a legitimate purpose for the Third Loan is more nuanced. He was saying, in essence, that he did not concern himself with the purpose of the Third Loan and as a result did not conclude that it was being sought and would be used for an illegitimate purpose. He was uninterested in that.
566. This is consistent with the account he gave of his attitude to all of the particulars and details of the Loans. They were irrelevant to him and of no interest. He did not need or seek explanations below the surface level. It seems to me that taken in this way and so interpreted, this was an accurate account of Mr Jafar’s state of mind. If Mr Naqvi said he needed the further funds urgently, Mr Jafar did not need or want to know more. He would let him have the funds and was unconcerned about how the funds would be used.
567. But in my view, as Mr Jafar had been told about the contents of the Year End Deposit Message he would, as an experienced and sophisticated businessman, have also been aware that Mr Naqvi was looking artificially to improve and misrepresent the financial position of AIML/AH. He was not troubled by this because he took the view that how the funds were utilised was a matter for Mr Naqvi. He chose to ignore (turn a blind eye) to what Mr Naqvi had said and not to dig deeper or make further inquiries, and thereby avoid having proof positive as to precisely what Mr Naqvi was going to do.
568. This attitude was not (consistent with) the attitude of an arm’s length lender. It is consistent with Mr Jafar’s awareness and acceptance of (at a minimum turning a blind eye to) various suspicious and improper or potentially improper aspects of Mr Naqvi’s conduct in relation to the Loans.
569. I would also note that Mr Nerguizian’s evidence on this topic was also unsatisfactory. He denied that he was aware of or paid any attention to the purpose for which the Third Loan

was being sought and how it would be used (Day 12, page 168-169). It seems to me that, even though BOS was not being asked to advance any part of or share the risk of the Third Loan and therefore was not directly interested in the details, it is unlikely that Badr, Mr Jafar and Mr Nerguizian would not have discussed what Mr Naqvi had said in the Year End Deposit Message Email. Mr Nerguizian's blanket denial of any awareness that Mr Naqvi had said that the funds would be returned unused or what Mr Naqvi had said he needed the funds for is, in view of the evidence that these three were working closely together and sharing all information, not credible.

Was Mr Jafar told that the Uninvested Capital had been spent?

570. I also consider that the Fund Parties are right to say that the evidence indicates that it is probable that Mr Jafar was told and was aware that the Uninvested Capital had been spent. I have found most of the Fund Parties' submissions on this issue to be persuasive.

571. The Fund Parties invited the Court to find that (a) Mr Jafar was informed by Mr Naqvi that (i) the Uninvested Capital had been placed in "*treasury*" and accounted for as an interest-bearing loan (to AH) , repayment of which was owed to the AGHF and (ii) that once the money was in treasury, it had been used for the general business purposes of the various Abraaj entities, (b) Mr Jafar understood what he was told to mean that the Uninvested Capital had been spent and that this was the reason why it could not be immediately returned to Healthcare Investors and (c) Mr Jafar knew that this (spending the Uninvested Capital on ordinary business expenses) was not permissible.

572. It seems to me that points (a)(i), (a)(ii) and-(b) are made out. I will come back to (c) shortly.

573. There are various reasons for concluding that it is likely that Mr Naqvi told Mr Jafar that the Uninvested Capital had been spent and that Mr Jafar's account that he was told and believed that the Uninvested Capital was held in the form of temporary investments was a later self-serving embellishment. I accept the assessment of the evidence and submissions of the Fund Parties on this issue but will highlight the key points:

- (a). The Uninvested Capital had in fact been spent by December 2017 and while Mr Naqvi did not want to reveal to Mr Jafar that he had been running the Abraaj entities as a Ponzi-scheme he did need to show Mr Jafar that the liquidity crisis that he and AH (and the other Abraaj entities) faced was extremely serious and that he and they were out of time with nowhere else to go and no one else to turn to. Disclosing that the Uninvested Capital had been spent (and was not retained and preserved in the form of temporary investments), thereby radically reducing AH's (and the other Abraaj entities') available liquid resources, was consistent with this.
- (b). Had Mr Naqvi said that the Uninvested Capital was retained in the form of temporary investments it is likely that he would have needed to explain even if only in outline, and that Mr Jafar would have asked for, even if only at a high level, some details of what temporary investments were held. By providing a description of the type of investments held and their tenor (when they matured and could be cashed) would have been helpful to Mr Naqvi and to Mr Jafar because it would have been reassuring for Mr Jafar to know that AH/AIML held investments of a particular type with reputable issuers. But even on Mr Jafar's account there was no discussion at all of what type of temporary investments had been made and were held. Mr Naqvi did not mention them (why would he have not brought with him to or referred at the First 20 December 2017 Meeting a schedule or outline details of the temporary investments if they existed and were an important element of his pitch to Mr Jafar) and Mr Jafar did not ask for any particulars about them. As the Fund Parties argued, in the context, had Mr Naqvi said that such investments were still held a whole series of obvious questions are likely to have been asked – what they were, when they matured, whether they could be sold and what the cost of breaking any term deposits would be.
- (c). Mr Jafar's recollection of what Mr Naqvi had said on this topic was poor, vague and changed. So, for example, during his cross-examination by Mr Ayres he said the following about his recollection (my underlining):

“Q. *But as we have seen from a number of documents we have already looked at, it is correct, isn't it, that Mr Naqvi did use the expression "general corporate purposes" or "general business purposes"?*

A. *It appears that this is doubtful now. No, I did say and do say that this was the sense that Mr Naqvi stated the story, if you like, the - I don't remember the exact words, but certainly he used the word "treasury", that the uninvested capital was put in the Abraaj treasury and he certainly said it fit that that was the purpose for the loan, to return uninvested capital to the investors in the Abraaj Healthcare Fund; and that made sense to me, that he wanted to do that to avoid reputational harm. That's the - you know, words to that - other descriptions, you're showing me details at different stages that words were used, what I affirm definitely is that there was no, no implication at any stage that Mr Naqvi on 20 December or in December 2017 implied that he was doing anything improper and if he had, I would have definitely not made the loans.*”

- (d). In addition, when I asked Mr Jafar (during his cross-examination by Mr Ayres, Day 5, page 137) precisely what words Mr Naqvi had used he was unclear and during this cross-examination his explanations were unconvincing and incomplete (he could not explain why in the Winding Up Affidavits he had said that Mr Naqvi had said that the Uninvested Capital had been “*used for the "general business purposes"*”) (my underlining):

“JUSTICE SEGAL: *Can I ask very quickly, before you move on, is that an expression that Mr Naqvi used? Did he use those words?*

A. *I don't recall exactly the words that he used. Definitely he used the words "treasury", "invested in treasury."*

.....

MR AYRES. *Your evidence is ... that "used for its proper business purposes" is the same as "placed in the treasury"?*

A. *Yes.*

.....

JUSTICE SEGAL: Where did those words come from, if Mr Naqvi didn't use them?

A. Your Lordship, I don't know. There are masses of documents that could well have come from somewhere else, quite honestly. Yes."

- (e). Mr Jafar's answer, when asked by Mr Ayres about the basis for his understanding that Mr Naqvi was saying that the Uninvested Capital had not been spent and was held in the form of temporary investments, revealed only a high-level and cursory thought process based on assumption and inference. He admitted that he had not sought to clarify and obtain a confirmation as to what Mr Naqvi meant by what he had said and had not asked Mr Naqvi any follow-up questions (Day 5, pages 122-124) (my underlining):

"Mr JAFAR. The way I assessed at that time, if I thought about it, was that the money was somehow deployed in treasury and that was not immediately available to be able to retransfer. That was the understanding that was being projected to me. They -- even at that time, we were not considering the possibility of a fraud.

.....

A. So it's quite logical to me that it didn't seem unreasonable that you would withdraw -- you would do cash calls for a project and the project gets delayed by, as he explained, delays owing to basically government. We have experienced that a lot. And in the meantime, to place the cash calls in bank deposits, if you have a long delay in a project, you would reduce your IRR on those - on that uninvested cash. So you would seek to invest in instruments, in investments, whatever they are, I did not ask what investments in particular to improve your return. So it sounded to me credible that that would be done. It added up.....

MR AYRES but it is true, isn't it, that you asked no pertinent questions and he gave no pertinent answer about what uninvested capital being placed in Abraaj treasury and being unavailable immediately to be cashed actually meant?

A. That was a satisfactory answer to me. I believed in what he - I believed him, I didn't examine what the nature of those

investments were, nor what other investments that are in the Abraaj treasury. I didn't feel it my business really to ask specifically, "What did you invest in and why couldn't you immediately cash?"

Q. Is the answer to my question that you didn't ask any more questions in relation to that topic?

A. You are correct."

- (f). When it was put to Mr Jafar that Mr Naqvi had confessed that the Healthcare Investors' funds had been spent and that he wanted Mr Jafar's help to deal with the resulting liquidity crisis, Mr Jafar's reaction was extreme, resorting to rhetoric rather than reiterating what he had been told and why his understanding was consistent with that or a rational and reasonable inference from it. His response was: "*No. It's an absurd - an absurd statement. Why would I advance funds into what turned out to be a black hole?*" I take Mr Jafar to mean that if he had been told that the Uninvested Capital had been spent – even if Mr Naqvi had also said that this had been permissible under the contractual arrangements with the Healthcare Investors – then he would have been bound to have concluded that the nature of the financial problem that he was being presented with was much more serious than his evidence in these proceedings has admitted and that in that event it was incredible and inconceivable that he would then have gone on to make the Loans. It seems to me that Mr Jafar is correct as to the first part of that proposition but wrong as to the second part. It does seem to me that the disclosure by Mr Naqvi of the fact that the Uninvested Capital had been spent, which I consider on the balance of probabilities took place, indicated that AH (and the other Abraaj entities) were facing a very serious financial crisis. But in my view, as I have said, it is likely that Mr Jafar was told and was aware of this. However, it did not follow that proceeding to make the Loans with such knowledge was irrational or wholly unreasonable. This was because in my view Mr Jafar assumed, based on Mr Naqvi and Abraaj's stellar reputation and his family's intimate relationship with Mr Naqvi (together with the short terms of the Loans) that Mr Naqvi was bound to be able and would find a way of repaying the Loans and looking after the Jafar family.

- (g). The conclusion that Mr Naqvi had said, and that Mr Jafar's true understanding at the time that the Loans were advanced was Mr Naqvi had said, that the Uninvested Capital had been "used" and therefore was no longer available was supported by Mr Jafar's earlier evidence in the Winding Up Proceedings. In the Winding Up Affidavits he had said this (at [12]) (my underlining):

"Mr Naqvi sought to downplay the contractual basis of the investors' concerns and the legality of their demands, while emphasizing the vital and urgent necessity of adhering to their demands. He told me that it is general industry practice in the West to return drawn down but un-deployed investor capital within a stipulated time frame, but that in emerging market environments, more tolerance is normally given to delays in doing so. He assured me that the unutilized investors' capital was placed into the Abraaj Group's treasury and used for the "general business purposes" of the company, and that treasury accrued interest on such amounts for the benefit of the "lending" fund."

- (h). When taken by Mr Ayres to this part of the Winding Up Affidavits (Day 5, page 133) Mr Jafar sought to defend his evidence by resorting to semantics. He said that the underlined wording in [12] did not "say "spent", it says "used" in the Abraaj group's treasury for the general business purposes of the company. So it wasn't spent." When asked what the difference was between "used for the general business purposes of the company" and "spent" he had said that "I would classify that as investment, invested in - because it's the treasury. I take treasury as an investment." I find this interpretation wholly unconvincing and self-serving. The most obvious meaning of "used" in conjunction with "for general business purposes" is "used up" or used to pay for things and to pay business expenses. Mr Jafar failed even to acknowledge the obvious weakness and difficulties with his strained interpretation.
- (i). In the Letter Before Action (at [105.2]) Jones Day had said that "[t]here was no contractual or legal basis for the Healthcare Investors' demands because (i) the uninvested capital had been placed in the Abraaj Group's treasury and used for its general business purposes with interest accruing for the benefit of [AGHF]; (ii) this was permitted by the terms of the relevant contractual arrangements; and (iii) Abraaj

Group's counsel (Freshfields) had provided a legal opinion that supported this analysis."

- (j). The fact that, after it came into the open that the Uninvested Capital had been spent and this was discussed with the AH board in February 2018, there was no record of Badr and Mr Jafar complaining about having been misled or deceived by Mr Naqvi's failure to disclose this in December 2017 is revealing and supports the conclusion that Badr and Mr Jafar knew and had been told this in December 2017. Lord Falconer, as I have noted earlier, argued (see Day 25, at page 56-69) that it was likely that Mr Naqvi had only become more forthcoming and started to reveal the truth, in particular as to the Uninvested Capital having been spent, even to Badr from between 6-8 February 2018. But Mr Jafar's and Badr's silence and the absence of any documentary evidence or allegation of conversations raising a complaint and allegation about being misled (in the whole period from early February and during the discussions and negotiations with Mr Naqvi and his advisers) is a strong indication that Mr Jafar and Badr already knew and had been told by Mr Naqvi that the Uninvested Capital had been spent. Furthermore, and this is the flip side of the same point, had Mr Naqvi misled Mr Jafar and Badr about whether the Uninvested Capital had been spent, he would surely have been very reluctant openly to admit (without obfuscation and evasion) that this had happened in early February because he would have known that his deception of Mr Jafar and Badr would then have been clearly exposed.

574. But while these factors reveal that Mr Jafar has not given a candid and accurate account of what Mr Naqvi had said about the Uninvested Capital having been spent, it does not follow that Mr Naqvi had said or that Mr Jafar knew or believed that this was definitely unlawful or impermissible. It seems to me likely that Mr Naqvi said that he believed, and had Freshfields' legal advice to support his understanding and position, both that the Healthcare Investors were not entitled to the immediate return of the Uninvested Capital and that the use to which the Uninvested Capital had been put had been permitted by the AGHF fund documents.

575. Mr Jafar put his case on this basis, although as with much of his evidence, his recollections were imprecise and subject to adjustment. In Jafar 1 at [30] Mr Jafar had stated that Mr Naqvi had said that he had obtained an opinion from Freshfields to the effect that the fund documents did not prohibit the placing of Uninvested Capital in treasury. In his cross-examination (Day 5, page 123) he went further and said that Mr Naqvi had stated that the Freshfields' opinion had also dealt with the question of whether the Healthcare Investors were entitled to demand the return of the Uninvested Capital. He said that he had asked Mr Naqvi *"specifically whether the investors in [AGHF] had a contractual right to demand repayment, and he said "No, in fact I've got a Freshfields opinion to that effect" and he showed me that. So I believed him. As it happened, they were pretty much true. I mean, I didn't analyse further than the obvious, to me, at the time."* In the Letter Before Action Jones Day confirmed that it was Mr Jafar's position that Mr Naqvi had dealt with both issues (it was stated, as I have quoted above, that Mr Naqvi had said that (my underlining) *"[t]here was no contractual or legal basis for the Healthcare Investors' demands because (i) the uninvested capital had been placed in the Abraaj Group's treasury and used for its general business purposes with interest accruing for the benefit of [AGHF]; (ii) this was permitted..."*).
576. This would have been an easy statement for Mr Naqvi to make because it was unlikely, and as matters turned out it was the case, that Mr Jafar would wish to read or pay attention to the detail of what Freshfields had advised. As I explain below, I consider it likely that Mr Naqvi only mentioned but did not produce at the meeting an opinion from Freshfields. There was no need for him to do so. The brief discussion at the First 20 December 2017 Meeting was not the forum to get into legal detail and that is not what Mr Naqvi wanted to do or what Mr Jafar required. Even on Mr Jafar's own evidence he did not want to read and seek to understand Freshfields advice. In my view it is likely that, as was the case with so much of the conversation with Mr Naqvi, Mr Jafar paid no attention to the detail (the evidence shows that Mr Jafar never received a copy of the Freshfields advice until the discovery process in these proceedings). He was told that Freshfields had provided an opinion – in fact they had written two Advice Notes on 17 December 2017, one relating to the custody of fund assets (the ***Freshfields Fund Assets Note***) and one relating to the AGHF (the ***Freshfields AGHF***

Note) (together the *Freshfields Notes*) – that supported Mr Naqvi’s position in relation to the Uninvested Capital and that confirmed that what had been done was legitimate. That was all that Mr Jafar heard and took notice of without clearly differentiating between the two separate issues of how the Uninvested Capital had to be held pending its deployment in projects and when it had to be returned to the Healthcare Investors.

577. As I have said, in my view Mr Jafar never saw and was not told about (nor was he interested in) the detail of the advice set out in the Freshfields Notes. Nor in my view would Mr Naqvi have felt constrained to identify the limitations and areas not covered by the advice in any event. I am satisfied that it is likely that he would have simply said that the Freshfields advice supported Mr Naqvi’s position and the view that AIML (and AGHF) had acted in accordance with the funds documents and the law. Interestingly, when the Freshfields Notes are read it is clear that they were brief, preliminary and based on assumed facts, and show that the relevant fund documents did not deal clearly and definitively with how the Uninvested Capital was to be held and whether the Healthcare Investors were entitled to demand its repayment. There were arguments on both sides. But it was at least arguable that AIML was entitled to place Uninvested Capital in deposit accounts including in accounts with AH and to invest in temporary investments, and was not required to segregate cash from its own funds (see the Freshfields Fund Assets Note). The discussion at the AH board meetings in February also indicated that the legal issue was not straightforward and that there were various unresolved issues (and it turns out that AIML and AH had entered into formal agreements regarding the lending of monies by the funds and the applicable terms which were designed to protect the financial position of investors).

578. The Fund Parties cross-examined Mr Jafar closely on whether he understood that the spending of the Uninvested Capital was bound to be unlawful and in breach of the relevant fund agreements. I have summarised above their submissions and Mr Jafar’s position on this point. The Fund Parties in essence argued and put to Mr Jafar that anyone with a basic knowledge of the way in which funds operated would appreciate (and that Mr Jafar must have appreciated) that spending investors’ money was wrongful. On this point, it seems to me that the Fund Parties went too far. It is, even without expert evidence on the point,

permissible to assert that investors and those with experience of investing such as Mr Jafar would agree that as a general rule funds may only use and apply investments made by investors in accordance with the governing fund agreements and that those agreements usually require that investors' funds are ring fenced, preserved and protected pending their deployment on relevant projects. But the use to which investors' funds can be put is subject to agreement and there is no single and invariable rule and practice. Sometimes, investors may be prepared to allow such funds to be placed on deposit with (loaned by the investment manager to) banks and related companies (who are then entitled to use the funds deposited as they wish). It all depends on what was agreed. Mr Jafar said, in essence, that Mr Naqvi told him that what had been done with the Uninvested Capital (and I have concluded that this included the fact that at least some of the Uninvested Capital had been spent) was permitted by the relevant fund agreements and that Freshfields had given advice that supported this view. He did not examine or seek to verify the advice and took what Mr Naqvi said at face value. It seems to me that this part of his account is consistent with the documentary evidence and context and is to be believed. Mr Naqvi did not tell him that placing the Uninvested Capital in AH's treasury and AH using the funds to pay business liabilities was illegitimate. Mr Jafar did not know or conclude that this was highly questionable.

What was Mr Jafar told the additional US\$40 million was needed for?

579. In my view, it is likely that Mr Naqvi told Mr Jafar that the additional US\$40 million that he urgently needed above and beyond the funds that he said were required to repay Uninvested Capital were needed to meet urgent general and various liquidity needs (which view is supported by Mr Nerguizian's evidence – see Nerguizian 1 at [19]). Mr Jafar did not bother to check and establish what precisely the funds were needed for. He took it that there were various pressing demands on AH's (the other Abraaj entities') cashflow and was happy to advance the sum that Mr Naqvi identified without further inquiry. It was clear that Mr Naqvi (and the Abraaj entities) was (were) under enormous and growing financial pressure. It seems to me that it is likely that Mr Jafar did know and that any reasonable lender in Mr Jafar's position would have understood that these ever increasing and unparticularised needs

and demands were evidence of business in serious financial difficulty. Mr Jafar said that this did not cause alarm bells to ring.

580. The following is the exchange with Mr Ayres that I am referring to (my underlining):

- Q. When Mr Naqvi said that there were or might be similar demands from other investors and/or in relation to other funds, was that not a cause for concern for you – despite the balance of the loan above what was needed to repay the Healthcare Investors kept increasing from an initial US\$40m to \$100m? Why not ask for more information?*
- A. No, I did not. I did not examine on what basis Mr Naqvi would need the additional amount. It could be any number of developments within his group.*
- Q. By the time you get to the 26th, did you not think that with all these increasing demands for cash, that Mr Naqvi was actually raising on any view the prospect of a run on the funds within the Abraaj Group and that the alarm bells were ringing?*
- A. No.*
- Q. On 26 December or at any other stage did you ask Mr Naqvi how much uninvested capital there was across the Abraaj Group which might not be available immediately to return to investors if demanded?*
- A. No, I did not. I **assumed** it was within the cushion that he wanted to have.*
- Q. A bona fide provider of short-term liquidity would have asked Mr Naqvi on the 20th why he thought \$40 million was sufficient for the purposes of the cushion, wouldn't they?*
- A. I did not.*
- Q. Because your story not truthful [Mr Jafar denied this]”*

581. In my view, it is likely, as I have said, that Mr Jafar well appreciated that Mr Naqvi's (and the Abraaj entities') businesses were in serious financial difficulty, but he was prepared to

lend because he assumed that Mr Naqvi would be able to fix the problems and arrange for repayment of the loans. It was only in this sense that he might legitimately say that the alarm bells were not ringing. To the extent that Mr Jafar was saying that the circumstances as described and known to him and as he understood did not indicate serious financial problems that gave rise to real risk, I would reject his evidence on this point.

582. The conclusion that Mr Naqvi had explained that he needed the extra funds to meet pressing and various demands for payment in the businesses of AH and the other Abraaj entities is supported by what he said in the Winding Up Affidavit. At [13] the additional \$40 million was referred to as being “*required to meet urgent liquidity needs.*”

What documents did Mr Naqvi refer to at or bring with him to the First 20 December 2017 Meeting?

583. It seems to me likely that Mr Naqvi only referred to an opinion from Freshfields. It is also likely that he referred to having obtained a clean audit opinion but I consider it unlikely that he would have referred specifically to the KPMG document containing the audited accounts for the year ended 30 June 2017. It also seems to me to be likely that Mr Naqvi did not bring a copy of the Freshfields’ opinion to the First 20 December 2017 Meeting. I reject Mr Jafar’s evidence to the contrary. Mr Jafar’s last-minute recollection during his cross-examination that he had seen a copy of the Freshfields’ opinion (and other documents) at the First 20 December 2017 Meeting appears to me to be convenient reconstruction.

584. In Jafar 1, Mr Jafar did not say that he had seen copies of any documents at the First 20 December 2017 Meeting. As regards the Freshfields’ opinion he merely said that Mr Naqvi had told him that “*he had obtained an independent legal opinion from Freshfields...*”. Had he been handed a copy to look at and read any part of it, he would have said so. The conclusion that Mr Jafar had not been handed a copy to look at is confirmed by the way in which Mr Ernest chased Mr Naqvi for a copy in May 2018. On 21 May 2018, as I have noted, Mr Ernest sent an email to Mr Naqvi in which he said that Mr Jafar was (my underlining) “*following up on your offer to provide the Freshfields opinion that you told [Mr*

Jafar] that you had (again back in December) that related to the use of the Funds' money by Abraaj Treasury: please let him have that." Mr Ernest did not say "*which you had shown him at the meeting in December.*" Again, in my view if Mr Naqvi had shown Mr Jafar a copy at that meeting Mr Ernest would have said so and phrased his request differently.

585. As the Fund Parties noted, by Response 310(d) to the GHF Further RFBPs Mr Jafar's pleaded case was that Mr Naqvi had informed him that "*a legal opinion confirmed the position stated by him*" but that he "*was not provided with a copy of the actual Freshfields Opinion at the time [at the First 20 December 2017 Meeting]*" (my underlining). Mr Jafar categorically rejected this clear statement as being simply wrong. He said he had not read the Responses and that his legal advisers had made a mistake (in fact his suggestion was that they had not checked the facts and this important document with him). I do not accept that evidence. It seems to me likely that the Response was carefully prepared after discussions and instructions had been given by Mr Jafar and that Mr Jafar had decided to change his story at trial to enhance his case. Lord Falconer argued that "*provided with*" did not connote or mean handed or shown a copy but merely that was not given a copy to take away with him. This does not seem to me the proper construction of the Response. "Provided with" means given a copy at the meeting to read.

586. Mr Nerguizian's evidence during his cross-examination by Mr Atherton (Day 13, pages 51-52) is also instructive (my underlining):

“Q. The only document that Mr Jafar referred to in explaining [to Mr Nerguizian] what had happened at the meeting with Mr Naqvi was the opinion of Freshfields; correct?

A. No, there was no document, he just mentioned it to me.

Q. The only document he referred to was an advice from Freshfields?

A. Yes.

Q. The first point is that is an accurate description of what Mr Jafar said to you; correct?

A. Yes.

587. This is evidence of what Mr Jafar had told Mr Nerguizian immediately after the First 20 December 2017 Meeting. I see no reason to ignore or discount Mr Nerguizian's evidence on this point (this was an issue which did not relate to Mr Nerguizian's conduct or BOS' position and on which he did not feel the need to support Mr Jafar's account). This supports the conclusion that no documents were shown to Mr Jafar at that meeting.

588. Mr Nerguizian's evidence also supports the conclusion that Mr Naqvi did not refer to any other documents. When cross-examined by Mr Atherton (Day 13, pages 60-61) he said this (my underlining):

"Q. In terms of what Mr Jafar said to you had occurred when he met Mr Naqvi, he didn't refer to any valuation from JP Morgan, did he?

A. No, no, not at the start.

Q. He didn't refer, did he, to the audited financial statements of Abraaj?

A. No. Mr Jafar is not a banker, he would not request, in my opinion, audited financials. That would be a requirement at our level and even that was not expected.

Q. He never mentioned those documents in his repeat –

A. During that 14 paragraph –

Q. He never said that to you, is what happened at the meeting?

A. I don't recall, I don't think so. At that time, he was just discussing the context and the concept of the financing, they would be giving \$90 million, he was proposing that Bank of Sharjah shares 50%, that the rate of interest et cetera was interesting..... Thereafter when we went to the account opening process and the structure being made under the name of Abraaj, one of my conditions was we need three years of financial - audited financials from Abraaj. The mechanism that did not happen and we went to the discount of cheques, so

the notion of requesting financials from Abraaj was somehow sidelined and forgotten.”

589. In my view, it is likely that had Mr Naqvi referred to the KPMG audited accounts and the JP Morgan valuation Mr Jafar would have mentioned them to Mr Nerguizian when reporting on what was discussed at the First 20 December 2017 Meeting (immediately after that meeting). Had Mr Jafar believed that Mr Naqvi was giving him assurances as to the financial position of AH and the other Abraaj entities by reference to, and that Mr Naqvi had supported his assurances by relying on, these reports and documents, there is an even stronger likelihood that Mr Jafar would have told Mr Nerguizian about these documents. However, he said nothing. Mr Nerguizian’s view of what documents Mr Jafar was likely to have been interested in also supports my assessment of Mr Jafar’s approach at the meeting. He was wholly uninterested in detail or the financial nitty-gritty.
590. In the Winding Up Affidavits (see [11]-[13]) Mr Jafar only referred to Mr Naqvi having said that he had a legal opinion from Freshfields that supported his opinion. He did not say that he had seen the opinion and did not mention the audited accounts or the JP Morgan valuation. In my view, even recognising that the Winding Up Affidavits did not need to go into all the detail, it is likely that if Mr Naqvi had mentioned these documents, Mr Jafar would have referred to them in the Winding Up Affidavits as important parts of the account of what he had been told. This could have been done briefly. He had referred to the Freshfields opinion so why not mention the audited accounts or the JP Morgan valuation? Interestingly, and I think tellingly, the Winding Up Affidavits made no mention at all of Mr Naqvi having discussed or given assurances as to the general financial position of AH or the Abraaj entities at the First 20 December 2017 Meeting (erroneously said to have taken place on 21 December). The focus was on the issues with the Healthcare Investors and, in relation to the First Loan, the existence of various cash generating activities that Mr Naqvi was “*on the verge of finalising*” that would allow the First Loan to be repaid and in relation to the Second Loan, the prospect of funds being reinvested by the Healthcare Investors early in the New Year so that the funds being advanced by Mr Jafar would only be needed for a short period. The Winding Up Affidavits also focussed on the asserted offer from Mr Naqvi of security

over all the unencumbered assets of “*the Abraaj group*” (the same security as had been offered to ENBD).

591. It also seems to me to be odd that the reference to the Freshfields opinion was said by Mr Jafar to have only been made by Mr Naqvi in response to a question from Mr Jafar and yet Mr Naqvi had brought a copy of the relevant document with him. If Mr Naqvi had taken the trouble to bring a copy of the relevant document with him, surely he would have taken the initiative and mentioned it first when explaining the position to Mr Jafar rather than waiting to be asked a question about the advice he had obtained. It is also odd that while Mr Jafar did not think that it was his business and did not feel the need to ask specific questions about what had happened to the Uninvested Capital and what temporary investments were held, he nonetheless had asked a series of very specific questions and Mr Naqvi had just the right documents with him to enable him respond.
592. It seems to me that Mr Jafar has belatedly and for self-serving reasons embellished his account of what he was told by Mr Naqvi and sought to enhance and increase the credibility of his case that he was given assurances as to the financial position of AH and the Abraaj entities by now saying that Mr Naqvi also referred to the audited accounts and the JP Morgan valuation. The credibility of his own account is diminished and undermined by his changed account and late new evidence during his cross-examination that he had in fact been shown and read (albeit only the KPMG clean opinion) a copy of the audited accounts. Mr Jafar said that he was not changing but only elaborating on his earlier evidence. It seems to me however that he was changing his evidence and elaborating (embellishing) beyond the truth of what had happened.
593. The account given in the Sharjah Criminal Complaint was different and did state specifically and clearly that Mr Jafar had been shown various documents by Mr Naqvi, including the audited accounts and the JP Morgan valuation. At [4] (using the English translation provided by GP8, reliance on which was not opposed) it is said that Mr Naqvi “*presented to [Mr Jafar] a set of documents regarding the financial situation of the Group ...*” and then at [12] (my underlining):

"The Respondent deluded the Complainant [Mr Jafar] that he was in the process of negotiating with [ENBD] for the purpose of obtaining a loan with a value exceeding two hundred million US Dollars, and that they were in the final stage of concluding the loan contract with [ENBD], for the sake of deluding that the Company has a stable financial solvency and that the banks are ready to lend it big amounts of money. To administer his criminal plan further, the Respondent [Mr Naqvi] submitted to the Complainant a draft of the terms intended to be applied to the loan with [ENBD] to make the Complainant reassured and to show the seriousness of the negotiation with [ENBD] the Bank. Thus, the Respondent used all those documents including the audited balance sheets of [AH] (Attachment No 1) to delude the Complainant that Abraaj Group has the financial solvency to repay that amount; whereas he pointed out that the Group has assets whose value exceeds [\$2.3 billion] while the Group's liabilities do not exceed 30% of its assets and that they amounted [to] only [\$735 million]. The thing that made the Complainant believe this story and the false disguised sayings made by the Respondent relying in that on the external fraudulent manifestations with which he deceived the Complainant using the Company's balance sheets and its financial statements and the report issued by JP Morgan, as well as the negotiations take place with [ENBD], in addition to his renowned reputation and name in the UAE and at the international level. That is what incited the Complainant to agree to the Respondent's request to pay the mentioned amount of money."

594. I do not consider that these statements in the Sharjah Criminal Complaint require or justify a different conclusion from the view I have formed based on the other evidence I have referred to (and that relied on by the Fund Parties). The Sharjah Criminal Complaint was prepared much later than the other documents. It was filed on 30 November 2022 (and led to Mr Naqvi being convicted of fraud *in absentia* in January 2023). It is clearly not an entirely reliable document. Mr Jafar in his cross-examination said that he had never read the Sharjah Criminal Complaint although he had given instructions to his Sharjah legal adviser, Mr Al Tamimi. During his cross-examination by Mr Ayres (on Day 6) and Mr Atherton (on Day 8) Mr Jafar was forced to admit that the Sharjah Criminal Complaint contained a number of serious errors (he referred to them as inaccuracies). I have summarised the Fund Parties' submissions as to this and the inaccuracies and inconsistencies which they identified. Those inconsistencies do seem to me to be material. I also note that the Sharjah Criminal Complaint, inconsistently with Mr Jafar's evidence in these proceedings, alleges that Mr Naqvi misrepresented the status of the negotiations with ENBD and alleges that these were not real.

595. During his cross-examination by Mr Atherton (Day 8, pages 22-25) Mr Jafar was pressed to explain why some important parts of the account in the Sharjah Criminal Complaint were inconsistent with his account and evidence in these proceedings:

“Q. I think you accept that in fact that's a further version of what occurred at the meeting on the 20th because your evidence makes clear that you did not receive or see the term sheet from Emirates NBD at the meeting in Sharjah on the 20th; correct?”

A. That's correct.

Q. So what we do have is a further different account of that meeting; correct?”

A. It is substantially conveying the same thing, without explaining that there were three or four meetings. The expert, presumably - I didn't write this report - didn't feel it necessary to go into a lot of detail as to when and where, et cetera. The fact that the – the ENBD term sheet was presented, when exactly he didn't feel it was up to him, that it was relevant to go into so much detail. But, you know... but you are right that technically, yes, he did not present the ENBD term sheet at the meeting, at the first meeting in my office, although he said he had arranged a loan from ENBD.

....

Q. I entirely understand why you want to pursue Mr Naqvi. But isn't it important in the context of a criminal complaint which may result in a conviction of Mr Naqvi - I don't know what the penalty might be - that the full facts, the full truth, is presented to the authorities for investigation and to form the proper basis of the prosecution? You would agree; yes?”

A. Yes, I would agree. But this is what the advice of my lawyers were, and they were submitting the complaint. So I take it that they did the right thing. They know the full story because I related to them the full story. They have been familiar with this story virtually from the beginning. So it was their decision what and how to field the relevant facts to the criminal complaint. I'm not here to criticise them or otherwise. But I just - I don't agree with your statement.”

596. It seems to me that Mr Jafar's UAE legal team were given considerable licence to present the case in whatever manner they thought was needed and they elaborated the facts to put forward the strongest possible case, without the detailed assertions contained in the document being properly checked and verified. That does not mean that the allegations were all or substantially wrong, just that there was some significant enhancement and embellishment of Mr Jafar's account and the document cannot be treated as reliable where other evidence in these proceedings or the context and inherent probabilities contradict what is said in the Sharjah Criminal Complaint. As Mr Jafar said to Mr Atherton (Day 8, 29-30): *"So it is what is fit for purpose. But nothing in what has been said, and I have repeated that umpteen times, is wrong in the criminal proceedings, it's just simply what the lawyers felt was enough."*
597. The context also indicates that it is probable that Mr Naqvi did not come to the First 20 December 2017 Meeting with multiple documents and conduct the discussion with Mr Jafar by handing him copies of documents and referring him to particular passages or by asking him to read these documents. The First 20 December 2017 Meeting was short and conducted in generalities. It is unlikely that Mr Naqvi had time to hand over and review multiple documents (according to Mr Jafar's latest account including what is said in the Sharjah Criminal Complaint the documents would have included a Freshfields Opinion, the audited accounts and the JP Morgan valuation – on the basis that Mr Jafar accepts that the Sharjah Criminal Complaint was wrong to add the ENBD offer document). In addition, as I have already said, it seems to me that the evidence demonstrates that Mr Jafar had no interest in or paid attention to any of the detail and is unlikely to have wanted to read any documents to which Mr Naqvi had referred or had with him.
598. I have noted and taken into account the submissions made in Mr Jafar's Written Closing Submissions (at [507-511]). I also note the evidence to the effect that Mr Naqvi was using the audited accounts and the JP Morgan valuation in his negotiations with other potential lenders. In Conway 1, Mr Conway referred to Mr Naqvi's communications with Mr Schmidheiny and his company Spectrum Value Management Limited:

"261. Mr Naqvi appears to have met with Mr Schmidheiny on 12 December 2017. I have not found a record of the meeting between [Mr Naqvi] and Mr Schmidheiny, but it appears from the contemporaneous documents that they discussed a potential sale of AH shares to Mr Schmidheiny. Mr Schmidheiny appears to have carried out the purchase through a company called Spectrum Value Management Limited ("SVML") which, according to its website, is the "family office of the Thomas Schmidheiny Family."

262. On 16 December 2017, Mr Naqvi sent Mr Schmidheiny an overview presentation on Abraaj, and a confidential JP Morgan ("JPM") valuation summary dated July 2017, showing a valuation of Abraaj at US\$3.19 billion.

...

264. On 19 December 2017, one of the team members at SVML, Jean-Claude Garo, emailed Mr Naqvi asking certain questions about the proposed share sale, including the amount of the shares to be sold and the price thereof. Mr Garo also asked for a copy of the full JPM valuation report, as well as the profit and loss and balance sheet of the Abraaj Group for the three years prior. In response, Mr Naqvi confirmed that there were 50 million shares in AH available for purchase, representing 3.3% of the shareholding, at a price of US\$1.20 per share.

265. In a further email attaching the Abraaj Group's financial statements, Mr Naqvi explained that the losses which had been incurred in 2015 and 2016 as being the result of significant expenses incurred in "removing legacy and senior ex-Aureos employees", and that the Group's financial performance in 2017 was a result of selling off all of the "legacy Aureos investments that resulted in a steep drop in fee income"

599. But these discussions involved Mr Naqvi sending documents by email and a due diligence process involving individuals working for Mr Schmidheiny who was asking for documents and raising detailed questions, rather than a brief initial meeting at which a request for emergency funding was made. I also note that this email indicates that the accounts (at least for 2016) revealed some issues that would require an explanation and this might suggest that Mr Naqvi would not have wanted to rely on these at an initial, key, meeting and set some hares running.

Did Mr Naqvi rehearse for Mr Nerguizian's benefit on the 20 December Call the problems being faced by the Abraaj entities and the assurances that Mr Jafar says that he was given at the First 20 December 2017 Meeting?

600. It seems to me likely that during the brief 20 December Call the focus of the discussion was the terms and likely structure of the proposed loans and that it is unlikely that Mr Naqvi set out and provided to Mr Nerguizian a series of precise and detailed assurances of the kind that Mr Jafar says he was given at the First 20 December Meeting.

601. Mr Nerguizian discussed what was said during the 20 December Call at [19] and [20] of Nerguizian 1. [19] stated that Mr Naqvi had asked for a short term loan of US\$ 290 million to cover the requests for the return of the Uninvested Capital and US\$40 million for “*short term liquidity needs*” and mentioned Mr Naqvi’s frustration with the Healthcare Investors. [20] stated that Mr Naqvi had “*emphasised that the loans were only needed to cover a short term funding gap. He assured [Mr Nerguizian and Mr Jafar] that while the money had to be repaid to investors before the end of December 2017 Abraaj was financially healthy and easily capable of generating the necessary funds to repay the loans by the end of January 2018. Mr Naqvi cited examples of potential sources of funds including the sale of Abraaj’s stake in Karachi Electric and the sale of shares.*”

602. Mr Nerguizian was asked about this by Mr Atherton (Day 13, page 64-65) (my underlining):

“Q. What I'm suggesting to you, in Mr Jafar's witness statement, when he is describing the conversation that you and he had with Mr Naqvi, he doesn't refer to the fact that Mr Naqvi spent any time telling you what Mr Naqvi had already told Mr Jafar.

A. And my question, your Lordship, is the following: why would we call Mr Naqvi then?

Q. Because you are calling Mr Naqvi because you are going to tell him that you and Mr Jafar are going to lend him US\$90 million.

A. Yes, maybe. But first we needed to listen from Mr Naqvi, reexplaining to me for my benefit what was going on. Now –

Q. That's not necessary because Mr Jafar has already told you what happened.”

603. When pressed further by Mr Atherton, Mr Nerguizian said this (Day 13, page 69) (my underlining):

“Mr Jafar did not repeat, not me. Basically, your Lordship, can I repeat for one more time the sequence of the events? I am called at Mr Jafar's office, Mr Jafar explains to me the transaction. Sorry to say but at this stage it's an amount and terms we are discussing. When we called Badr, we wanted - I wanted to make sure that Badr as a board member of the private equity fund, he would know or not if there was a problem. Badr confirmed that Arif Naqvi had just called him and that in his opinion there was nothing wrong. Now, thereafter we called Arif Naqvi, Arif Naqvi reexplained the transaction, the same way Mr Jafar had explained to me, and then that was the comfort, that was the object of the call, thereafter we said we would be looking at it, I needed an approval from my chairman....”

604. It seems to me that it was probable, and that Mr Nerguizian's latter answers support the view, that the main part of the discussion related to the amount Mr Naqvi urgently needed and for what purpose the funding was required, which was not just to repay Uninvested Capital. Mr Naqvi on Mr Nerguizian's account made it clear that there was a substantial need for extra funding to pay other liabilities and for other needs. I can accept that Mr Naqvi would also have added and made the other comments that Mr Nerguizian mentioned in [20] of Nerguizian 1 but only in the form of high-level generalities which he did not seek to particularise or support by reference to legal advice or documents.

Mr Naqvi's repeated requests that remittance documents refer to the purpose of the Loans as investment

605. I am satisfied that it is likely that Mr Jafar was aware that Mr Naqvi had requested, and said that it was important, that the purpose of the payments to be made by Mr Jafar must be stated in remittance and payment documents to be for “*investment*,” that he appreciated that this was a misdescription that would allow Mr Naqvi to present and record the funding in a manner that suited him but that he did not consider it necessary to challenge Mr Naqvi on this or investigate the matter further because he did not consider that it affected his position and was content to fit in with whatever Mr Naqvi wanted.

606. Mr Jafar received the Naqvi First Loan Investment Email from Mr Naqvi (on 21 December 2017) in which the request was made and its importance emphasised (it was an email addressed to Badr on which Mr Jafar was cc'd but in my view Mr Jafar was reading all the emails sent at this stage from Mr Naqvi). Mr Jafar was not copied on the 26 December Naqvi

Investment Email in relation to the Second Loan. But, importantly as regards showing that the issue was flagged, Mr Nerguizian's evidence at Nerguizian 1 [67] was that he recalled Mr Naqvi's request in relation to the remittance information and believed that he had mentioned it to Mr Jafar. It seems to me that he is likely to have done so in view of the repeated requests that were made, Mr Naqvi's emphasis on the importance of this designation and the obvious point that must have occurred to Mr Nerguizian as an experienced banker that the designation was (at least without further explanation) inconsistent with the known and actual purpose and nature of the advances.

607. Mr Jafar said that he could not recall paying attention to the issue or Mr Nerguizian having raised it with him. At Jafar 1 at [127] Mr Jafar said that that as far as he was concerned a reason/description had to be provided on all transfers in the UAE and this was simply a mechanical issue and that he did not *"at any time have in [his] mind Mr Naqvi's request to designate the Loan advances as 'investments'"* and that, even if he had, *"[he did] not believe it would have caused [him] to believe or suspect that there was anything untoward about the Loans"* (Mr Nerguizian used precisely the same words to explain his state of mind in Nerguizian 1 at [67]). During his cross-examination by Mr Ayres, Mr Jafar reiterated that he had no recollection of seeing the Naqvi First Loan Investment Email and sought to suggest that because it was only copied to him he would not have read it (*"... it was copied to me. I have something like 70,000 emails in my inbox that I haven't opened, especially ones that are copied to me..."*, Day 6, page 136) although he went on to say that even if he had seen it, it was not something which he would have regarded as significant.

608. I do not accept Mr Jafar's attempt to marginalise the requests made by Mr Naqvi (and Mr Lakhani) as to suggest that they did not appear on his radar screen. As I have said, it seems to me to be likely that Mr Nerguizian raised (I would say, as I have done already, flagged) the issue with him for obvious and self-evident reasons. Once raised, he must have turned his mind to the point. It is consistent with the other evidence and my findings as to his attitude and state of mind during his discussions and negotiations with Mr Naqvi that while appreciating that Mr Naqvi's request suggested that Mr Naqvi intended to avoid making full and proper disclosure of the Loans and was inclined to play fast and loose with and ignore

when convenient the rules of good practice, this did not affect his decision to lend and proceed because this is what he expected of Mr Naqvi and he was content to let Mr Naqvi act in whatever way he wanted to (and no doubt always did). Mr Jafar assumed that Mr Naqvi's conduct would not prejudice or affect Mr Naqvi's ability to procure the repayment of the Loans. When the point was flagged by Mr Nerguizian, Mr Jafar, for this reason, saw no need to take the matter further.

609. I also do not accept Mr Nerguizian's new explanation, offered only belatedly during his cross-examination by Mr Atherton (Day 12, pages 128-137), as to why he considered that Mr Naqvi's request to refer to "*investment*" was innocuous. This was because he took Mr Naqvi to be responding to his (Mr Nerguizian's) own request to specify the "*rationale for the transaction.*" He noted that in the Loan Terms Email he had said, in the context of a direct loan being made by BOS, that BOS would need a letter application for the facility stating the rationale of the transaction and the source of the repayment confirming that this is a pure commercial or investment transaction and said that, "*I guess because I had mentioned that he had two options to mention in the transfer form, for a commercial transaction or an investment. Since for sure it was not a commercial transaction in the sense that there was an exchange of goods, it automatically, I assume, [Mr Naqvi] considered that it has to be mentioned investment in order to be able to transfer from [BOS].*"

610. I found this new explanation to be based on a self-serving mischaracterisation of what was said in the Loan Terms Email and to damage Mr Nerguizian's credibility. Mr Nerguizian's explanation assumed that Mr Naqvi thought he was responding to BOS's request (made in relation to the Initial Structure) to tell it (BOS) why AIML (AH) needed the funds to be advanced. But Mr Naqvi's insistent requests related not to statements addressed to and for BOS as to the purpose of the Loans but to statements in documents sent by BOS to AIML (AH) which were for AIML (AH's) records (and not for BOS's records). Mr Nerguizian's explanation wholly failed to provide a reason as to why Mr Naqvi repeatedly emphasised the importance to *him* of the reference to the purpose of the payments being for investment in the remittance (documents that would be seen at the Abraaj end of the transaction and by its auditors).

611. As I have said, my conclusions and findings of Mr Jafar's knowledge of and state of mind in relation to these matters fits with and is supported by my view that Mr Jafar was aware that Mr Naqvi was intending to cut corners and was prepared to ignore the regulatory requirements or the requirements of good governance because he wanted to avoid the emergency loans having to be disclosed to the AH non-executive directors or to AH's or AIML's auditors, at least until the crisis had been stabilised. Mr Jafar understood that Mr Naqvi needed to manage and manipulate the messaging at least for a period.

Mr Nerguizian's assessment of the ENBD term sheet

612. Mr Nerguizian said (at [41] of Nerguizian 1) that (my underlining) "the fact that a respectable institution like ENBD was willing to loan that amount of money to Abraaj reassured me that there was no unacceptable risk."

613. During his cross-examination by Mr Ayres the following exchange took place (Day 12, page 153):

"Q. I'm still talking about the meeting [about the ENBD term sheet]. You told his Lordship you didn't take a copy. Did you make any notes during the meeting?"

A. No, I just read it [the ENBD term sheet]. As far as I was concerned, Mr Jafar wanted to make sure it was something serious, properly documented, properly structured, so I read it and I read it and I realised that it was a proper term sheet with all the necessary conditions and then I said, fine, I informed Mr Jafar that it is genuine and that's it."

614. I note that Mr Nerguizian said (Day 12, page 155) during his cross-examination (for the first time) that Mr Naqvi had also shown him a JPM valuation document (with a valuation of "3 billion something") and that he was unable to recall whether Mr Jafar had mentioned the JP Morgan valuation before or whether he was told that Mr Naqvi had previously given Mr Jafar a copy. But it was obviously of such little significance that Mr Nerguizian did not think to ask for and take a photocopy of the valuation or to discuss it with Mr Jafar after the meeting.

615. Mr Nerguizian's email to Mr Jafar and Badr on 26 December 2017 after his meeting with Mr Naqvi is an odd document. He said as follows (my underlining):

"Met today with Arif and I fully understand his reaction to ENBD offer

There is I understand some old blood and I fully agree that he should not accept their conditions.

This said I also do not recommend individuals to become lenders (they would put us out of business)

The request is for 200 USD value tomorrow or latest value 28 Dec 2017

You need to secure yourself and I would recommend the check mechanism again..."

616. I say that this is odd because first Mr Nerguizian failed to explain, even in outline, *why* he "fully" agreed that Mr Naqvi should not accept ENBD's conditions and secondly because of the cryptic statement, apparently not needed and not connected to his comments relating to the ENBD term sheet, that he did not recommend that individuals act as lenders.
617. The comment that Mr Naqvi was right to refuse to accept ENBD's terms (in particular their requirement to have a full asset security package) involves implicitly the view that ENBD was being unreasonable in imposing these conditions, and that involves the view that the credit risk assessment underlying ENBD's requirements for such conditions was also unreasonable. But Mr Nerguizian made no reference to, nor did he seek, to address this. The only conclusion that he appears to have come to was that there was insufficient time to satisfy ENBD's conditions and that there were historic difficulties in the ENBD-Naqvi relationship. It is wholly unclear to me why Mr Nerguizian needed a meeting with Mr Naqvi to reach these conclusions and how he could form a view as to whether Mr Naqvi was behaving reasonably without speaking (if only briefly) to ENBD.
618. The comment that individuals should not become lenders appears to be a coded message to Mr Jafar not to lend the funds as requested by Mr Naqvi. But leaving that possibility to one side, the part of Mr Nerguizian's position that appears hard to justify and was never justified or properly explained is his statement quoted already that he had concluded that he had been reassured that lending to AIML/AH at that time involved "*no unacceptable risk*" because an

“institution like ENBD was willing to loan that amount of money to Abraaj.” ENBD had made it clear that they would only lend if they were given a variety of protections including full asset security. That indicated that ENBD certainly did not consider that lending to AIML/AH was low risk and must have regarded making loans at that time high risk. I can see that it might be reasonable to say that had lending to AIML/AH been considered by ENBD to be out of the question they would not have even put forward an offer with onerous conditions and that is perhaps all that Mr Nerguizian was saying when he said that he took that the ENBD term sheet evidenced that there was *“no unacceptable risk”* that made lending wholly out of the question. But that is only a very limited form of comfort (particularly when not based on any discussions with ENBD) and ultimately in my view the onerous conditions imposed by ENBD made it impossible to justify Mr Jafar’s view that the Second Loan was only a low-risk proposition.

What did Mr Naqvi say about the sources of repayment of the Loans?

619. In my view the evidence shows that it is likely that Mr Naqvi mentioned various different possible sources of repayment, including the funds to be reinvested by the Healthcare Investors, without getting into detail and without identifying those funds or any other methods of cash generation as being *the* means by which he would make repayments. What funds would be available and would be used to facilitate repayments was left open. Mr Jafar was content to leave it to Mr Naqvi to decide.
620. Mr Jafar dealt with this issue at [35] and [36] of Jafar 1. He said that Mr Naqvi had stated that there were many sources of other cash revenues that *“Abraaj”* expected to realise over the following month and which could be used to repay the Loans, including proceeds from the sale of the shares in Karachi Electric Company and the imminent sale of AH treasury shares (and Mr Naqvi had mentioned that he had recently agreed sales of blocks of shares in AH at a price pursuant to the JP Morgan valuation to Mr Schmidheiny and an existing shareholder in AH). In his Written Closing Submissions Mr Jafar argued that his evidence was corroborated by Mr Naqvi’s email to Mr Jafar dated 1 April 2018 (in which he said that he wanted to give Mr Jafar *“a summary of the exact position re KE, since the primary source*

of repayment of the [Second Loan] is from there”). Mr Jafar argued that it was inherently likely that Mr Naqvi would have wished to reassure a potential lender that his money would be repaid, with multiple potential sources of income already having been arranged.

621. GP8 argued, as I have noted, that the evidence showed that Mr Jafar and Mr Nerguizian understood that reinvested Healthcare Investor monies would be a source of repayment for the First Loan and the Second Loan. They submitted that while Mr Jafar had been cautious, claiming during his cross-examination that he believed that reinvested Healthcare Investor funds would only be used to repay the Loans “*in certain circumstances*” (Day 6, page 36) Mr Nerguizian had been clear that his understanding was that these funds would be the principal source of repayment and that Mr Naqvi had told him that “*repeatedly*.” GP8 submitted that Mr Jafar knew that repayment of the Loans using and out of further cash calls and reinvested funds would have constituted a misappropriation of Healthcare Investor monies and been improper. They argued that this conclusion was consistent with Mr Jafar’s attitude to the treatment of the Uninvested Capital. Mr Jafar knew and understood that spending the Uninvested Capital had been improper and been prepared to accept and turn a blind eye to that impropriety – he was equally prepared to accept and turn a blind eye to being repaid out of Healthcare Investors’ funds. GP8 also argued that Mr Jafar’s explanation in the witness box as to why he could have been repaid out of fresh investments was a new story which he could not and did not have in his mind at the time and which was in any event flawed.

622. When cross-examined by Mr Ayres, Mr Jafar had (a) reiterated that he understood that there were multiple potential sources of repayment and that he did not regard or wish repayment of the First Loan and Second Loan to be limited to funds generated from fresh investments and (b) vigorously denied that he knew or indeed should have concluded that repayments of the First Loan and the Second Loan out of further investments made the Healthcare Investors would involve the improper and unlawful use of investor funds (Day 5, pages 141-148). He said as follows (my underlining):

“A ... [Mr Naqvi] was telling me that he was being assured - he said, look, the peculiar thing is that they are asking for these funds to be returned and I was being - this is [Mr Naqvi] saying - "I am being assured by the bosses that the funds will be returned when the - these particular funds will be returned when the relevant project, whatever they were, were matured." In addition, he said, "They are going to be paying cash calls for other projects or other ongoing projects." I didn't go into detail, it wasn't my business to go into detail. And that had nothing to do with repayment of my loans. In fact, if you think about it, the repayment of my loans could well have been from the uninvested capital being in the treasury, as soon as - whenever that could be turned into cash. And I didn't ask for the timing of that. It was an ongoing business so I assumed - I didn't want to tie my loans to that specifically. But if it were going to be from that, which it could have been, it was up to Abraaj to do it. It had nothing to do with the return of the funds... My loans were going to repay the investors for the uninvested cash, so they are satisfied. Right? ... that - was the only problem as between Abraaj and the investors in those funds. That gets squared away. And returning those funds means everything was fine and dandy after that. That left the uninvested - the portion that was already invested in the treasury, placed in the treasury, to be free to, for example, to repay my loans...

Q. ...But the reality of your position at the time was that you thought you were going to get repaid from the return of the capital by the healthcare investors, directly from those monies.

A. ...that's not what I said. But it could - it's exactly the same. You have now got two lots of funds' money, either cashing the uninvested cash that was placed in the treasury, could repay me or the funds being returned that could also repay me and the uninvested and the cash in the treasury or the funds in the treasury would then go to investing in the projects. It's a timing issue, that's all."

623. Mr Jafar said that he did not regard it as inevitable that the First Loan and the Second Loan would be repaid out of further funds invested by the Healthcare Investors. That might be the source of the funds used to repay these loans but Mr Naqvi might well use other cash resources. That was a matter for Mr Naqvi and Mr Jafar did not press for further details. Nor did he want to limit the sources and cash resources that could be used to repay these loans (and not, to use his words, tie repayment of the First Loan and the Second Loan to receipt by AGHF or other funds of further cash calls and investments from investors). I find this evidence credible. It supports and is entirely consistent with my view and finding that Mr Naqvi had spoken in generalities about multiple sources and methods of cash generation that would allow him to arrange for repayment of the First Loan and the Second Loan when the time came. This was all part of Mr Naqvi's high-level patter and salesman's generalities

which Mr Jafar was content to accept and not question. So, I reject GP8's challenge to this part of Mr Jafar's evidence.

624. It seems to me that Mr Nerguizian's evidence was consistent with this view, namely that Mr Naqvi mentioned various different possible sources of repayment including the funds to be reinvested by the Healthcare Investors without getting into detail. The exchange with Mr Ayres went as follows (Day 12, page 99) (my underlining):

“Q. At the time on 20 December, you and Mr Jafar understood and believed that the money that would be used to repay you would be the same money that would be repaid by the Healthcare Investors' cash calls?”

A. Yes, that was what we are - that was what [Mr Naqvi] was saying repeatedly. And if it did not happen, there were other sources.”

625. It also seems to me that GP8's criticism of Mr Jafar's “two lots” account is unjustified. Mr Jafar had sought to explain why even if he had been repaid out of further investments it would not have been improper. He was saying, as I understood his evidence, that at the time he *assumed* that there would be no problem with this because it was down to Mr Naqvi to sort out how the repayment could properly be made and it did not occur to him that the use of investors' money to repay his loans would be bound to be wrong. He could rationalise that view, looking at the matter now and taking a big picture view, since he did not see that the investors could be prejudiced, because his loans would have been used to repay them their Uninvested Capital so that they no longer had a claim on that, so that if the Uninvested Capital was used to repay his loans, they could not object. Alternatively, if new investments from new cash calls were used to repay his loans, then the Uninvested Capital (which the investors no longer had a claim to because Mr Jafar had in substance repaid it) could be used to fund the projects that the new investments were intended for.

626. This view has a clear businessman's logic and at that level makes sense. It is also, importantly, consistent with Mr Jafar's laissez-faire approach to Mr Naqvi's business practices. Mr Jafar, as he made clear during his cross-examination, was content to leave it to Mr Naqvi to sort out how he would be repaid and believed in Mr Naqvi's ability to make the

repayment happen. It would be for Mr Naqvi to find a way of repaying the First Loan and the Second Loan that worked but Mr Jafar was not troubled by precisely how he (Mr Naqvi) would do so. He accepted that there were legal arguments available to justify Mr Naqvi's position in his dispute with the Healthcare Investors and that these might justify the spending of the Uninvested Capital. He did not concern himself with the details of how new investments could be used to repay his loans but assumed that it could be done if necessary and that it would be for Mr Naqvi to take responsibility for this. The legalities were not his (Mr Jafar's) concern.

Did Mr Naqvi mention the names of the Healthcare Investors?

627. Another inconsistency between Mr Jafar's pleaded case and his evidence arises in relation to whether Mr Naqvi named the specific investors who were demanding the return of their Uninvested Capital. Mr Jafar's pleaded case as contained in Response 310(b) of his Further and Better Particulars was that the investors were identified "*simply as investors in the Healthcare Fund.*" This was also reflected in the RRASOC at [20(1)] which referred only to "*certain investors in the Healthcare Fund*" (although at [20(4)] of the RRASOC it was averred that Mr Naqvi had mentioned in the context of the risk of adverse publicity "*high profile investors such as the Gates Foundation and the International Finance Corporation ("IFC")*"). However, in Jafar 1 at [29] Mr Jafar said that Mr Naqvi had specifically named the investors in the Healthcare Fund as "*the Bill and Melinda Gates Foundation, the IFC, CDC Group, and the Proparco Group.*" In his cross-examination, Mr Jafar once again disclaimed responsibility for what was said in his pleadings and said they were wrong. He blamed his legal advisers for failing to prepare the documents properly. He said that (Day 7, page 94) "[w]hoever drafted it was obviously not thorough." I find this to be an unsatisfactory response and agree with the Fund Parties' challenge to this evidence. It seems to me that while the odd oversight in checking the pleaded case can be understood and overlooked, Mr Jafar's repeated disowning of his own pleaded case and his failure to read and check important statements of his position (he said that he had not read Response 310(b): Day 7, at page 77) strongly suggests a lack of care in the giving of his evidence and undermines his credibility. As the GHF Parties pointed out, it is likely that Mr Jafar was

asked for and gave instructions as to how the relevant Request should be answered. While it is possible that his legal team made a mistake and misunderstood his instructions that seems to me to be unlikely (particularly in light of Mr Jafar's multiple allegations of such errors and his admitted failure to check the documents).

628. That the relevant Healthcare Investors were not specifically identified by Mr Naqvi in the course of the First 20 December 2017 Meeting was also borne out by the evidence of Mr Nerguizian. In his cross-examination (Day 13 at pages 51 and 52) he said as follows:

“Q. In the course of your evidence yesterday you referred to on two occasions the Gates Foundation, you referred to the Melinda Gates Foundation and the Gates Foundation but Mr Jafar did not refer you specifically to the names of any of the investors, did he?”

A. I can't recall it during that meeting he mentioned the Gates but Arif Naqvi subsequently mentioned.

Q. Mr Jafar didn't mention it to you when he described the course of his conversation with Mr Naqvi, did he?”

A. I don't think so.

Q. And you don't refer anywhere else in your witness statement to Mr Naqvi specifically referring to the names of the investors, do you?”

A. No, I don't.”

629. The inconsistency in Mr Jafar's evidence and his evident careless approach to checking it are significant as providing further grounds for doubting the reliability of Mr Jafar's account of events. But the issue of whether or not the relevant Healthcare Investors were specifically identified by Mr Naqvi does not seem to me to be of material significance in determining Mr Jafar's deceit claim. It is consistent with my finding that the discussion at the First 20 December 2017 Meeting was conducted in generalities without Mr Naqvi or Mr Jafar going into detail that Mr Naqvi would have mentioned only the names of the main Healthcare Investors concerned. By doing so and identifying the big names involved he would have demonstrated the seriousness of the problems he faced by showing that the investors concerned could not be ignored. But he ran the risk of giving Mr Jafar the names of people

to contact to verify Mr Naqvi's account. On balance it seems to me likely that Mr Naqvi would have said that the Healthcare Investors pressing for repayment of the Uninvested Capital included major investors such as Mr and Mrs Gates and possibly one or two other names but have gone no further.

Making findings and drawing adverse inferences from Badr's failure to give evidence

630. In my view, the Fund Parties were broadly right to assert that the conditions for drawing the specific adverse inferences which they set out were satisfied in this case albeit that I consider that some of the findings and adverse inferences which they invite the Court to draw cannot be made or need to be reformulated. While bearing in mind the *dicta* in the cases reminding judges of the need for caution (including the judgment of Mrs Justice Cockerill in *Magdeev*) and that it is only in a comparatively small number of cases that it would be appropriate to draw an adverse inference, I am satisfied that this is a proper case for doing, and one of those rare cases where it is appropriate to do, so. I have concluded that the Court should make certain findings of fact adverse to Mr Jafar's case based on and by drawing inferences from the evidence adduced on the basis that the Court can properly infer that had Badr been called to give evidence these findings of fact would have been made.

631. It seems to me that the Fund Parties have established that Mr Jafar could have called Badr as a witness; that Badr had material evidence to give to this Court; that the Fund Parties have identified with sufficient particularity the inferences to be drawn and also explained why such inferences are justified having regard to and based on the evidence that is properly before the Court. It also seems to me that the Fund Parties had a reasonable excuse for not themselves seeking to call Badr (since he was out of the jurisdiction). It seems to me that the evidence indicates that Mr Jafar, despite his protestations to contrary, took the decision to keep Badr from giving evidence because it was in his interest and Badr's interest to do so. The Court can and should infer that had Badr been called and given truthful evidence it would have been very damaging to Mr Jafar's case and that Mr Jafar did not want to put Badr in the position where he would be forced to lie to avoid undermining his father's case.

632. I have already discussed at length the applicable law. I note and have regard to the guidance given by Lord Leggatt in *Efobi* that the determination of whether any positive significance should be attached to the fact that a person has not given evidence is dependent on the context and particular circumstances. That determination is to be informed by various considerations including whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the points on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. The determination as to whether to draw an adverse inference is ultimately, having regard to the relevant considerations, a matter of ordinary rationality.
633. It seems to me that the Court should be particularly cautious before drawing inferences of dishonesty and making findings of dishonest or improper conduct.
634. The first issue and consideration to be taken into account is whether Badr was available and might have been called by Mr Jafar and whether Mr Jafar gave good and sufficient reasons as to why Badr did not give evidence. If the reason for a witness's absence shows that in all the circumstances it was justifiable that the witness was not called, then no adverse inference may be drawn.
635. Mr Jafar's evidence as to the reasons why Badr had not given evidence and the steps he had taken to seek to have him do so were dealt with most clearly in his cross examination by Mr Ayres. Mr Jafar said this (Day 6, page 110) (my underlining):

"MR AYRES

Do you know why Badr is not giving evidence to this court in this trial?

A.

Well, Badr has, your Lordship, given me reasons why he doesn't want to be involved, and I asked - I didn't want to pressure him as such - I asked the head of our legal department, Mr Drazen Petkovich, to also ask, so he doesn't feel pressure from me to do anything and he pretty much gave him the same answer, which is basically that this is not his case, he doesn't want to get involved, any documents that he

may have - this was in connection with discovery - any documents that he has would have - any documents of relevance that he has would have been disclosed by either myself or the liquidators or Mr Naqvi himself or Tushar. And there were no other documents that are - that would be relevant, in his view, that could be disclosed. So he felt it was the second reason. And the third reason is that - he gave three reasons. The third reason was he didn't want to get involved in obfuscation and proving a negative, as he saw it. Those are - and the reasons already disclosed to the court. He actually also gave me another reason which I didn't feel appropriate myself to put down, which I can say now, which is that he felt that TPG - and I think that is a company that eventually owns the Healthcare Fund, as he put it, play dirty. So this is what were his reasons...

Q. Can you describe the efforts that you made to persuade Badr, despite those reasons that you have given, to participate in the trial of this claim?

A. Yes. As I said, your Lordship, I asked him myself, I asked Drazen to ask him, I even said at one point, "Some of the lawyers believe that you could be helpful." And his response to that was, "I don't really think so. It would just be an excuse for the other side just to prolong and have a sideshow." That is what he said, "and in any case, whatever I say that would be positive, they would say, 'Well, he would say that, he's your son'." So that was his logic.

Q. It's true, isn't it, if you really insisted and looked Badr in the eye and said, "You must participate", because he's your son he would do it?

A. Yes. Actually, at one point he said to me, "Whatever you ask me, if you ask me to jump off a cliff, I would do that." And then he jokingly said, "Well, now I've got a family, I probably wouldn't do that." But I did not feel I should pressure him.

Q. So is it unfair to say that the reason Badr is actually not participating in this trial is your choice?

A. Well, I have already explained, your Lordship, the circumstances. Choice has nothing to do with it.

Q. When I say "choice" I mean that you could, as his father and he as a respectful son, but you as a respectful father, could insist that he come here, and you have chosen not to insist.

A. Yes. I certainly did not want to press him. It was - he has a free choice to make.

636. Lord Falconer submitted that Mr Jafar was being candid in providing this explanation and should be given credit for doing so (and in Mr Jafar's Written Closing Submissions at [588] it was said that Mr Jafar had given "*sympathetic evidence*" on this point which I take to mean that Mr Jafar's predicament in dealing with his son was entitled to the sympathy of the Court). Unfortunately, I am unable to accept that Mr Jafar's account was complete or truly candid. Furthermore, in my view, even on Mr Jafar's own account, his failure to insist that Badr gave evidence was not acceptable or excusable.

637. It is crystal clear from the documentary evidence and the witness testimony that Badr played a central and critical role in the events on which Mr Jafar's case is based. This is a case in which, as I have explained, the absence of Mr Naqvi at trial and the failure of Mr Jafar and Mr Nerguizian to keep contemporary records of their conversations with Mr Naqvi, makes fact finding as to what was said by Mr Naqvi very challenging. In such circumstances the evidence of Badr becomes of particular importance. Having the detailed written evidence and the ability to cross-examine one of the four parties to the critical discussions would have been of great assistance to the Fund Parties and the Court. Radio silence from Badr is of great significance. There is no doubt that he would have been able to give evidence on all the factual issues arising in Mr Jafar's deceit claim.

638. Mr Jafar accepted that he could have insisted on Badr giving evidence. He chose not to do so.

639. Badr's reasons, as relayed by Mr Jafar, as to why he did not want to give evidence are wholly unconvincing and do him no credit. He said (as I understand what Mr Jafar said) that since this was not his case, he did not want to get involved; that in his view he had done enough by providing copies of documents; that his involvement would give the Fund Parties an

additional target to attack; that he would be put on the spot because he would be asked to prove a negative and that he was concerned that TPG might “*play dirty*.” But he must have appreciated that in order for there to be a just outcome all those involved in the critical oral discussions had to play their part and give their account of what had been said, and his involvement and relationship with Mr Naqvi made his evidence of particular importance. It is beside the point that this is not his case. It was also not for Badr to decide whether the provision by him of documents was sufficient. In any event it is clear that not all phone messages and other documents had been provided. It was also clearly wrong to characterise his evidence and cross-examination as of marginal significance and likely to produce a side-show that would distract from and adversely affect the Court’s task of fact finding.

640. Badr’s reasons in my view were excuses for avoiding giving evidence. They were camouflage. It seems to me likely that he and Mr Jafar appreciated that if Badr was required to set out on oath what he had discussed with Mr Naqvi and what he knew, and when, his evidence would have contradicted or undermined Mr Jafar’s (neat and tidy) account. They also appreciated that it would be more difficult for the Fund Parties to challenge Mr Jafar’s account of what he was told by Mr Naqvi if there was a major gap in the evidence caused by Badr’s absence. If this was not the case, Badr would have given evidence. I am afraid to say that his absence just looks very bad. To put the point rather crudely and colloquially, his absence failed to pass the smell test. Mr Jafar’s deliberate decision to withhold Badr’s evidence creates the strong impression that he wanted carefully to manage and manipulate the evidence in these proceedings to leave out the evidence that was likely to be damaging. If Badr had genuinely believed his father’s case and wanted to ensure that the Court had before it the full picture and all the relevant evidence, he would have come forward and given evidence. I conclude that he refused to testify and give evidence because he appreciated that it was likely to be damaging and that his knowledge would be exposed in cross examination.

641. As I have already indicated, in my view the documents, WhatsApp messages and emails indicate and strongly suggest (they raise the strong inference) that Badr was aware in December 2017 that Mr Naqvi intended to cover up and keep quiet about the fact that he had

been forced to obtain emergency loans from Mr Jafar and that these entities were on the brink of insolvency, at least for a period until he could stabilise the financial position of the Abraaj entities details. It also appears likely that not only did Badr appreciate that Mr Naqvi did not intend to tell the AH non-executive directors of the Loans and the circumstances that had caused him to plead for funds in the midst of a cash crisis, but Badr himself failed to tell his fellow non-executive directors until the last minute. This conduct makes it likely that Badr was complicit in that cover up. If this assessment based on the documentary evidence is wrong and unjustified, Badr (by giving evidence for his father) could have corrected the record and given his own account. Only by giving honest, comprehensive and candid evidence to the contrary (and by submitting to cross-examination) could these inferences and implications be rebutted. I am driven to conclude that the reason that Badr was not called was because he would have been unable to do so.

642. Of course, ultimately, it was a matter for Mr Jafar to decide who to call as a witness and whether to arrange for (or on his own account press) his son to give evidence. He bears the burden of proof in these proceedings and he no doubt was advised and warned as to the risks in not calling Badr. He chose to take those risks. In my view, the result is that his case has been seriously weakened. I have to say that I regard the absence of evidence from Badr as a black hole in the middle of Mr Jafar's case.
643. Having decided that there was no good or sufficient reason for Mr Jafar's failure to call Badr the next issue is whether the Fund Parties have established that Badr had material evidence to give to this Court and on what issues. For the reasons I have already set out at length, and which I do not need to repeat, I am satisfied that this requirement has been satisfied.
644. The next limb of the test is whether the Fund Parties have identified with sufficient particularity the inferences to be drawn and explained why such inferences are justified in light of the evidence before the Court. It seems to me that the Fund Parties, as the parties inviting the Court to draw adverse inferences, have set out clearly (a) the points on which the inferences are sought and identifying the inferences sought; (b) the reason why it is said

that the missing witness would have material evidence to give on these issues; (c) why it is said that the Fund Parties have themselves adduced relevant evidence on these issues.

645. As regards the last point, the Fund Parties rely primarily on the documentary evidence adduced by Mr Jafar and the JOLs together with the evidence obtained during the cross-examination of Mr Jafar, Mr Nerguizian and Mr Cleary. This seems to me to be sufficient to permit the Fund Parties to request the Court to make findings of fact adverse to Mr Jafar based on inferences derived from that evidence which has been properly admitted for the purpose of these proceedings.

646. As I have noted above, the Fund Parties invited the Court to conclude that had Badr been called to give evidence the following six findings of fact would have been made (it is helpful to set them out again at this point):

- (a). That Badr was aware of financial irregularities and corporate misfeasance on the part of Mr Naqvi and alerted his father prior to the advance of funds. It was exceedingly unlikely that Badr did not tell his father about these issues.
- (b). That Badr also understood that there were significant financial problems within the Abraaj entities and made those known to his father. Nevertheless, he, and his father, were willing to advance funds to AH and AIML.
- (c). That Badr understood that Mr Naqvi's request for funds was for the purpose of window dressing and Badr informed his father of this.
- (d). That Badr knew and understood that Mr Naqvi could not himself contract on behalf of GP8 or Fund IV and knew and understood that in the negotiation of the Loans Mr Naqvi was only acting for himself, AIML and AH (Badr was a director of AH and very likely knew that Mr Naqvi was not a director of GP8 and understood that GP8 and Fund IV were not operational entities in the context of the Loans).

- (e). That Badr was acting as his father's agent in connection with the Loans and kept his father fully apprised of communications with Mr Naqvi and, consistent with his conduct in 2018, also his knowledge of matters concerning Abraaj more generally.
 - (f). That the reason why Badr had not given evidence was because his cross-examination would reveal the true position and thereby undermine Mr Jafar's account of the circumstances in which the Loans were made and the purposes for which they were being requested. Badr's principal loyalty was and is to his father and family, not to AH, and he had no interest in providing a truthful account of events to the Court. Mr Jafar had decided not to put his son in a position where he had to choose between telling the truth or supporting Mr Jafar's claim.
647. As regards the first proposed finding, I am satisfied that the Court should make such a finding, but the reference to "*financial irregularities*" and "*corporate misfeasance*" must be understood in accordance with my assessment of the specific facts and what probably took place. I have already found that it seems to me that the documentary record demonstrates that it was likely that Badr knew that Mr Naqvi did not intend to disclose the Loans to the non-executive directors of AH and did not do so himself until the AH board meeting on 8 February 2018 to assist Mr Naqvi. It also appears likely that when he did eventually make this disclosure he sought to hide from his colleagues on the AH board his earlier involvement in the negotiations of the Loans. To this extent, Badr was aware that Mr Naqvi was acting improperly by hiding critical information from the AH board. He may have convinced himself that this was for the best, because full and immediate disclosure would be disruptive, distracting and dangerous and because it was likely to give rise to extensive inquiries and potential damage to confidence in Mr Naqvi and the Abraaj entities. But I have no doubt that he would have appreciated and did appreciate *at least* that Mr Naqvi was acting in breach of the basic principles of good governance. He may have also understood that Mr Naqvi was acting in breach of duty as an AH director. However, I do not say that Badr was aware of the underlying fraud being conducted by Mr Naqvi. As I explain below, it seems to me inherently improbable that Mr Jafar would have advanced or that Badr would have allowed his father

to advance the Loans knowing that the Abraaj entities were being run as a Ponzi scheme. I accept Mr Jafar's account to that extent.

648. But in my view, it is likely that Badr was motivated by strong loyalty to his friend who was facing (in his mind) a terrible and potentially career and business destroying crisis. He believed in Mr Naqvi as a hugely successful and influential local business leader in control of a vast private equity and business empire that controlled very valuable assets and his ability to navigate somehow through the financial crisis and to find a way of repaying the Loans. He was prepared to help and support Mr Naqvi in whatever way he could and he was prepared to turn a blind eye to Mr Naqvi's questionable business practices if they were needed to save Mr Naqvi and the Abraaj entities businesses. Some cutting of corners and breaking of, or ignoring, the rules were needed in the crisis to avoid a collapse but were justifiable if they did so (as they often are perceived to be in such financial crises).
649. As I have said, I consider that it is probable that Badr told Mr Jafar everything he knew and thought. In fact, I would say that based on the documentary evidence, context and inherent probabilities, it is inconceivable that he would not have done so. Taking into account what Badr had told him and based on his own assessment of Mr Naqvi, Mr Jafar believed, based primarily on Mr Naqvi's stellar reputation and celebrity status, in Mr Naqvi's unassailable ability to manage the cash funds of the Abraaj entities and thereby to arrange for the Loans to be repaid (in the relatively short period that they were to be outstanding).
650. Badr and Mr Jafar knew that Mr Naqvi was prepared to adopt some questionable business practices that were likely to be inconsistent with the rules and governance best practice but thought that was acceptable for an enormously successful and well-respected business leader of a large business facing an existential crisis. The questionable business practices included borrowing funds for the sole purpose of giving a false impression as to the amount of funds held at the year end and by hiding from his board and auditors – characterising for internal purposes the monies received as investments – and the need for and existence of huge rescue loans. It is also likely that while, as I have found, he did not conclude that (it was established that) Mr Naqvi and the Abraaj entities were acting wrongfully and in breach of the

investment agreements with investors as regards the use of the Uninvested Capital, he was aware that Mr Naqvi and the Abraaj private equity funds were accused of misapplying investors' funds and probably that the claims were being made by major investors, and so were serious.

651. As regards the second and third proposed findings, I am once again satisfied that the Court should make these findings. It is clear from what I have already said that I am satisfied that Badr understood that when Mr Naqvi approached him and his father the Abraaj entities were on the brink of running out of cash and that immediate funding was needed not just to deal with the demands of the Healthcare Investors but to meet other liabilities. It was also obvious that the financial position of the Abraaj entities was unstable. The amounts which Mr Naqvi said were needed to keep the Abraaj entities afloat kept increasing even over the short period of the discussions and it was clear that other lenders were only prepared to advance funds if onerous lending conditions were satisfied, so that Mr Jafar (the Jafar family) was the lender of last resort. Badr (and Mr Jafar) also knew that Mr Naqvi was having to resort to dubious and probably improper methods to avoid the discovery of the financial problems. While Badr (and Mr Jafar) assumed that Mr Naqvi would be able to turn matters around and ensure that they were somehow repaid, they both appreciated that material uncertainties remained as to which of the deals that Mr Naqvi had mentioned would come to fruition and which cash sources and resources would be available to fund repayment of the Loans. For this reason I accept that it is appropriate to make a finding that Badr (and Mr Jafar) were aware that there were significant financial problems within the Abraaj entities at the time the Loans were made. Because I am satisfied that (it is likely that) Badr discussed all material matters with Mr Jafar I also accept that it is right to find that Badr discussed his knowledge of the financial crisis being faced by Mr Naqvi and the Abraaj entities with Mr Jafar and that despite their awareness and knowledge of these matters Mr Jafar was willing to (and Badr was willing that Mr Jafar should) advance funds to AIML (and AH). I have already discussed the window-dressing allegation and confirmed my conclusion and finding that Badr understood that Mr Naqvi's request for the Third Loan was for the purpose of misrepresenting the true amount of funds held by the Abraaj entities at the year end and that Mr Jafar was also aware of this.

652. As regards the fourth proposed finding, it seems to me that just like his father, Badr did not turn his mind directly to the question of the capacity in which Mr Naqvi was negotiating for the funding from Mr Jafar save that he was aware before the Loans were advanced of who the recipient of the loan advances was to be and that the cheques relating to all the Loans were to be drawn by AIML so that AIML would be assuming a liability in respect of the Loans. He was aware that Mr Naqvi had not said that he intended to create liabilities binding on or to impose obligations on GP8 or Fund IV (or AGHF) and that in the context of the discussions the issue of legal obligations and liabilities was confined to the Abraaj entities that were to be direct recipients of the funds advanced by Mr Jafar or who were to sign the relevant documents to be prepared in connection with the Loans (including the cheques). In my view Badr is likely to have understood had he turned his mind to the point, in the absence of clear statements to the contrary, that Mr Naqvi was only contracting and negotiating loans for and on behalf of the borrower who was to be liable to repay those Loans (in this case AIML and possibly AH). Accordingly, I consider that the second part of the proposed finding is supported by the evidence (that Badr knew and understood that in the negotiation of the Loans Mr Naqvi was only acting for AIML and AH, as well as on his behalf to the extent that he assumed responsibility for what was discussed and agreed). It also seems to me likely, based on the information provided to him and the knowledge derived from his position as a director of AH, that Badr would have been aware that Mr Naqvi was not a director of GP8 and that that GP8 and Fund IV were not operational entities in the context of the Loans. I therefore also consider that the first part of the proposed finding is supported by the evidence.

653. As regards the fifth proposed adverse inference and finding, it seems to me that, as I have already said, the evidence amply demonstrates that Badr was closely involved with the negotiations and discussions leading up to the making of the Loans, that he had crucial discussions with Mr Naqvi on a one-to-one basis, that he kept his father fully apprised of all his communications with Mr Naqvi and that he and his father were in constant contact regarding what was being said, all relevant information and developments and what was to be agreed. Based on telephone records, Mr Jafar accepted during his cross-examination that he was in close communication with Badr during December 2017. During his cross-examination (Day 12, page 117 and 159-160) Mr Nerguizian accepted that Badr was

centrally involved in the negotiations of the Loans and that on 26 December Badr was probably convincing Mr Jafar to make the Second Loan and the Third Loan. Badr was also acting on his own behalf in his discussions with Mr Naqvi when he considered and offered to make advances out of his funds (he was determined to assist his friend Mr Naqvi obtain the loans he desperately needed).

654. The phone records show that there were no phone calls involving Badr and Mr Nerguizian prior to Mr Nerguizian sending out the Post-Mirage Meeting Email at 9:05pm on 20 December 2017 and it seems to me that the Fund Parties were right to say that this strongly suggested that when Mr Nerguizian drafted this email he believed from his discussions with Mr Jafar that Mr Jafar had been talking to Badr and had accepted (at least provisionally) that Badr could participate as a lender. The Fund Parties argued that it could be inferred that the only reason why he (Badr) was not permitted or did not participate in the lending was because of the concern expressed by Mr Nerguizian regarding the need for any loan advanced by Badr to be publicly disclosed. I did not find convincing Mr Jafar's denial that he had given this impression to Mr Nerguizian or that he had been having detailed discussions with Badr about his participation in the lending. What is clear is that despite Badr's offer to assist and Mr Nerguizian believing when he drafted the Post-Mirage Meeting Email that Badr was being considered as a lender, Badr did not make any advances. Mr Jafar during his cross-examination said that he had not wanted Badr to participate in the lending. This was in my view part of his attempt to distant Badr from the process of agreeing and negotiating the Loans. But I consider it likely that Mr Jafar, probably with Badr's agreement, concluded that it was important that Badr did not participate as a lender. This however was not, as Mr Jafar sought to suggest, because Badr's role was marginal or entirely ministerial and peripheral. It was because they realised that Badr's participation would undermine Mr Jafar's ability to present himself as an arm's length lender and also could result in the auditors having to make a public disclosure in financial statements of the existence of the Loans and the involvement of the Jafar family.

655. In these circumstances, it seems to me that the Fund Parties are right to say that the evidence justifies a finding (and an adverse inference to the effect) that Badr was intimately involved

in the negotiations and kept his father fully apprised of communications with Mr Naqvi and also his (Badr's) knowledge of matters concerning Abraaj more generally.

656. The Fund Parties also invite the Court to find and draw an adverse inference to the effect that Badr was acting as his father's agent in connection with the Loans. It is clear, as I have already explained when discussing the WhatsApp messages, that Badr was holding himself out as being able, and that Mr Naqvi believed that Badr was permitted, to make decisions regarding the terms of the Loans. He clearly held a wide brief from his father. As Mr Jafar said during his cross-examination (Day 6 at page 113):

“Q Mr Jafar, when Badr was passing on messages given to him by you, he was doing so because you asked him to, correct.”

A. Yes. And no -- and vice versa, he was passing messages also from whomever, whether Naqvi or Nerguizian or anything unrelated even, from my daughter. I was expecting - I fully expect him to not have any doubt as to the truthfulness of his passing messages.”

657. Although Mr Jafar was only asked about and focussed on messages, his response confirms that Badr did on occasions act on his instructions and had a pivotal role in receiving and passing on messages from various parties.
658. It seems to me likely that Mr Jafar would have taken the position, and that Badr would have understood, that it was for Mr Jafar ultimately to make the key decisions regarding the Loans although Mr Jafar placed a great deal of trust in, relied on and was strongly influenced by Badr. The evidence does not show that Mr Jafar appointed or held out Badr as having the authority generally to agree to advance funds or to agree terms governing such lending on Mr Jafar's behalf without reference back to or obtaining the agreement of Mr Jafar. For that reason, I do not consider it right to make a general and unqualified finding that Badr was acting at all times and in relation to everything he did in connection with the Loans as his father's agent. But that does not mean that Badr did not on occasions act as his father's agent. If Mr Jafar requested and instructed Badr to confirm a point to Mr Naqvi he is to be taken as having given Badr express authority to bind him (Mr Jafar). It was also open to Badr, because

of his close relationship both with his father and Mr Naqvi and because of the perceived need to accommodate Mr Naqvi's urgent needs and wishes, to agree points with Mr Naqvi implicitly on the basis that Mr Jafar needed to confirm his agreement but on the understanding and assumption (made by both Badr and Mr Naqvi) that he (Badr) would be able to persuade his father subsequently to accept what he had agreed. So, for example, Badr felt able to tell Mr Naqvi that the Treasury Shares Option had been waived.

659. The Fund Parties also need to show that they could not themselves have been expected to call or issue a witness summons in respect of Badr. As I understood the submissions made by Lord Falconer on Mr Jafar's behalf, this point was not contested (see Mr Jafar's Written Closing Submissions at [585]-589)). The Court will not directly compel a person abroad to attend the Court to give evidence. Although the Court can, of course, request a foreign court to exercise its own powers to assist in the taking of evidence, Mr Jafar did not suggest that the Fund Parties could or should have applied to the Court to issue a letter of request to the relevant UAE court for the purpose of having Badr give evidence while outside the Cayman Islands. I understand ([409 to 410] of the GHF Parties' Written Opening) that the GHF Parties, on 20 September 2023, obtained an Order from the Southern District of New York under 28 U.S.C paragraph 1782 for discovery from Badr for use in these proceedings, requiring Badr to produce documents and to submit himself for an oral examination. The GHF Parties said the 1782 Order had been served on Badr on 20 September 2023, but that Badr challenged the 1782 Order on various bases including as to service, and Badr had not therefore produced any documents or submitted himself for an oral examination pursuant to the 1782 Order.

What was discussed on the 18 December call and when was the First 20 December 2017 Meeting arranged?

660. Mr Jafar invited the Court to find that he and Badr did not speak about Mr Naqvi or his request for loans prior to 20 December 2017. I find this improbable and that it is likely that Mr Jafar and Badr were aware in advance of the First 20 December 2017 Meeting that Mr Naqvi wished to meet to discuss urgent financial assistance.

661. The mobile telephone records show that on 18 December Mr Naqvi had called Mr Jafar and that he returned the call immediately, and then made a further call to Mr Naqvi (so that Mr Jafar had made two calls). The total time spent was 2 minutes 57 seconds and 3 minutes 48 seconds, respectively. On 19 December at 21.28 Mr Jafar had received a call from Badr that lasted ten minutes.
662. GP8 said that it was likely that the call on 18 December was the occasion on which Mr Naqvi had first called Mr Jafar to ask for an urgent meeting and explained that he needed urgent financial assistance. They noted that Mr Jafar had called Mr Naqvi back (twice, having been cut off at some stage during the first call) and spoken in total for nearly seven minutes. GP8 further argued that it was likely that during the call from Badr on 19 December Mr Jafar and Badr had discussed Mr Naqvi's call of the previous day asking for funds.
663. Mr Jafar denied that the calls on 18 December related to Mr Naqvi's request for an urgent meeting. Instead, the call had been about his (Mr Jafar's) introduction of Mr Salam to Mr Naqvi for a training job at Abraaj. Mr Jafar also said that the call from Badr on 19 December was not about Mr Naqvi or a request made by him for an urgent meeting. Mr Jafar said during his cross-examination that the request for funding that Mr Naqvi did (subsequently) make *"didn't concern Badr, so there's no way I would be discussing that with Badr."*
664. I have set out in detail above Lord Falconer's submissions regarding what was discussed during the Jafar-Naqvi calls on 18 December and the Jafar-Badr call on 19 December.
665. I find Mr Jafar's explanations and Lord Falconer's submissions (with his reconstruction of what was discussed) unconvincing. First, in view of the significance of what Mr Naqvi wished to discuss with Mr Jafar it seems to me highly likely that he would have wished to speak to Mr Jafar and explain that he needed to have an urgent meeting to discuss an important issue. I think it likely that he would have said that he was looking for urgent financial assistance. Doing so would have justified the urgency of the meeting and avoided the risk of Mr Jafar being surprised by and unready to respond to a request for a substantial loan to be advanced almost immediately. I do not accept Lord Falconer's submission that

Mr Naqvi would have made his request for a meeting seem to be trivial or casual. If you are about to ask someone to lend you immediately US\$90 million you are unlikely to tell them that you wish to meet for a casual chat. They need to be primed and ready to respond by understanding in general terms what they are about to be asked to do.

666. I also find unconvincing the suggestion that the calls were about Mr Jafar's wish to find a job for Mr Salam. The timing of the discussions relating to Mr Salam and the manner in which arrangements were made for Mr Naqvi to meet him are unclear. Mr Jafar only gave Mr Naqvi Mr Salam's contact details on 26 December (in the email of that date) which was the same day that Mr Naqvi saw him. It could be, but it seems unlikely, that Mr Naqvi would have had time to and immediately made contact with Mr Salam after the email from Mr Jafar to arrange a meeting on the same day. It is wholly unclear when the request to meet was first made although it is likely to have been before 26 December. But there is no independent evidence that the request was made by Mr Jafar during or linked to the call on 18 December. The link between the 18 December call and the request relating to Mr Salam is no more than tenuous. The proximity of the call on that day to the crucial meeting that we know took place on 20 December in my view makes it much more likely that the call was intended to set up and deal with the request for that meeting.

667. That the meeting was arranged before 20 December is supported by the electronic calendar invitation in Mr Naqvi's email inbox which was created on 19 December by Ms Magdalena Hansen (discovered by the AH JOLs), although the precise timing and provenance of this invitation and whether it was amended subsequently and if so by whom remain unclear.

The Reinvestment Representation

668. The Reinvestment Representation was that "*Senior representatives of the Healthcare Investors and the IFC had assured Mr Naqvi that funds returned to investors would be re-invested before the end of January 2018.*"

669. The primary evidence as to the concerns of, the requests from and the discussions with, the Healthcare Investors was contained in Mr Farnum's evidence (in Farnum 1 and Mr Farnum's cross-examination). Mr Farnum was the Director, Strategic Investment Fund at BMGF, which had been a limited partner in the AGHF since 2015 when it made a US\$100 million limited partner commitment making it the provider of the largest external (i.e., non-Abraaj) commitment to the AGHF. BMGF together with other limited partners in AGHF appointed a representative to the AGHF Limited Partner Advisory Committee (**LPAC**). In April 2016 Mr Farnum became BMGF's representative on the LPAC and the main point of contact between BMGF and AGHF. The LPAC was an LP advisory committee that played an advisory and not a management role. AIML was the investment manager of AGHF and Mr Farnum said that Mr Khawar Mann, the CEO of AGHF, was responsible for the day-to-day management and operations of AGHF (I shall return later to Mr Farnum's evidence regarding who controlled and Mr Naqvi's role in the management of AGHF).
670. Mr Farnum explained that drawdown notices had been issued in September and November 2016 and March 2017. The drawdown notices had stated that the money invested would be used for certain investments. Mr Farnum said that by mid-2017 he was growing concerned about the way in which AGHF and its investments were being managed and that this concern had been heightened when AGHF's audited financial statements as of 30 June 2017 showed that the money that had been drawn down pursuant to the drawdown notices had not been invested. On 12 October 2017 there had been a call between the members of the LPAC and representatives of AGHF during which the LPAC members had asked questions as to why there had been additional drawdowns when funds from the previous drawdowns had not been invested, and discussions with the management of AGHF, including its CFO Mr Hilal, continued during the rest of October and into November 2017. These discussions culminated with an email sent to Mr Mann and Mr Vettivetpillai on 30 November 2017 by Mr Farnum (on behalf of BMGF, CDC, IFC, and Proparco) in which three requests were made, namely that they be provided with details on how funds had been used and how that correlated with the drawdowns; that they be provided with actual bank statements showing the location of funds for the duration of AGHF's existence and that any unused capital be returned to the

investors by 31 December 2017. Mr Farnum said that he believed that BMGF had a contractual right to demand the return of the funds in the circumstances.

671. On 8 December 2017 Mr Vettivetpillai responded in a lengthy email to Mr Farnum (and the other LPAC members), a first draft of which appears to have been prepared by Mr Naqvi, in which he set out the steps that would be taken by AGHF, including providing the following week a confirmation of bank balances and the reconciliation requested by Mr Farnum's email; the return before 15 January 2018 of all uncommitted and unused funds held as at 31 December 2017 and committing to work with the LPAC and AGHF's external auditors to design new audit processes as part of the annual audit to enable all of the LPAC's concerns, including cash movements, to be addressed as part of the auditors' normal procedures. In addition, on 15 December 2017, Mr Mann sent an email to the LPAC providing details of investments to be effected by the end of January 2018.

672. Following further emails from members of LPAC, on 19 December 2017 Mr Mann responded by email to the LPAC members as follows (my underlining):

"We refer to our recent correspondence and discussions in which we have each made proposals as to how to best address the issues raised. We have listened to your concerns and wish to ensure that you are completely comfortable.

Accordingly, in the spirit of partnership and in a good faith effort to resolve matters in a constructive manner, we will immediately arrange to return \$ 95.5 million to you, along with the disbursements from OPIC that related to the approved investments that are attributable to each investor; and are also happy to return any remaining unutilized OPIC funds to OPIC as well (although being a credit facility, once returned, it cannot be re-drawn, hence we will have a separate discussion with OPIC on the mechanics of that).

As per the deployment schedule sent to you previously, we will retain \$ 20.8 m, which represents four weeks of weekly disbursements in January on projects across India, Pakistan, East and West Africa that are already approved. Together with amounts already invested or applied toward fund expenses, this represents 100% of amounts drawn down to date.

We will issue revised draw down notices to ensure consistency with the final amounts drawn (net of funds returned).

Pending resolution of your concerns, we will make no further draw down requests and suspend our work on the two transactions that we have contractually committed to complete, or seek alternative sources of capital to complete them. This will give you time to adequately focus on the issues you have raised and their resolution. In doing so, there is a possibility that AGHF may not obtain the benefit of these transactions.

We will also meet with the auditors to commence the planning process in order to finalize a review of the Fund's books and records in order to satisfy any concerns or queries you may have had. We will provide you a copy of the auditor's report and arrange for you to meet with them to address any remaining questions you may have.

Once all outstanding issues have been fully addressed to your satisfaction, we would propose to meet with you to establish the best way to move forward with AGHF in a manner that achieves all our objectives.

We thank you for your partnership and look forward to continuing a constructive dialogue."

673. On 22 December 2017 Mr Farnum replied on behalf of the LPAC members as follows (my underlining):

"Thank you for your message. We look forward to the immediate return of \$95.5 million to the LPs and will expect to receive these funds on or before December 31, 2017.

Please send the revised drawn down notices that you reference in your message below so that we can confirm that these funds relate solely to projects that have already been approved.

We also acknowledge and accept the manager's commitment that AGHF will not make any further draw down requests until the concerns we have raised have been satisfactorily addressed. We agree that this is a prudent course under the circumstances. We will follow up in the coming days on next steps to satisfactorily resolve our ongoing information requests."

674. At [31] of Jafar 1, Mr Jafar had said as follows (I set this out again for ease of reference):

"Mr Naqvi stated that the Healthcare Fund Investors had nonetheless started to make noise (he mentioned that this had started with the Gates Foundation, but that the other Healthcare Fund Investors, who seemed increasingly coordinated, were also becoming vocal in concert). He said that he had argued to try and knock sense into them to no avail⁷. He said that, in the circumstances, he did not want the matter to escalate and get out of hand, and worried that an open/public dispute with these

globally high-profile institutional investors could be very damaging to Abraaj's reputation, notwithstanding the contractual correctness of Abraaj's position. In particular, he said he was concerned that any negative publicity would affect the otherwise smooth progress and closing of the very important global USD 6 billion APEF VI fund launched by Abraaj, for which he said he had already obtained commitments from investors for over half."

675. In footnote 7 Mr Jafar set out what he says he was told by Mr Naqvi. I also set out the text again for ease of reference:

"Mr Naqvi commented that the surprising thing was that Abraaj would anyway be making cash calls of the Investors in January 2018 to fund investments and that he had been assured by senior representatives of the Investors that they would continue to meet cash calls in a timely manner in the New Year including to repay the returned Uninvested Capital once the delays to the relevant projects had been resolved. So the money that the Investors were demanding would very soon be returned to Abraaj anyway."

676. Mr Jafar's evidence during his cross-examination by Mr Ayres as to what Mr Naqvi had told him at the First 20 December 2017 Meeting regarding the position and attitude of the Healthcare Investors, in particular as to their intentions regarding making further investments pursuant to new draw down notices, was as follows (Day 5, pages 139-142) (my underlining):

"[Mr Naqvi] said that other than the bean counter, the higher-ups in these organisations, or some of them, promised that those funds would be returned as soon as the - in other words, the investors were not pulling out of the funds. That was the message, the core message... [Mr Naqvi] was telling me that he was being assured - he said, look, the peculiar thing is that they are asking for these funds to be returned and [he] was being ... assured by the bosses that the funds will be returned when the - these particular funds will be returned when the relevant project, whatever they were, were matured." In addition, he said, "They are going to be paying cash calls for other projects or other ongoing projects." I didn't go into detail, it wasn't my business to go into detail. And that had nothing to do with repayment of my loans. In fact, if you think about it [now], the repayment of my loans could well have been from the uninvested capital being in the treasury, as soon as, whenever that could be turned into cash. And I didn't ask for the timing of that. It was an ongoing business so I assumed - I didn't want to tie my loans to that specifically. But if it were going to be from that, which it could have been, it was up to Abraaj to do it. It had nothing to do with the return of the funds..."

677. When cross-examined by Mr Atherton, Mr Jafar said as follows:

“A. [Mr Naqvi did say that] senior representatives from the Healthcare Investors, including the IFC did say that they would reinvest before the end of January. He did mention before the end of January. But that was more in the context, my Lord, of he said, I very clearly remember him saying, "The surprising thing about all this hullabaloo [that's my word] is that we will be making cash calls in January on other projects and they assured me that they will be investing, as well as returning the funds that I'm returning to them - I will be returning to them before the end of December." So it may have been conflated. That's what he said...

Q. If you could look at footnote 7, where you provide a bit more detail about what you say Mr Naqvi said at the meeting.... The paragraph that I took you to in the [RRASOC] is rather more condensed and what I'm suggesting to you .. is the content of footnote 7 is in fact what Mr Naqvi said to you about what investors were going to do and the circumstances in which they would be reinvesting or repaying the capital into the fund. Is that correct?

A. Yes. I think that's what I said.

Q. Footnote 7 is what Mr Naqvi said to you? That's a reflection of what he said?

A. Yes.”

678. I found revealing Mr Jafar’s reference, in his answers to Mr Ayres' questions, to the core message that he understood Mr Naqvi to be giving. The key point being made and take-away, as he understood it, related to assurances given by the Healthcare Investors that they were not withdrawing and terminating their investment (not that particular sums would be reinvested during a particular timeframe). They had not made or communicated a decision to withdraw. This appears to have been the main point that Mr Jafar understood Mr Naqvi to be making. But this statement, as the emails from Mr Farnum extracted above confirm, was true. At the time of the First 20 December 2017 Meeting the discussions with the members of the LPAC were continuing albeit that their position was not known or clear at that time, or before the First Loan was advanced (on 21 December 2017). But immediately after that advance, when Mr Farnum’s email of 22 December 2017 was sent, it became clear that the Healthcare Investors did not intend to withdraw their investments and that discussions would be continuing with a view to finding a solution to the problems and issues that had been identified.

679. It seems to me unlikely that Mr Naqvi gave Mr Jafar a clear and precise assurance that further investments would be made, and that cash-calls would be made and met, during January 2018. It seems to me to be much more likely that he spoke in general anecdotal terms about the discussions with the Healthcare Investors and his confidence that, despite the disputes and difficulties, they would not withdraw from AGHF and would be making further investments. This understanding of what Mr Naqvi said and the way in which he would have said it seems to me to fit with the overall picture and evidence of the discussion at the First 20 December 2017 Meeting.
680. I can accept, consistently with my finding that Mr Naqvi limited himself to generalities and that Mr Jafar did not ask for details or question what he was told, that Mr Naqvi would have spoken in general terms about the Healthcare Investors still being on board and not having withdrawn from AGHF and that he expected, and even that he had received some high-level confirmations, that further investments would be made in January or the New Year. But, as I have found, and as Mr Jafar claimed in his oral evidence at trial, Mr Naqvi was not tying or directly linking repayment of the First Loan (and the Second Loan) to receipt of further investments but was talking about a variety of cash generating activities that would produce sufficient funds to allow these loans to be repaid. Even recognising that Mr Naqvi wished to paint a rosy picture to induce Mr Jafar to advance the Loans, he did not need to give assurances that further investments would be forthcoming in January and doing so would have opened him up to the risk that Mr Jafar may wish to check the position with one or more members of the LPAC and have found out that commitments to reinvest had not in fact been given. Nor, where the injection of further investments was not seen by Mr Jafar as critical to the ability of Mr Naqvi to procure the repayment of the First Loan (and the Second Loan) did Mr Jafar understand that assurances were being given to him, or rely on assurances, as to reinvestments being made in January 2018. Furthermore, had Mr Naqvi given clear assurances that the Healthcare Investors would be reinvesting in response to further cash-calls during January 2018 it is likely that a reference to the cash injections and the use of the funds generated thereby as the source of repayment of the First Loan and the Second Loan would have appeared in the contemporaneous emails and documents. The repayment date for the First Loan was originally the end of January 2018 and therefore took

account of the possibility of such further investment but the further investment was not said by Mr Naqvi or seen by Mr Jafar as being a necessary precondition required to allow, or the dedicated source, for repayment of the First Loan (or the Second Loan).

681. Accordingly, in my view it is likely that Mr Naqvi did not give Mr Jafar an assurance that the Healthcare Investors would (or had said that they would) meet cash calls in the New Year and reinvest a sum equal to the amount of the Uninvested Capital returned to them, either conditionally (once the delays to the relevant projects had been resolved) or unconditionally. It is likely that Mr Naqvi said (based on what he had been told and his assessment of the position of the Healthcare Investors) that he was confident and expected that further investments would be made early in the New Year and that the issues with the Healthcare Investors would be resolved but he did not say and assure Mr Jafar that such further investments would definitely be forthcoming (or that he had been given a clear assurance that this would happen). What he did tell Mr Jafar was that he (Mr Naqvi) would be able to repay the Loans from one of a number of sources of cash, which he expected would include funds reinvested by the Healthcare Investors but which might not.
682. It is therefore not strictly necessary for me to decide whether, if in fact what Mr Naqvi had said was as set out in footnote 7 Mr Jafar had established that a statement had been made in accordance or consistent with his pleaded case (as set out at [20(8)] of the RRASOC). However, in case I am wrong in my interpretation and findings as to what Mr Naqvi said, I will deal with the point.
683. Lord Falconer submitted that footnote 7 was sufficiently captured by the phrase in [20(8)] of the RRASOC that "*Senior representatives of the Healthcare Investors and the IFC had assured Mr Naqvi that funds returned to investors would be reinvested before the end of January 2018.*" He said that the substance of the pleaded representation, and the fundamental point, was that Mr Naqvi's statement gave the impression that the disputes with the Healthcare Investors were no more than a storm in a teacup and that the net amount of money that would be available to the Abraaj entities would not be affected by the row about Uninvested Capital. Another way of looking at the point, Lord Falconer said, was to say that

the effect of [20(8)] of the RRASOC was that the Healthcare Investors were willing to put back the money that had been taken out, which meant that the whole problem may be easily solved. But, said Lord Falconer, this was plainly untrue as the disputes with and problems concerning the Healthcare Investors could not be solved at all because the finances of the business were insoluble because of Mr Naqvi's fraud. Lord Falconer also argued that the Fund Parties' reliance on an alleged deficiency in the drafting of Mr Jafar's pleading was a bad point since they were clearly not taken by surprise by Mr Jafar's case.

684. It seems to me that Mr Jafar's pleaded case required him to prove that Mr Naqvi had given Mr Jafar a clear and specific assurance that funds would be re-invested before the end of January 2018 because of what he had been told by senior representatives of the Healthcare Investors. It would in my view be sufficient for Mr Jafar to show that Mr Naqvi had assured him, in clear and specific terms, that he had been told by such senior representatives that the funds would be re-invested if certain matters were, and upon their being, resolved *and* that they were satisfied that this would happen within the identified timeframe. This would show that the assurances included a confirmation that any conditions to the reinvestment of funds would be satisfied in time. But the account of what Mr Naqvi told Mr Jafar set out in footnote 7 does not go that far. According to Mr Jafar's account in footnote 7, he was told that the Healthcare Investors had given a conditional confirmation (that they would reinvest "*once the delays to the relevant projects had been resolved*") but not that they had given a confirmation that the condition would be satisfied in time. I can see that it might be said that it was implicit from the asserted assurance in the final sentence of footnote 7 ("*[s]o the money that the Investors were demanding would very soon be returned to Abraaj anyway*") that Mr Naqvi at least was saying and believed that the Healthcare Investors' stated condition for re-investing would be satisfied but I would not accept such an argument. To establish that the clear assurance pleaded in [20(8)] of the RRASOC was made out, it would be necessary to show that Mr Naqvi had said and given a specific and clear assurance that he had received a confirmation and been assured by the Healthcare Investors that any conditions would not prevent the reinvestment in January and Mr Jafar's evidence does not, even on his own case, go that far.

What really happened and what was said by Mr Naqvi at the First 20 December 2017 Meeting?

The approach I have adopted

685. In reaching my view on the disputed issues of fact and in making my factual findings I have had in mind and sought to apply the principles set out in the authorities I have discussed above, in particular the twelve principles (or propositions) set out at [267] above.

686. I have sought to make findings of fact based upon all of the evidence and to assess the witness evidence alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. I have taken into account, since in this case the events in question took place many years before the trial (although there have been earlier proceedings in which the facts have been relevant and evidence adduced as to them) the warnings in *Gestmin* and the other authorities about witnesses' recollections and the need to test that evidence against the contemporaneous documents and known or probable facts (where and to the extent that it is possible to do so). While I accept that because Mr Jafar was not in the business of making loans some caution is needed when relying on and drawing inferences from documents containing technical and legal terms, it still seems to me that the *Gestmin* guidance should be applied with substantial force subject where appropriate to checking that the relevant documents were read and were likely to have been understood by Mr Jafar and not assuming that Mr Jafar was familiar with the more esoteric or complex features and terms of banking documents and financing structures that would be familiar to a professional banker. However, I have also taken into account the evidence and my assessment that Mr Jafar is an experienced and financially sophisticated businessman with a significant amount of experience in the financing of business and corporate transactions.

687. I have given particular attention to the need in this case to test witness recollections by reference to contemporaneous documents, inherent probabilities and established facts because the evidence of Mr Jafar and Mr Nerguizian is clearly self-serving and promotes Mr Jafar's case (and Mr Nerguizian's interests). I have borne in mind that it is one thing to remember a fact that goes against that person's interests and another thing to remember

matters which assist his/her own case but run contrary to the contemporaneous documentation and which are only recalled many years later.

688. I have considered whether the Statements have been proved to the reasonable satisfaction of the Court. I have borne firmly in mind that where a plaintiff relies on words spoken in the course of a conversation it is necessary that those words be proved with a degree of precision sufficient to enable the Court to be reasonably satisfied that they were in fact spoken but have recognised that the Court may be reasonably satisfied as to the meaning an oral statement from evidence of the substance of what was said. This is a particularly acute concern and issue in this case where the only evidence as to what was said by Mr Naqvi comes from Mr Jafar and Mr Nerguizian. It seems to me important that Mr Jafar is able to establish that Mr Naqvi said precisely what Mr Jafar alleges, either by adducing sufficient evidence of the specific words spoken by Mr Naqvi or as to the substance of what he claims to have been said. I have also taken into account the principle that the assessment of the evidence of what was said at the First 20 December 2017 Meeting and in the conversations between Mr Jafar and Mr Naqvi must be made against the relevant background and context.
689. I have taken into account the fact that Mr Jafar's case is based on serious allegations of fraud by Mr Naqvi so that evidence of the fraudulent conduct must be cogent and convincing although I have taken into account and given some weight to the fact that there is evidence to indicate that Mr Naqvi is a fraudster. There is evidence that the collapse of AH, AIML and the other Abraaj entities appears to have been the result of a Ponzi scheme undertaken by Mr Naqvi and his associates, that the management of these companies and entities probably acted improperly and unlawfully, that Mr Naqvi has been accused of defrauding other purchasers of AH shares around the same time that Mr Jafar was asked to make the Loans (including the Indorama Group and Mr Lohia and SCI, the family company of Dr Schmidheiny) and that Mr Naqvi has been accused by various regulatory and prosecuting authorities of fraud. I appreciate that Mr Naqvi has not given evidence and not had an opportunity to defend himself and that the allegations of fraud have not been proved in a manner that establishes their truth for the purpose of these proceedings. But when

considering the evidence adduced and assessing the likelihood that Mr Naqvi intended to deceive, I have taken these matters into account.

690. In assessing in particular the credibility and evidence of Mr Jafar and Mr Nerguizian I have considered and applied the five main tests mentioned above (consistency with what is agreed or clearly established by other evidence, internal consistency, consistency with previous statements of the witness, the general credit of the witness and his/her demeanour). My assessment of the credibility of Mr Jafar and Mr Nerguizian has been explained above both generally and by reference to each issue in dispute (where I have identified when and the grounds on which I have concluded that their sworn evidence is to be disbelieved).
691. As I have explained, I have rejected Mr Jafar's and Mr Nerguizian's evidence, and decided that their evidence is to be disbelieved, in a number of critical respects. I have not done so lightly and have carefully and anxiously considered when and whether it was right to do so. In this case it has been necessary to test rigorously their evidence against the various factors that I have set out above in particular the contemporary documentary record and the relevant context and inherent probabilities. This has not been a straightforward exercise because the documentary record is less than comprehensive, and because of Mr Jafar's failure to produce Badr as a witness. But the Court must do the best it can with the evidence adduced and material available to it to make appropriate factual findings. As I have said, I do think that Mr Jafar's failure to produce Badr as a witness is particularly damaging to his case as it has suggested that he and Badr are seeking to withhold key evidence from the Court in a self-serving exercise to limit the material before the Court and manipulate the proceedings in Mr Jafar's favour (by making it difficult for the Court to see the full picture). I do have a good deal of sympathy for Mr Jafar's predicament since it is clear that the faith and trust he placed in, and the assumptions he made about the wealth, success and reliability of, Mr Naqvi were without foundation, and he has as a result lost a huge sum of money. But this does not justify a less than candid approach to the giving of evidence and his attempts to sanitise and adjust his evidence on critical issues to improve and support his case. This has made it all the more difficult for Mr Jafar to satisfy the legal and evidential onus of proof that rests on him.

692. In relation what is required to satisfy the balance of probability standard, I have taken into account Lord Nicholls *dicta* in *Re H and Others (Minors)* as well as the other authorities I have referred to and discussed above dealing with this issue and the approach to be taken by the Court when assessing evidence as to whether alleged oral conversations took place and what was said during them.

My conclusions regarding what was said

693. At [332]-[336] in their written Closing Submissions the GHF Parties summarised what they submit probably occurred during Mr Jafar's conversations with Mr Naqvi at the First 20 December 2017 Meeting:

“332. ... *It is far more likely that Mr Jafar simply made short-term, relatively high-risk loans with his ‘eyes open’, because in so doing he was assisting a long-standing friend, in relation to a group of companies of which he had formerly been involved as a director, of which his son was a director (and who also appears to have been a close friend of Mr Naqvi) and in which he had a substantial economic interest and, in the process, was anticipating making a multi-million dollar profit in the space of little more than a month or two. As Mr Jafar put it, and as noted in paragraph 319 above, he was “used to taking quick decisions. It was a business opportunity”, and as Mr Nerguizian put it, “it was a good opportunity to make some money before the end of the year.”*

333. *Mr Jafar disputes this by reference to an argument, essentially, that obviously he would not have risked losing US\$350million for fees worth c.US\$23 million, of course, that is precisely what he did, just as any lender risks the entire capital loaned in exchange for the interest and fees payable on it. The real point is that Mr Jafar would not have advanced the Loans unless he thought that he would probably be repaid, and of course the GHF Parties are not suggesting otherwise. However, the fact that Mr Jafar was due to make a profit of US\$23 million over the space of little more than a month is clearly a relevant factor that explains why Mr Jafar was commercially interested in making the Loans which he regarded as a good business opportunity, notwithstanding that he knew far more about the risky nature of the Loans than he now professes.*

334. *Much the same point is made in respect of Mr Jafar's US\$56 million investment in AH, and it has the same answer; whilst of course it is not worth throwing away US\$350 million for the sake of saving US\$56million, that is not what Mr Jafar thought he was doing. No doubt Mr Jafar thought he probably would still get repaid. However, the combination of US\$23 million profit and safeguarding a*

US\$56million investment goes to show a large part of the reason why Mr Jafar went on to make the Loans, despite having his eyes open as to the risky nature of the transaction. In short, it was worth advancing US\$350 million, even at relatively high risk and in the knowledge that something was wrong in relation to Abraaj's governance, in exchange for a quick profit of around US\$23million and the protection of assets worth around US\$56 million.

335. *Indeed, even if the GHF Parties are wrong to say that Mr Jafar 'had his eyes open', it is still hard to see how the "Overarching Message", with its vagaries and uncertainties that went unclarified, which was recorded nowhere, and which is entirely absent from Mr Jafar's account before the Sharjah courts, can really have had any material impact at all on Mr Jafar's decision-making.*

336. *Rather, even if it was made and believed by Mr Jafar, it was crowded out in terms of significance by a raft of more important factors, such as the opportunity for quick profit, the protection of Mr Jafar's investment, the trust that Mr Jafar placed in Abraaj and Mr Naqvi as a success story more generally, the fact that Badr had provided some reassurance that all was well, and the fact that proper financial documentation in the form of AH audited accounts and the JP Morgan Valuation had been (he says) provided to Mr Jafar. Set against those more weighty factors, which are much more of the kind that would influence a serious businessman such as Mr Jafar, the suggestion that Mr Jafar was materially influenced by a nebulous implied representation that he did not record and has repeatedly omitted to mention in other proceedings is a fiction."*

694. It can be seen from what I have already said and the findings that I have already made and referred to above that I consider this account to be broadly correct. It seems to me, applying the authorities I have discussed above, that the documentary evidence and the inferences to be drawn from the documents, the context and the inherent probabilities and the adverse inferences to be drawn against Mr Jafar and the findings of fact to be made based on an assessment of the evidence that Badr was likely to have given, shows that Mr Jafar's and Mr Nerguizian's evidence cannot be relied on in material respects and that what Mr Naqvi said and what Mr Jafar knew, understood Mr Naqvi to mean and relied on were different from Mr Jafar's and Mr Nerguizian's accounts.

695. It seems to me likely that Mr Naqvi told Badr (expecting him to and knowing that he would pass on the message to Mr Jafar), that Badr told Mr Jafar and that Mr Naqvi confirmed to Mr Jafar that Mr Naqvi and the Abraaj entities were on the brink of insolvency and that urgent and extraordinary measures were needed to save him and these entities and that he

had come to the Jafar family as a last resort as his saviours and rescuers. Mr Naqvi focussed on the problems caused by and the financial impact of the Healthcare Investors' demands for the return of the Uninvested Capital but also explained that there were other very large amounts that had to be paid and demands for payments that required substantial additional funding in order to prevent collapse.

696. It is likely that Mr Naqvi would have indicated that at least in the short-term extraordinary measures were required so that he could manage and stabilise the situation. These included not disclosing the Loans to the AH board or recording them properly in the records of the relevant Abraaj entity (including by having the BOS remittance documents refer to the payments made as being funds for investment and not loans), so as to avoid the damaging publicity that would have come from the disclosure of the Abraaj entities' need for very expensive emergency loans from a connected local businessman rather than a financial institution and the likely oversight and interference by the AH board in the action he was taking, as well as, if possible, the manipulation of the Abraaj entities' records of funds held for investment (to mislead the auditors and for the purpose of improving the presentation of the Abraaj entities' position in their financial statements) by the receipt over the financial year-end of substantial sums that would be returned immediately unused in the New Year.
697. Badr was strongly motivated to assist and support Mr Naqvi, and go along with Mr Naqvi's emergency measures, because of his close friendship (involving an almost family-like loyalty and connection) and because of his high regard for Mr Naqvi as a prominent and successful local business superstar and mogul. It is likely that he sought to persuade Mr Jafar and was influential in persuading Mr Jafar to make the Loans (this may well be one of the reasons why Mr Jafar was so anxious to distance Badr from the negotiation of and decision making in relation to the Loans although another and important reason for doing so was to assist in presenting himself as an arms' length lender). Mr Jafar, as an experienced and successful (canny) businessman would have made his own decision, albeit that he felt the pressure of his son's persuasion.

698. Mr Jafar and Badr both assumed that all would be well and that Mr Naqvi would be able somehow to find the funds to repay the Loans. Mr Naqvi mentioned in very general terms various potential cash sources which could be used to fund repayment of the Loans. But he did not go into any detail and neither Mr Jafar nor Badr asked him to do so. In fact, Mr Naqvi kept the whole discussion at a high level of generality. He only spoke of “*Abraaj*” without identifying or being specific about which entities he was referring to (until it was necessary to do so to identify who would borrow and be liable in respect of the Loans) and Mr Jafar never asked Mr Naqvi to do so. Mr Jafar was content to proceed on the basis of Mr Naqvi’s amorphous account. Furthermore, not only did Mr Jafar not ask for particulars, he did not seek to check anything he was told. He did no real due diligence at all. He and Badr relied on their view of Mr Naqvi’s stellar reputation and record of success and also on their assumption that their quasi-family relationship would ensure that Mr Naqvi would repay their loyalty and support in his hour of need.
699. In my view, Mr Jafar has sought to reconstruct the details of what he was told in order to sanitise the narrative by ignoring or removing from his account the statements and disclosures made by Mr Naqvi (and his understanding of the context) that show that Mr Jafar knew that he was making loans to companies in the midst of a severe liquidity crisis that was not contained and that his lending alone might not immediately resolve, and that would require Mr Naqvi to bend the rules of proper governance in order to avoid a collapse and insolvency. He has sought to present a picture of himself as an innocent and incompletely informed arms’ length (outsider) lender who was given by Mr Naqvi a neat and carefully constructed picture of the Abraaj entities as being in a stable and solid financial position with only a contained and limited blip on their financial radar (albeit one that had caused a short term liquidity crisis) which was easily manageable and would disappear and be resolved by his lending (so that there would be no material further risks to the Abraaj entities financial condition thereafter, which justified his low-risk assessment) and a picture of Mr Naqvi as a businessman who always observed the rules of good governance. But this was not the case. Mr Jafar (and Badr) knew that the financial difficulties and crisis were not so limited and contained, that there were ongoing problems and risks, and also that Mr Naqvi was acting and going to act inconsistently with important aspects of the rules of proper governance. Mr

Jafar nevertheless went ahead and made the Loans because he believed in (and made assumptions as to) Mr Naqvi's ability to manage and sort out the problems, that Mr Naqvi would look after the Jafar family (he assumed that Mr Naqvi had substantial personal wealth) and get them their money back and because the Loans were very short-term and he was being handsomely rewarded.

700. Mr Jafar was also aware that in order for Mr Naqvi and the Abraaj entities to be saved it was necessary for BOS to be involved and adopt a new and unorthodox structure for the lending. In my view it is likely, in view of Mr Jafar's willingness to accede to Mr Nerguizian's request to enter into the Addendum, which on his own evidence he considered was not intended to have legal effect, that Mr Jafar was aware that Mr Nerguizian was in some difficulty and needed to cover up, and manipulate BOS' internal records so as to avoid disclosing, the existence of or a payment default under BOS' exposure to Abraaj risk. Mr Jafar was willing to assist Mr Nerguizian and adjust the presentation of the loss-sharing arrangements where necessary. I consider that it is likely that Mr Nerguizian had discussed with Mr Jafar at the outset that the New Structure (which was understood by Mr Nerguizian, Mr Jafar and Mr Naqvi to be the only methodology available for facilitating the funding needed by Mr Naqvi at such short notice) was designed to circumvent and would involve the circumvention of the rules and regulations that needed to be complied with if BOS was to take on Abraaj risk. It is therefore likely that Mr Jafar appreciated that Mr Nerguizian was also required to take extraordinary measures (that involved bending and in some respects ignoring the relevant regulatory rules).

701. But Mr Jafar was not aware of the wider fraud and Ponzi scheme being conducted by Mr Naqvi. In my view, it is likely that Mr Jafar took the view that the emergency necessitated emergency measures. He appreciated that these emergency measures were not in accordance with proper or good governance and involved hiding (covering-up) for a period the making of the Loans and the identity of the lender and misrepresenting the nature of the payments made to AIML/AH and also inflating the figures for investments held at the year-end, to create a good impression of the Abraaj entities' financial position. He also took the view that the emergency necessitated the action taken by Mr Nerguizian and the bending and

circumvention of some internal BOS and regulatory rules. But this all had to be done for the worthy objective of helping Mr Naqvi and saving the Abraaj entities, which he believed Mr Naqvi would do if given the necessary funds and financial support.

702. This is the crucial context in and factual background against which Mr Jafar's deceit claim has to be assessed. It can be seen that in these circumstances and in light of these findings, core elements of Mr Jafar's deceit claim have not been made out. He cannot say that he understood Mr Naqvi to be telling him (in the simple, unqualified and plain vanilla manner set out in his pleading) that all was well with the Abraaj entities, that they only faced limited short-term problems and that they were being managed and that he managed them and acted fully in compliance with the rules and requirements of good governance.

703. In light of this analysis and the findings I have made and explained above, I can now set out the findings of fact that I shall make on the various factual disputes identified by the parties in respect of which they have invited me to make such findings.

704. I have found that (and that when making findings as to what it is likely that Mr Naqvi said, I find that Mr Naqvi used words to the effect I set out):

(a). It is likely that Mr Salam was not discussed during the phone call on 18 December 2017 and that during that call Mr Naqvi arranged to meet with Mr Jafar on 20 December 2017 and alerted Mr Jafar to the fact that Mr Naqvi and the Abraaj entities were facing a very serious financial problem that Mr Naqvi needed Mr Jafar's (and his family's) help to resolve. It is likely that he would have said that this help would involve urgent loans with further details to be discussed. It is also likely that Mr Naqvi would have also approached Badr and explained his desperate need for financial assistance and that Badr and Mr Jafar would have spoken about Mr Naqvi and his request for financial assistance prior to 20 December 2017.

(b). It is likely that during the First 20 December 2017 Meeting Mr Naqvi did not use the term the "*Abraaj Group*" but when speaking about the Abraaj entities referred just to

“*Abraaj*” without more, and without, save on a few occasions, identifying specific entities or indicating which entities he was referring to.

- (c). It is likely that Mr Naqvi was using the term “*Abraaj*” as a generic description of all corporates and partnerships (which I have referred to as entities) operating under and using the name “*Abraaj*” including AH and its subsidiaries and the Funds. He regarded those entities as a collective which he controlled and operated. He was talking, in the context of seeking the emergency loans from Mr Jafar, in general terms about their combined but undifferentiated liquidity needs and problems. While he said that AHGF needed funds to repay the Uninvested Capital he did not go beyond that by identifying the manner and route by which funds would be channelled to AGHF to enable this to be done (for example he did not say that it would be AGHF’s investment manager or general partner that would need to be in receipt of the funds). Nor did Mr Jafar ask Mr Naqvi for any details of how the loan advances would be channelled to the Healthcare Investors and who would be the indirect recipients of the loan advances let alone for details of their financial status. He was wholly uninterested in such matters. However, it is likely that Mr Naqvi intended to refer and was understood by Mr Jafar to be referring to AH as the *Abraaj* entity that would probably be the borrower of the loans he was seeking (although no decision was made as to the identity of the borrower at, and the identity of the borrower was not settled and agreed until after, the First 20 December 2017 Meeting). It is likely that Mr Naqvi considered and Mr Jafar understood and accepted, that Mr Jafar’s formal (legal) relationship would only be with the entity that was selected and agreed to be the borrower and that it was for Mr Naqvi to decide how funds were directed and paid on after the loan advances were made to the borrower. It is likely that Mr Naqvi did not indicate or suggest that he was talking for or making engagements on behalf of any entity other than the borrower. The fact that Mr Naqvi made no reference to GP8 or Fund IV supports the view that he did not say or indicate that he was talking on behalf of all the Funds or those who would be the indirect recipients of the loan advances to be made by Mr Jafar.

- (d). It is likely that Mr Naqvi told Mr Jafar that certain investors in AGHF had demanded the return of the Uninvested Capital without going into detail and without identifying all the Healthcare Investors concerned. It is likely that Mr Naqvi said that the Healthcare Investors pressing for repayment of the Uninvested Capital included major investors such as Mr and Mrs Gates and possibly one or two other names.
- (e). It is likely that Mr Naqvi told Mr Jafar that the requests made by the Healthcare Investors for the return of the Uninvested Capital were unjustified and unreasonable and that Mr Naqvi said that there was no legal basis for the requests and that this view was supported by written advice from Freshfields, who were acting for Abraaj.
- (f). It is likely that Mr Naqvi told Mr Jafar that the Uninvested Capital had been treated as being available for Abraaj treasury operations (and therefore as having been placed with and held by the Abraaj treasury function) and available to be used, and had been used, for general business purposes (the payment of general Abraaj ordinary course of business liabilities) with the result that at least a material part of the Uninvested Capital had been spent and was no longer retained.
- (g). It is likely that Mr Naqvi also told Mr Jafar that the use and disbursement of the Uninvested Capital in this way was permitted by the relevant agreements with the Healthcare Investors.
- (h). It is likely that Mr Naqvi told Mr Jafar that Abraaj was facing a liquidity crisis and that substantial funds were needed immediately in order to avoid disaster, including the collapse and insolvency of Abraaj and the destruction of Mr Naqvi's businesses and reputation. It is likely that Mr Naqvi said that he needed to borrow sufficient funds to enable the Uninvested Capital to be repaid and to pay other substantial sums (US\$40 million) in respect of other liabilities which were due and payable, or imminently due and payable, and had to be immediately paid (and which Abraaj did not have sufficient funds to pay).

- (i). It is likely that Mr Naqvi said that the Uninvested Capital had to be repaid because a failure to do so, even though the Healthcare Investors had no immediate right to repayment, would result in adverse publicity that would cause irreparable reputational and consequential damage to Abraaj.
- (j). It is likely that Mr Naqvi said that he would be able to repay (arrange for repayment of) the loans at the end of January 2018 (which became 28 February 2018 during the 20 December Naqvi Call) and that there were various and multiple sources of cash which would fund repayment including proceeds from the sale of the shares in Karachi Electric Company, the imminent sale of AH treasury shares and further investments to be made during January 2018 by the Healthcare Investors.
- (k). It is likely that Mr Naqvi did not say (and that he did not give Mr Jafar a clear assurance) that he had been assured (and did not assure Mr Jafar) that funds returned to the Healthcare Investors would (definitely) be re-invested before the end of January 2018 (and that the Healthcare Investors had said and he was satisfied that any conditions to re-investing would be met by that date).
- (l). It is likely that Mr Naqvi did tell Mr Jafar that all would be well and that he would be repaid. The message was that while the financial problems were serious and the liquidity issues were not confined to the disputes surrounding the Uninvested Capital (and if not resolved would result in the insolvency of the Abraaj entities) Mr Naqvi would be able to resolve the problems and the Abraaj entities would be put back on a sound financial footing. But Mr Naqvi gave this message in the context of an acknowledged severe financial crisis whose cause and extent were not fully disclosed or discussed (there was for example no discussion of what had caused the immediate need for US\$40 million for additional liquidity and what liabilities were falling due or overdue and in need of immediate payment) and which would not necessarily be immediately contained/resolved (it was not clear that further emergency liquidity demands could be avoided or that further investments would be made in response to future cash-calls), and where Mr Naqvi would be required, as Mr Jafar understood, to

undertake what I have labelled emergency measures, and so ignore a number of important rules of good governance (and even probably act in breach of duty as an AH director).

- (m). What Mr Naqvi however did not say or disclose to Mr Jafar was that he was running the Abraaj entities as a massive Ponzi scheme. While Mr Jafar was aware of and accepted the emergency measures that Mr Naqvi was intending to take and had taken to manage the crisis he faced, he was not aware that Mr Naqvi was engaged in fraudulent conduct. In my view, Mr Jafar is likely to have concluded that these measures were justifiable in a crisis and would not cause any harm because Mr Naqvi would be able to resolve the problems and ensure that the Abraaj entities survived and ultimately prospered. Mr Jafar's standing as a highly regarded and leading member of his local business community, with a fine reputation, is indicative of the fact that he would not have engaged or participated in conduct which he knew to be fraudulent. It is also highly unlikely that he would have been prepared to take the risk of making the Loans had he been aware that the Abraaj entities were being run on a fundamentally fraudulent basis. His assumptions about Mr Naqvi's business acumen and ability to overcome the crisis and get him his money back were based on Mr Naqvi's standing and reputation, which could not have withstood Mr Jafar having direct knowledge of his fraudulent activities. The Fund Parties have not submitted that this was the case and I accept Mr Jafar's evidence as to this. While I have not had the benefit of Badr's evidence (or cross-examination) on precisely what he knew about the activities of and was told by his close friend Mr Naqvi, and while I have concluded that in Badr's absence the evidence justifies a series of adverse inferences and findings that are critical of Badr's conduct, I do not consider that there is a basis for finding that Badr was aware of Mr Naqvi's fraudulent conduct (emails he sent in early 2018, quoted above, indicate his anger at Mr Naqvi when it became clear that Mr Naqvi would be unable to magic away the Abraaj entities' problems and had been fraudulently commingling and dissipating investors' funds and fraudulently mismanaging the Abraaj businesses).

Was the Reinvestment Representation made?

705. For the reasons I have already set out, I consider that Mr Jafar has failed to establish that the Reinvestment Representation was made.

Were the express representations pleaded at [25] of the RRASOC made?*The Express Representations*

706. I now need to consider, in light of the findings I have made as to what Mr Naqvi said at the First 20 December 2017 Meeting, whether the three express representations pleaded at [25] of the RRASOC were made.

707. It will be recalled that Mr Jafar claimed that by the Statements, Mr Naqvi had represented that:

- (a). The Abraaj Group was not in any underlying financial trouble, it was simply facing short-term liquidity issues over the year end (I have referred to this as the First Express Representation).
- (b). It was intended that approximately US\$250 million of the loan monies would be used for the purpose of returning Uninvested Capital to the Healthcare Investors (I have referred to this as the Second Express Representation).
- (c). Mr Naqvi believed, and had a reasonable basis for his belief, that the borrower would be able to repay the money to Mr Jafar before the end of January 2018 or shortly thereafter (I have referred to this as the Third Express Representation).

The First Express Representation

708. In my view, as will be apparent from the findings I have made above, Mr Jafar has not established that the First Express Representation was made. However, I do consider that the Second Express Representation and the Third Express Representation were made.

709. As I have noted above, the existence and meaning of a representation is ascertained by construing the statement in question and determining what a reasonable person in the position and with the known characteristics of the actual representee would have understood it to mean and the statement made must be construed in context. The First Express Representation is too simple, neat and unqualified to capture fairly what a reasonable person in Mr Jafar's position and with his characteristics would have understood Mr Naqvi to have meant. While Mr Naqvi was saying that he would be able to resolve the financial problems faced by the Abraaj entities and be able to put them back on a sound financial footing, he was not saying that everything was completely resolved and did not provide sufficient information from which it could be inferred that the solution to the crisis was cut and dried or straightforward. The context in which he said that he would be able to resolve the problems was an acknowledged severe financial crisis whose cause and extent were not fully disclosed or discussed. As I have already said there was no discussion of what had caused the immediate need for US\$40 million for additional liquidity and what liabilities were falling due or overdue and in need of immediate payment. Since it was not clear why substantial further funds were needed in a huge hurry and what for, the reasonable inference was that the crisis might well not be completely under control or that further emergency liquidity demands could be avoided, or that sufficient further sums would be forthcoming from investors in response to future cash-calls. Mr Naqvi's account left open too many questions to be understood by a reasonable representee as an unqualified assurance that the Abraaj entities problems were completely contained and at an end.

710. I have found that it is likely that Mr Naqvi used words to the effect that he would be able to resolve the problems and the Abraaj entities would be put back on a sound financial footing. To that extent, Mr Naqvi did address and comment on the "financial trouble" facing the Abraaj entities. But the First Express Representation ignores the context in which the relevant statements were made by Mr Naqvi and therefore offers a distorted meaning of what

he said, and importantly what a reasonable person in Mr Jafar's position would have understood him to mean. Such a reasonable person, in light of the factors I have identified and the circumstances in which the Loans had been requested (in particular the very short notice given by Mr Naqvi, the fact that Mr Jafar was the lender of last resort, the resulting desperation and panic, the changing and rapidly increasing substantial funding needs, the onerous terms imposed by ENBD, the unresolved disagreements with the Healthcare Investors and the need for secrecy and for Mr Naqvi to adopt his dubious and potentially dangerous – in the sense that if discovered they could at least result in a challenge of his actions – emergency measures) would not have understood Mr Naqvi to be saying that the Abraaj entities were “*simply*” facing a limited liquidity problem that was completely contained and measurable such that it was clear that all the difficulties and challenges would be solved and disappear (evaporate) immediately after (“*over*”) the year end.

711. It seems to me that because Mr Naqvi had given Mr Jafar (and Badr) an insight into the severe problems that he and the Abraaj entities faced, and the need for him to take extraordinary steps to manage and resolve these problems, his words cannot reasonably be interpreted (and would not have been understood by a reasonable prospective lender in Mr Jafar's position) as giving the Abraaj entities a clean bill of health, which is what the First Express Representation involves. The First Express Representation also, as I have said, requires Mr Naqvi's words to have sent the message that all the problems would be immediately and instantly resolved by early in the New Year. In view of the steps that Mr Naqvi indicated he was required to take and the continuing uncertainties as to precisely how and when the problems would be resolved, it seems to me that the words that Mr Naqvi probably used would not have been understood by a reasonable prospective lender in Mr Jafar's position in that way.

712. Mr Naqvi did not say or represent, or in the context his statements could not reasonably be understood as saying, that the Abraaj entities were completely free from potentially life-threatening financial troubles and that all the risks and challenges would disappear and be taken care of in the New Year, because it was clear that there could well be further liquidity shortfalls and problems, that there were continuing uncertainties as to if and when further

investments would be forthcoming, whether there would be further adverse consequences of the disputes with the Healthcare Investors and what would happen if Mr Naqvi was unable to prevent details of the emergency loans made by Mr Jafar being disclosed internally or externally. So Mr Jafar was on notice of this type of potentially continuing and underlying financial trouble. What seems to me to be likely is that Mr Naqvi was saying, and a reasonable lender would have understood him to mean, that despite these difficulties, he would be able to ensure that Mr Jafar was repaid.

713. Mr Naqvi certainly did not tell Mr Jafar that he was running the Abraaj entities as a Ponzi scheme so that their financial position was misrepresented in their financial statements, extremely precarious and unsustainable in at least the medium to long term (and probably even, as it turned out, the short term). The entities were therefore for that reason in a severe state of underlying financial trouble and to that extent and in that way Mr Naqvi was deceiving and intending to deceive Mr Jafar.
714. Is this sufficient to support a finding that the First Express Representation was made, even though Mr Naqvi's statements were made in the context of acknowledging the continuing financial risks and troubles I have referred to? Can the statements made by Mr Naqvi reasonably be understood to have been saying that the financial affairs of the Abraaj entities were sound and secure for the long term and structured in a conventional and proper manner? In my view no, because of the context. The discussion between Mr Jafar and Mr Naqvi was brief and focussed on how the proposed short-term loans would be repaid. The evidence shows that Mr Jafar did not ask about and was not interested in any details beyond the high-level headlines. Mr Naqvi was saying, in the context I have described, *"don't worry, I will ensure that you will be paid. Don't worry about these financial problems, I have got them in hand and can get them sorted. It will take some manoeuvring, manipulation and economies with the truth but I have all of this in hand."* Mr Jafar assumed that Mr Naqvi would be able to deliver. He did not need or understand Mr Naqvi to be talking about the long term financial stability of the Abraaj entities – had he done so and regarded that as a point being addressed he would have asked more questions even if Mr Naqvi had made a brief reference to the historic audited accounts – he was just focussing on and understood Mr Naqvi to be talking

about the short term and assuring him as to how he (Mr Jafar) would be paid in January or February 2018.

715. The position would be different in the case of an arms' length lender who was negotiating with Mr Naqvi in a conventional lender-borrower negotiation where the prospective lender wished to be satisfied as to the long term solvency of the borrower (and relevant related parties upon whom the borrower was dependent) and had asked Mr Naqvi to confirm this (and had sought some confirmation of the basis on which Mr Naqvi had asserted that the borrower and those other related parties were in a financially sound and secure state). In such a case, as discussed below, it is likely that the borrower and probably Mr Naqvi would be taken to have impliedly represented that the borrower would be able to repay the loan when it fell due. Directors of borrowers who know that the borrower will be unable to do so will ordinarily be liable in deceit when entering into the relevant loan obligation (indeed standard form loan documentation will usually contain express representations that would cover the financial position of the borrower and the accuracy of its financial statements).
716. I do understand that the fact that Mr Jafar was not told, and was deceived, about the existence of the Ponzi scheme and the Abraaj entities' consequential financial frailties and the real risk he was taking creates considerable sympathy for Mr Jafar and a strong merits-based pressure to find in his favour and hold that Mr Naqvi made an actionable misrepresentation. But in my view the manner in which he conducted his discussions with Mr Naqvi mean that it is not possible to find that the First Express Representation was made.

The Second Express Representation and the Third Express Representation

717. It seems to me that Mr Jafar has established that the Second Express Representation was made. I do not accept the GHF Parties' submission that the Second Express Representation (and the Third Express Representation) were only implied and not express representations since none of the words that Mr Naqvi was likely to have used could be objectively interpreted as amounting to representations of intention or belief.

718. It also seems to me that Mr Jafar has established that the Third Express Representation was also made. As I have said, it seems to me likely that Mr Naqvi's key pitch and message was that he would be able to procure the repayment of the Loans on time or shortly after the agreed repayment date and when he spoke about the multiple cash generating transactions and sources of repayment of the Loans he was to be taken as saying that he had adequate and sufficient grounds for this view.

The Overarching Message

719. Since I have found that the First Express Representation was not made, it follows that Mr Jafar is unable to establish that the Overarching Message is to be implied and was implicit in what Mr Naqvi had said in light of the asserted Express Representations.

720. It will be recalled that Mr Jafar claims that three implied representations were made as a result of Mr Naqvi's express representations (my underlining):

- (a). That the finances and management or governance of the entities for the benefit of which he was seeking to raise monies were essentially sound and proper, and any liquidity issues which they were experiencing were short term (what I have referred to as the First Implied Representation).
- (b). That AGHF was one of those entities (what I have referred to as the Second Implied Representation).
- (c). That there was, or were, one or more other such entities which he did not identify by name (the Third Implied Representation).

721. As I have noted, when assessing whether an implied representation has been made the Court must consider what a reasonable person would have inferred was being implicitly represented by the representor's words (and conduct) in their context. The Court must assess

whether the alleged implied representation would be objectively understood to have been made from those words.

722. In my view, the First Implied Representation cannot be implied from what Mr Naqvi said. The findings I have already made and set out above explain why.
723. For the reasons I have just explained in relation to the First Express Representation I consider that a reasonable person in Mr Jafar's position would not have inferred that Mr Naqvi was implicitly representing in the unconditional and unqualified terms set out in the First Implied Representation that the finances of the Abraaj entities to which Mr Naqvi referred, or was reasonably understood to have referred were "*essentially sound*."
724. For the reasons I have already explained I consider that a reasonable person in Mr Jafar's position would not have inferred that Mr Naqvi was implicitly representing in the unconditional and unqualified terms set out in the First Implied Representation that the management or governance of the Abraaj entities to which Mr Naqvi referred, or was reasonably understood to have referred, were "*essentially sound and proper*." As I have found, it is likely that Mr Jafar appreciated that Mr Naqvi was acting and going to act inconsistently with important aspects of the rules of proper governance. It is likely that he knew and accepted that Mr Naqvi needed to and would avoid disclosing the details of the Loans to the AH non-executive directors or to AH's auditors. It is likely that he knew and accepted that Mr Naqvi needed to and would manufacture remittance records to avoid the payments being treated and booked as loans. It is likely that he knew and accepted that Mr Naqvi was engaged in some manipulation of financial records artificially to increase the number of investments apparently held by Abraaj entities so as to present a more favourable picture to the auditors and in the relevant financial statements. A reasonable person in Mr Jafar's position with this knowledge and understanding would not have inferred that Mr Naqvi was implicitly representing that the "*management or governance of [the relevant entities] were essentially sound and proper*."

725. For the reasons I have already explained I do not consider that a reasonable person in Mr Jafar's position would have understood Mr Naqvi to be addressing in his remarks the financial position or governance of the indirect recipients of the funds to be advanced by Mr Jafar (or to be giving assurances as to such matters on their behalf). There was no discussion of the management and governance of the Funds save that Mr Naqvi did say that AGHF was acting within its rights in not repaying the Uninvested Capital and in giving the Uninvested Capital to the Abraaj central treasury function to invest and spend. Mr Jafar did not raise the issue of proper governance or invite Mr Naqvi to provide him with any assurances as to this (as he easily could have done).
726. I would add that the fact that in truth the Abraaj entities were being run as a Ponzi scheme is not sufficient (by itself) to support the implication of a representation by Mr Naqvi that those entities were not being so run. As I have already said, I accept the Fund Parties' submission that the helpful test (whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would necessarily have been informed of it) will not assist Mr Jafar on this point. As I have explained above by reference to the relevant authorities, it is not *sufficient* (on its own) for the implication of a representation that a reasonable representee would naturally assume that the true state of affairs did not exist and that they would have been informed of it. While the test has been used at the stage of deciding what if any representations have been made, the counterfactual of truth (what would the plaintiff have done had he known the true position) does not on its own stand in as a substitute for the application of the proper test for assessing what on the facts a reasonable representee would have understood the representor implicitly to be saying. All the circumstances must be taken into account and there is a need for clear words or conduct from which the relevant representation can be implied. In my view, as I have explained, and even taking into account the helpful test, I consider that Mr Jafar has not established that Mr Naqvi is to be treated as having implicitly made or delivered the Overarching Message.
727. I did not take Mr Jafar's pleaded case or his submissions to be asserting based on the application of the helpful test that Mr Naqvi impliedly represented that there was no Ponzi

scheme. But he did refer to the helpful test (see for example [596] of his Written Closing Submissions) and argued that its application, as one but an important factor to be taken into account, supported his case as to how Mr Naqvi's words should be interpreted and as to the implied representations that he should be treated as having made. But Mr Jafar's case is based on what Mr Naqvi said and the context in which he said it as I have explained this is an unusual case by reason of the circumstances in which Mr Naqvi requested and Mr Jafar advanced the Loans and Mr Jafar's position, knowledge and understanding (including that gleaned from Badr) and reasons for making the Loans. When Mr Naqvi's (likely) statements are evaluated in light of all these factors and the context it appears that Mr Jafar is unable to establish that the Overarching Message was given. The helpful test would have significant weight in the case of an arm's length lender without the insider knowledge that Mr Jafar had (because of Badr's close relationship with Mr Naqvi and of the disclosures that Mr Naqvi made to support his pleas for the emergency funding) who was interrogating Mr Naqvi about the financial position of the Abraaj entities and undertaking the usual due diligence. I can see that the expectation that such a person would reasonably and naturally assume that the Abraaj entities' financial position was not compromised and put at serious risk by a Ponzi scheme and that he would necessarily have been informed of such fundamental problems would be a powerful indicator that Mr Naqvi should be taken to have been implicitly confirming that there were no such problems. But, as I have sought to explain, that is not this case.

Was the Overarching Message impliedly made as a result of the signing of the AIML cheques?

728. In his oral closing submissions, Lord Falconer referred (Day 25, pages 100-104) to the judgment of Flaux J in *Lindsay*, to which we will return when considering section 6 of the Mercantile Act, and appeared to argue that the part of the Overarching Message that related to the relevant Abraaj entities' (Lord Falconer argued that the Funds were covered) ability to repay the Loans and as to their solvency was to be implied from Mr Naqvi's signing of the AIML cheques.

“Had the representation not been made - and this is a thought experiment, just to test it - suppose he had said, “Will you lend me \$350 million?” “Yes, certainly, here’s the money.” Then there would be in question of deceit because nothing was said that was deceitful, though, subject to this, the law is quite astute to say that if you give any sort of indication that you will repay, that equals an implied assertion that you are not insolvent. The authority for that is paragraph 106 of Flaux J in Lindsay v O’Loughnane But the key point that Flaux J is making is that the signing of the trade note by the director equals a representation by the director that the company is able to pay its debts... In those circumstances a representation by Mr Naqvi, in this case on behalf of the funds, saying they can repay, which is exactly what he was saying, has exactly the same effect, and the signing of the postdated cheques gives exactly the same message from him, because he signs, along with somebody else, the postdated cheques..... The other point about it is remember that the persons who signed the cheques were Mr Naqvi on the one hand and had Mr Lakhani on the other, who is a director of the funds -- both funds. He is a director of ADV1 and a director of [AGHF].” (Day 25, pages 100-104)

729. The problem with an argument to the effect that the cheques were the source of the Overarching Message (or a key part of it) and the basis for Mr Jafar’s implied representation case is that Mr Jafar’s case is not pleaded in this way (and in any event the ability to repay representation is only one part of the Overarching Message).

By reason of my findings as to what representations were made Mr Jafar’s Cayman Islands law deceit claim fails

730. On the basis that I have found that the Reinvestment Representation and the First Express Representation were not made and that the First Implied Representation was not implicit in what Mr Naqvi said, in the terms pleaded by Mr Jafar, it follows that Mr Jafar’s claims in deceit as a matter of Cayman Islands law fail and fall to be dismissed. His claims were based on the Reinvestment Representation having been made and the Overarching Message in its entirety having been implicit in what Mr Naqvi had said.

Would a claim in deceit have succeeded based on what I have found that Mr Jafar was told – inducement?

731. I discuss below in more detail (when considering the position if I am wrong about what Mr Naqvi said to Mr Jafar) the requirement that before the presumption of inducement in fraud

cases can arise a fraudulent representation must have affected the representee's mind by generating an erroneous belief. I also consider what is needed to rebut the presumption if it applies. But before considering what the position would have been had the Reinvestment Representation been made and the Overarching Message been implicit in what Mr Naqvi said, in the terms pleaded, I need to consider whether Mr Jafar could have succeeded in a deceit claim based on what I have found that he was in fact (likely to have been) told.

732. As regards what Mr Naqvi said and what Mr Jafar understood him to be saying:

- (a). Mr Naqvi spoke about the combined but undifferentiated liquidity needs and problems of the Abraaj entities. He identified the particular problems of AGHF and the need to repay the Uninvested Capital but did not go beyond that by identifying the manner and route by which funds would be channelled to AGHF to enable this to be done.
- (b). Nor did Mr Naqvi discuss or identify any other Abraaj funds or other Abraaj companies that were suffering and had the urgent need for the additional liquidity that he referred to and had caused him to request an increase in the loans to be advanced by Mr Jafar. He therefore did not discuss or identify for whose benefit the funds were to be advanced by Mr Jafar beyond saying that they would need to be used (by some unspecified payment mechanism) to repay the Healthcare Investors.
- (c). Mr Naqvi did not identify or refer to and Mr Jafar had no understanding of which Abraaj entities would be the indirect recipients of the loan advances he was to make let alone details of their financial status and position, save that it was understood that the Healthcare Investors would need to be repaid their Uninvested Capital (by or on behalf of AGHF). The manner in which the repayment would be made and the Abraaj entity that would make the repayment was not discussed. Mr Jafar understood that US\$250 million was required to repay the Uninvested Capital and that there were additional urgent liquidity needs of at least US\$40 million in other unidentified Abraaj entities.

- (d). Mr Naqvi never indicated that he was talking for or seeking to represent or bind, so as to give rise to any formal or legal commitments or obligations, any particular Abraaj entity but there was an understanding between Mr Naqvi and Mr Jafar that when Mr Naqvi was discussing the loans it was likely that the borrower would be AH (as the ultimate parent company) and it was assumed that, in the absence of anything to the contrary, that it would only be the borrower subsequently identified (by the relevant documents and the advance of the Loans) who would assume any liabilities in respect of or responsibility in relation to the Loans. It was also assumed that funds would be disbursed and paid out by AH (or the entity agreed to be the borrower) in any manner that Mr Naqvi considered to be appropriate. No decision or agreement was made as to the identity of the identity of the borrower at the First 20 December 2017 Meeting or until the AIML cheques were issued and the facility documentation agreed.
- (e). Mr Naqvi had told Mr Jafar that certain major investors such as Mr and Mrs Gates in AGHF had demanded the return of the Uninvested Capital and that their demands for the return of the Uninvested Capital were unjustified and without a proper legal basis (a view that was supported by written advice from Freshfields). Mr Naqvi said that nonetheless, the Uninvested Capital had to be repaid urgently because a failure to do would cause irreparable reputational and consequential damage to Abraaj.
- (f). Mr Jafar understood that the rights and wrongs of the Healthcare Investors' demands were contested and that there was an ongoing dispute with them but accepted without question or further inquiry what Mr Naqvi said and assumed that there were at least good grounds for Mr Naqvi's view that the demands for the return of the Uninvested Capital were unjustified and without a proper legal basis.
- (g). Mr Naqvi had also told Mr Jafar that the Uninvested Capital had been placed with the Abraaj treasury function (probably by way of a loan from the funds to AH) and that at least a material part of the Uninvested Capital had been spent by paying liabilities incurred for general business purposes, so that much of the Uninvested Capital was not retained.

- (h). Mr Naqvi also told Mr Jafar that the use and disbursement of the Uninvested Capital in this way was permitted by the relevant agreements with the Healthcare Investors although it was probably clear or to be inferred and Mr Jafar understood that the Healthcare Investors did or might well not accept this. So Mr Jafar appreciated that the issue might be contested but once again accepted without question or further inquiry what he was told by Mr Naqvi and assumed that the use and spending of the Uninvested Capital could have been permitted.
- (i). Mr Naqvi told Mr Jafar that Abraaj was facing a liquidity crisis and that substantial funds were needed immediately in order to avoid disaster, including the collapse and insolvency of Abraaj and the destruction of Mr Naqvi's businesses and reputation. Mr Jafar understood that Mr Naqvi and the Abraaj entities were on the brink of collapse.
- (j). Mr Naqvi told Mr Jafar that despite these serious problems he would be able to find solutions that would resolve the problems and ensure that Mr Jafar would be repaid on or near the proposed repayment date of 31 January 2018. He said that he would be able to arrange for the funds advanced by Mr Jafar to be repaid and that Mr Jafar need not be concerned about non-payment. There were various and multiple sources of cash which would fund repayment including proceeds from the sale of the shares in Karachi Electric Company, the imminent sale of AH treasury shares and further investments to be made during January 2018 by the Healthcare Investors. Mr Naqvi told Mr Jafar that in order to stabilise and manage the crisis he would need to avoid details of the emergency loans being disclosed (either to the whole AH board or the auditors) or becoming public at least until matters had settled down. Mr Jafar understood that Mr Naqvi needed to cover up and keep the lending secret for the time being and to misdescribe and misrepresent the purpose for which the funds to be paid by Mr Jafar had been advanced. He also appreciated that the Abraaj entities would be facing continuing risks and difficulties after his loans had been advanced because of the continuing disputes with the Healthcare Investors, their continuing and potentially increasing liquidity needs which had not been discussed in any detail and could be higher than the \$40 million sum added to his loans, and because of Mr Naqvi's cover-up and emergency

measures. But he accepted without question or further inquiry Mr Naqvi's assurance that he would be repaid the Loans.

733. This is a summary of my findings as to the statements that were probably made by Mr Naqvi and Mr Jafar's state of mind in response to them. This shows that what Mr Naqvi said was in Mr Jafar's mind at the time he made the decision to lend. In addition, on the basis that Mr Naqvi deliberately failed to disclose to Mr Jafar that the Abraaj entities were being run as a Ponzi scheme so that the risks involved in making the Loans were substantially greater than the risks he had disclosed, Mr Jafar was affected by and subject to an erroneous belief resulting at least in part from what Mr Naqvi said. He was aware from what Mr Naqvi had said of a certain type of risk and of certain facts and matters relevant to an assessment of the risk but not aware of the full range of risks to which his lending was subject. It seems to me, however, that what Mr Naqvi said and any resulting misrepresentation did not extend to or involve assurances as to the long-term solvency of the Abraaj entities. Mr Naqvi and Mr Jafar were focussing on the short term and Mr Naqvi's ability to arrange for the repayment of the First Loan and the Second Loan early in the New Year. Nonetheless, what he said about the challenges and difficulties faced by the Abraaj entities misrepresented the level of risk of non-repayment to Mr Jafar. While it is possible that Mr Naqvi believed, and to my mind Mr Jafar has not proved that Mr Naqvi did not believe, that with the funds to be advanced by Mr Jafar he had a realistic chance that he could avoid an Abraaj collapse and continue the Ponzi scheme, his assurance as to his ability to arrange for repayment of the Loans would have brought with an implied representation that his belief was based on reasonable grounds which, because of the risks associated with the discovery of or failure of the Ponzi scheme, would have been untrue.

734. In these circumstances the presumption of inducement would arise and it would have become necessary to consider whether the Fund Parties would have been able to rebut it and to establish on the evidence that there was no inducement. While recognising that rebutting the presumption is not easy and that the Court is required to be convinced on the facts that there was in fact no inducement, it seems to me that in this case the facts as I have found them show that there was no inducement. Mr Jafar heard but did not rely on what Mr Naqvi said.

Mr Jafar's decision to lend was based on the *assumptions* he made about Mr Naqvi's ability to resolve the crisis he found himself in and to find a way of repaying Mr Jafar, he paid no serious attention to and gave no real weight in his decision making to the discussion as to who would be the borrower, the precise financial position of the Abraaj entities, how the Uninvested Capital had been held or spent, how the Healthcare Investors would be repaid, to and through whom the Loans would be on-lent and disbursed, and the sources of cash out of which repayment of the Loans would be funded. What Mr Naqvi told him about these matters was of no real or substantial significance in his decision to lend.

735. As I have already said in my view Mr Jafar's decision to lend was based primarily on his assumptions about Mr Naqvi's exceptional business abilities, his wealth and the size, standing and success of the Mr Navi's businesses, which caused him to assume that Mr Naqvi was able to control the crisis at least for the relatively short period before the Loans were to be repaid and to find the funds needed to effect the repayment. He was also influenced by the substantial return that he was being offered which would be earned in return for a short-term investment, and the need to protect a substantial investment of his own (or that he controlled). He was aware of the serious problems and challenges faced by Mr Naqvi which would require expert navigation through the stormy waters affecting Mr Naqvi's businesses but assumed, based on what he knew about Mr Naqvi and his stellar reputation, that Mr Naqvi had the requisite expertise. He was also influenced by the need to bail out a local business hero and the entreaties of Badr to save his close friend. The underlying facts and details concerning the financial position of the Abraaj entities and how the funds to be advanced would be deployed were so secondary not to be worthy of his serious attention (let alone checking and validating) and for that reason of no real significance.

736. Mr Jafar's assumptions were, sadly for him, mistaken. As was made clear in the judgment of Justice of Appeal Geoffrey Bell in the Bermuda Court of Appeal in *Credit Suisse Life (Bermuda) Limited v Ivanishvili and others* [2023] CA (Bda) 13 Civ. and in the judgment of Mrs Justice Cockerill in *Loreley* the reliance on assumptions is insufficient.

737. In *Credit Suisse* (a case admittedly involving a different fact pattern from the present case since there was a claim based on conduct by CS Life which was said to give rise to an implied representation and not something said to the plaintiff directly) Bell JA said this at [262] (my underlining):

“The Chief Justice held that, in appropriate circumstances, an implied representation, intended by the representor to be relied upon by the representee, which is accompanied by evidence that the representee would not have entered into the agreement if he had known the true position can be sufficient to found liability for misrepresentation. In my view this formulation elevates what is, in essence, an assumption of the representee (that the Bank had been and would continue to be honest) into an understanding that a representation had been made; elides the difference between representation and non-disclosure; and entitles the Plaintiffs to a claim in misrepresentation based upon assumption alone, which is insufficient.....

738. In *Loreley*, Mrs Justice Cockerill said (at [392]) as follows at (my underlining) when considering the application of the helpful test and the hypothetical of truth in the context of the inducement analysis:

“But it only works when there are not competing causes for the action; and particularly the possibility – of huge import in cases such as this one where representations of honesty are posited – that the representee's own pre-existing (mistaken) assumption may be operating.”

739. Mr Ayres put the point well in his oral closing submissions (Day 27, page 23):

“The reality, the heart of this, is that any person's mistaken assumptions about a state of affairs, however reasonable or natural those assumptions might be, is not the same thing as a statement having been made about that state of affairs by an alleged tortfeasor. It is the tremendous danger of considering assumptions as constituting representations. The Loreley Financing case is one of the cases which confirms the orthodox point of view from English law that in terms of contractual situations there is no general duty of good faith, and obviously you can omit to say things and obviously the law deals with situations in which there is dishonest nondisclosure and omission but the reality is the starting point is that you do not have to say things, and obviously different systems of law may operate on different bases, there may be principles of good faith in different systems of law that infect the process of contracting and also performing contracts but that does not apply to English law and we would submit should not apply as far as the Cayman law of representation is concerned.”

What would the position have been if the Reinvestment Representation and the Overarching Message were made out?

740. In case I am wrong on the question of what was said and what representations were made by Mr Naqvi I need to go on and consider the position if the correct view is that the Reinvestment Representation was made and the Overarching Message was implied. For the reasons set out below, I consider that Mr Jafar's claim in deceit would still fail since he has failed to establish that he was induced to make the Loans by what Mr Naqvi said. I have assumed for this purpose that Mr Jafar would be able to establish that the Reinvestment Representation and the Overarching Message were false. Since I have decided that the deceit claim fails to overcome the inducement hurdle, I have not gone on to set out and review (and have thereby avoided adding to an already overly long judgment by discussing) the evidence and disputes as to whether any elements of those representations were true or believed by Mr Naqvi to be true. It seems to me that the evidence shows however that it is very unlikely that had Mr Naqvi made the Reinvestment Representation or made the Overarching Message any material parts of these representations would have been true or that he would have believed them to be true.

741. The first issue is whether Mr Jafar would have shown that Mr Naqvi understood that he was making the Reinvestment Representation and that the Overarching Message was implicit in what he had said. Mr Jafar must establish the meaning that Mr Naqvi subjectively would have intended to convey by the Reinvestment Representation and the Overarching Message. A representor, as I have noted, must understand that he is making the express or implied representation and that it had the misleading sense alleged. It is necessary to show that the representor intended his statement to be understood by the representee in the sense in which it was false. It is also necessary that there would have been an intention that the representation should be acted on and for the statement relied on to have the character of a statement upon which the representee was intended, and entitled, to rely. If the statement in question was accompanied by other statements by way of qualification or explanation which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement or was saying that no reliance could be placed upon it, then the statement would not support a claim in deceit.

742. The Fund Parties did not challenge that these requirements would have been satisfied had Mr Naqvi said what was pleaded as the Reinvestment Representation and said words that supported the implication of the Overarching Message. Nor did they seriously challenge the claim that in such circumstances Mr Naqvi would have intended to mislead and misrepresent the position to (and thereby deceive) Mr Jafar although they did argue that some of what Mr Naqvi had said was true and not materially false. What they did challenge head on was Mr Jafar's claim that even if the Reinvestment Representation had been made and the Overarching Message implied he had relied on and been induced to make the Loans by them.
743. As I have noted, for a plaintiff to establish reliance he must show that he understood the representation to have been made, including in the sense alleged and that he did, in fact, rely on the representation in the sense intended by the representor. For a claim in deceit to succeed the plaintiff must have given some contemporaneous conscious thought to the fact that the alleged representations were being impliedly made. It is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee. The core question is what the state of the plaintiff's (representee's) mind was, whether his mind was impacted or affected by the misstatement and whether such impact was at least in part the cause of what he did (it was a cause or one of the causes but not necessarily the only cause). Was the representation one of the reasons why the representee decided to act as he did (to enter the relevant contract)? Was the representation of no real significance?
744. While the onus of proof is on the representee to prove inducement, in a fraud case, as I have noted, there is an evidential presumption of fact (not law) that a representee will have been induced by a fraudulent misrepresentation intended to cause him to enter a contract which will be very difficult to rebut. Where the plaintiff has the benefit of that evidential presumption he only needs to show that the misrepresentation was actively present in his mind when he made the decision to enter into the relevant transaction. But even in such a case the requirement of awareness precedes the presumption of inducement.
745. On the basis that Mr Jafar is able to establish that the Reinvestment Representation was made and the Overarching Message implied, and that Mr Naqvi knew these representations to be

false and intended Mr Jafar to rely on the representations, the deceit presumption of inducement would arise if Mr Jafar was able to establish that these misrepresentations were actively present in his mind when he made the decision to make the First Loan (and the other Loans).

746. The Fund Parties argued that Mr Jafar had not established that the Overarching Message was present in his mind at the time that the Loans were advanced. They submitted that even if the Overarching Message was capable of being implied from the statements and representations made by Mr Naqvi it was far too vague to have been actively present in Mr Jafar's mind or to have been operating on his mind. They also submitted that the Reinvestment Representation and the Overarching Message were causally irrelevant, so that Mr Jafar could not show that he had been induced by them to make the Loans.
747. So, before considering the issue of inducement, the first question is whether had the Reinvestment Representation been made and the Overarching Message implied the evidential presumption would apply, as Mr Jafar claimed, so that it was for the Fund Parties to establish that it has been rebutted on the evidence.
748. I do not accept the Fund Parties' claim that the Overarching Message was so vague and imprecise that it could not have been present in or operating on Mr Jafar's mind. I do accept though that the multilayered formulation of the Overarching Message, which was said to be based on statements which gave rise to express representations from which implied representations were said to be implicit, was complex and made it more difficult for Mr Jafar to show that Mr Naqvi had intended to make statements, and that Mr Jafar understood Mr Naqvi as making statements, explicitly and implicitly, that matched such a complex structure. But the Overarching Message was sufficiently precise and comprehensible to make sense to Mr Jafar and have an impact on his mind and understanding of the relevant background facts. The multilayered formulation recognised that Mr Naqvi had not said very much and had not directly addressed the long-term financial position of the Abraaj entities, spoken about or identified the entities for whose benefit he was negotiating the First Loan save for his reference to the need to repay the Healthcare Investors or discussed the

governance or financial standing of such other entities. Mr Jafar had to stretch his case to include an implicit reference to the funds other than AGHF and to their governance and financial standing. As I have said above, I consider that this was too much of a stretch and the evidence does not support this aspect of Mr Jafar's case and the Overarching Message. But if I am wrong about that, and the right conclusion is that the Overarching Message was implicit in what Mr Naqvi said, as pleaded, it seems to me that Mr Jafar would have been able to show that the Overarching Message (and the Reinvestment Representation) were sufficiently present in his mind to engage the inducement presumption. They impacted and in part shaped his view of the relevant factual background and of matters relating to the Abraaj entities' ability and capacity to survive and repay his loans, as well as confirming the entities for whose benefit the Loans were sought. Once again, on the basis that Mr Naqvi deliberately failed to disclose to Mr Jafar that the Abraaj entities were being run as a Ponzi scheme Mr Jafar's understanding of these matters and the relevant background to the request for the First Loan (and the other Loans) in order to persuade him to advance the Loans, the view that Mr Jafar had formed of these facts and matters was erroneous and had resulted at least in part from what Mr Naqvi said.

749. As the passages in the judgment of Mr Justice Jacobs in *Vald Nielsen* that I have quoted above make clear, the critical issue (or real question) is whether the relevant representation can be said to have had an impact on the plaintiff's state of mind and thinking (was his mind "disturbed" by the misstatement). It must have produced in his mind an erroneous belief. This is what must be shown for the evidential presumption to apply. If it does, the next question is whether there has been an inducement and whether the defendant can rebut the presumption by adducing sufficient evidence to show that there was in fact no inducement. The authorities make it clear that rebutting the presumption is not easy. I shall return to the inducement issue after considering whether had the Reinvestment Representation been made and the Overarching Message been implied they could be said to be actively present in Mr Jafar's mind in this sense when he made the decision to lend.

750. The question is whether the Reinvestment Representation and the Overarching Message, if made and implied, would and can be said to have affected Mr Jafar's mind by generating an

erroneous belief. It seems to me they would have done so. Mr Jafar would have believed that the reinvestment of substantial funds by the Healthcare Investors early in the New Year was guaranteed. He would have believed that the financial problems being faced by the Abraaj entities were a blip which would be completely resolved early in the New Year without the need for any risky dissimulation or departures from the requirements and standards of good governance (and action that could be said to be inappropriate for a director of AH to take). He would have focussed on and been reassured about the long-term sustainability and solvency of the Abraaj entities. He would have understood the identity of and focussed on the indirect and ultimate recipients of the loan advances for whose benefit they were made.

751. The question then would have arisen as to whether the Fund Parties would nonetheless still have been able to rebut the presumption and show that there was no inducement on the facts of this case. In my view, despite the significant differences between the express and implied representations that I have found to have been made by Mr Naqvi and the much wider scope and unqualified nature of the Reinvestment Representation and the Overarching Message, they would still have been able to do so. This is because the increased scope and unqualified nature of the representations would not change the fundamental point that Mr Jafar was not focussed on, paying attention to or taking into account the content of what he was told by Mr Naqvi beyond paying superficial attention to the headlines of what Mr Naqvi had said. He was basing his decision making on his prior assumptions as to Mr Naqvi's standing, expertise, control of the Abraaj entities and their cash flows and Mr Naqvi's loyalty to Badr and the Jafar family that would drive and enable him to get the Jafar family's money back. The precise nature, extent and impact of the problems with the Healthcare Investors and the reasons for and extent of the liquidity crisis that had generated the need for substantial further funds beyond the sums needed to repay the Healthcare Investors were of no concern. He (Mr Jafar) took it as read that Mr Naqvi would be able to handle the situation and ensure that he would be repaid with a handsome profit (and ultimately preserve the Abraaj businesses that thereby ensure that his investment would be protected and preserved).

752. For there to be inducement, the representation which is actively present in the plaintiff's mind must also in fact have influenced and acted on his decision making (so as to be one of the causes of what he did). It is sufficient for the misrepresentation to be an inducing cause of the plaintiff entering into the transaction on the terms that he did. It is not necessary for it to be the sole cause. For this purpose, it is not appropriate to try to measure the precise weight of a misrepresentation where it is one of the reasons why a representee has entered a contract. The key question becomes whether it can be said that the misrepresentation was of no real significance. If the Court is satisfied that the representation was of no real significance it will decline to hold that it was one of the reasons which induced the contract. If, however, it was a matter of significance, the decision will be the other way.
753. I have already identified the reasons why I have concluded that Mr Jafar's decision to lend was based on his assumptions about Mr Naqvi's exceptional business abilities, his wealth and the size, standing and success of the Mr Naqvi's businesses. See [719] above.
754. I recognise and take into account the guidance in the authorities that make it clear that there is a high threshold to be reached before the presumption will be treated as rebutted (although ultimately it remains a question of fact in the circumstances of the case to be assessed by the Court). But this seems to me to be a case in which the Fund Parties would be able to satisfy the test and where the evidence taken as a whole and in context demonstrates that Mr Jafar has been unable to show that he would have been induced to make the Loans by reason of the Reinvestment Representation and the Overarching Message. As I have said, because Mr Jafar's decision to lend was based on the *assumptions* he made about Mr Naqvi's ability to resolve the crisis he found himself in and to find a way of repaying Mr Jafar, he paid no real or material attention when making his decision to lend, to the discussion as to who would be the borrower, the precise financial position of the Abraaj entities, how the Uninvested Capital had been held or spent, how the Healthcare Investors would be repaid, to and through whom the Loans would be on-lent and disbursed, and the sources of cash out of which repayment of the Loans would be funded. The matters covered by the Reinvestment Representation and the Overarching Message were, in the circumstances, of no real significance to his decision making. As the Fund Parties submitted, the evidence shows

(either directly or by inference) that these express and implied representations did not have a causative effect in the relevant sense (see for example the GHF Parties' Written Closing Submissions at E2.2 (which rightly pointed out that the causative irrelevance of the Reinvestment Representation and the Overarching Message was made especially clear during Mr Nerguizian's cross-examination and his response to my questions)).

755. Lord Falconer said that *Vald Nielsen* was his best case and the authority that was closest to the facts of this case, and which set out the analysis he relied on. But I do not see that the facts of *Vald Nielsen* can be said to be analogous to the facts of the present case or that the decision assists Mr Jafar's case. That was a case of an alleged express representation based on a document (an email) which was a written response to specific questions being raised in another email by an arm's length prospective seller of the company in question. The following passages from Mr Justice Jacobs' judgment show that there was a substantially different underlying factual situation and therefore that different issues were addressed in *Vald Nielsen* (my underlining):

"What, if any, factual representations were made in the 20 April e-mail?"

171. *This is a case where express representations were made in a particular e-mail. The question of what representations of fact were made is in my view to be answered by construing that e-mail in the context in which it was made, and interpreting the statements objectively according to the impact that they might be expected to have on a reasonable representee in the position and with the known characteristics of Mr. Johnsen...*

172. *Read in that context, it seems to me that there are a number of clear factual representations, which are material for present purposes.*

...

176. *....there is in my judgment no difficulty at all in concluding that there was a representation in the terms pleaded in paragraph 48 (2) of the Re-Amended Particulars of Claim, namely, that "the figures in the Financial Overview represented the UK management's genuine (and current) forecast of Updata UK's financial position". Indeed, this is a classic case where, as discussed in Clerk & Lindsell paragraph 18-13, a party provides a representation of his opinion as to what will happen in the future, and the law has no difficulty in saying that the opinion must be honestly entertained at the time that it is made.*

For reasons explained hereafter, I consider that this representation alone is sufficient for the purposes of the Claimants' case based upon deceit in relation to the 20 April email. Nevertheless, I will address the other representations which are set out in paragraph 48 of the Re-Amended Particulars of Claim.

177. Paragraph 48 (1) of the Re-Amended Particulars of Claim pleads a representation that "the UK management had a reasonable basis for believing the figures included in the Financial Overview to be correct". The formulation of this representation can be criticised because, in the context of a forecast as to what results will be in the future, it is inappropriate to say that the figures are "correct"; at least if "correct" means that what will actually happen in the future. However, the Claimants did not contend that this pleaded representation was to be understood in that rather literal way. Rather, this pleading is intended to reflect the type of representation discussed in paragraph 18-14 of Clerk & Lindsell; namely a representation that by expressing an opinion (here as to the future results), the representor impliedly states that he believes that facts exist which reasonably justify it. I consider that in the circumstances of this case – where the senior Updata UK management knew the up-to-date information and where there was an imbalance of information between the management and the representatives of Updata Europe – such a representation was made. Indeed, this is in my view the substance of the representation pleaded if the words "to be correct" were omitted: i.e. a representation that the UK management had a reasonable basis for believing the figures included in the Financial Overview.

...

179. I also consider that the representations pleaded in paragraphs 48 (4) ("that all the information which was material and/or relevant to Updata UK's financial position and/or the value of Updata UK had been made available to the European Vendors"), 48 (5) ("that there was no other relevant or material information to disclose") and 48 (6) ("that the UK management had not provided to LMS and/or Tenon any information which the European Vendors did not also have") are not made out on the basis of the 20 April e-mail. These are all, in my view, far too broadly expressed and cannot reasonably be derived from the statements made in the 20 April e-mail.
180. However, that e-mail did state, in response to the request for the latest budget for the years in question, that the "projections used were the same that we presented to Helge Homan and Jens in March". It was common ground that the "projections used" referred to projections used by LMS. The first sentence of the e-mail referred to the "numbers used by LMS". The statement in the second sentence as to the "projections used" is equally to be read by reference to what LMS had used. In context, any reasonable representee would understand that he was being told that these were the projections which had been provided to LMS by Updata UK's management (just as they had been provided to Mr. Homann and Mr. Nielsen) and that these were the projections which had been used, in

the sense of being considered or evaluated, by LMS in deciding upon their offer. In my view, this is the objective interpretation of what was said in the second sentence.

...

G: Inducement

The parties' arguments in relation to the forecasts

392. The Defendants argued that these representations played no real or substantial part in inducing the EVs to sell. In his oral closing submissions, Mr. Choo Choy emphasised a number of points. There was no contemporaneous evidence of any reliance being placed either on the 20 April e-mail or on the 3 June e-mail or its attachments. It was not as if the EVs were actively considering the contents of those documents in terms of valuing their shares. There was no analysis of what the figures implied or meant in terms of what was offered. There was no evidence that Mr. Johnsen used the figures which he was given in any tangible way, to try to either assess the acceptability of the LMS offer or try to influence it. That explained why no-one on the Udata Europe side picked up the oddity about the contents of the Updated Kelso Presentation; specifically the fact that one of the slides indicated that new contracts had been won in 2009, but the "best case" figures were nevertheless exactly the same as those in the Financial Overview.
393. The Defendants submitted that even if the lower figures being shown to Mr. Nielsen in the Updated Kelso Presentation had a causal impact, because higher figures might have led to a higher price being offered, that was not the same thing as the EVs relying on and being induced in any relevant legal way by the representations. This was a case where a sale process was already in train, and the only causal impact of the representations was on the course of the bidding process and the resulting price being offered. But it played no real and substantial part in the decision of the EVs as to whether to transact. Although Mr. Johnsen and others on the Udata Europe Board may have wanted to understand the basis of the offer being made by LMS, that did not mean that they were themselves relying on the information when deciding whether or not to sell; because the decision to sell was "essentially predetermined", and the level of offer ultimately came through the bidding process. At best, therefore, the figures may have been given a cursory glance. The evidence as to what happened to the 3 June e-mail was consistent with this proposition: it was not forwarded either by Mr. Birkeland or Mr. Holm to the other members of the Board, and that is why there was no evidence of any Udata Europe Board discussion or consideration of the contents of the Updated Kelso Presentation.
394. Ultimately, therefore, there was no real inducement by the forecasts themselves in terms of the ultimate sale, certainly in terms of the decision to sell, which had been essentially preordained or predetermined by the Bank's course of action, or as to the price level.

Analysis and conclusions

395. In my judgment the representations made in the 20 April 2009 e-mail, and those in the Updated Kelso Presentation, were an inducing cause of Updata Europe entering into the transaction with LMS on the terms that it did. In so far as this is a necessary legal requirement, I consider that they played a real and substantial part in Updata Europe's decision. In this respect, the Claimants have the benefit of an evidential presumption which is difficult to rebut, and none of the points made by the Defendants has persuaded me to hold that it has been rebutted.

396. *In reaching these conclusions, I have taken into account the contemporaneous documents and the inherent probabilities, as well as the evidence of Mr. Johnsen and Mr. Hildebrandt. I start with the former.*

The contemporaneous documents and inherent probabilities

397. The starting point in my view is the 20 April e-mail itself. Mr. Johnsen was seeking out information a matter of days after the LMS offer: the offer had been made on Thursday 16 April and Mr. Johnsen asked for the information on the following Monday morning. The Defendants accepted the obvious fact that Mr. Johnsen was doing this in order to evaluate the LMS proposal. He was clearly doing this because the information requested was highly material within the context of what was happening at that time.

756. For the reasons I have already given, I also do not consider that Mr Jafar has established that Mr Naqvi when participating in the First 20 December 2017 Meeting or the subsequent discussions said, or that a reasonable person in Mr Jafar's position would have understood Mr Naqvi to be saying when making the Reinvestment Representation or the statements from which the Overarching Message was alleged to be implied, that he was talking or was purporting to talk for or making commitments or giving assurances on behalf of, the Funds. To the extent that Mr Naqvi made any statements intended to induce Mr Jafar to make the Loans in the context they were intended to be made, and a reasonable person in Mr Jafar's position would have understood that they were only being made by Mr Naqvi on behalf of the entity (or entities) who incurred liabilities and/or assumed responsibilities in respect of the Loans as borrowers (and Mr Naqvi was a director of both AH and AIML). I discuss below (under the heading "Attribution") the separate question of whether, if I am wrong on this point, and the proper finding of what Mr Naqvi said and the proper interpretation of his statements is that he was intending to speak for, and that a reasonable person would have

understood him to have been acting and making representations on behalf of, the Funds, the representations so made can properly be attributed to the Funds.

Section 6 of the Mercantile Act (1997 Revision)

The Fund Parties' position in outline

757. The Fund Parties argued that section 6 of the Mercantile Act (**Section 6**) applied to the Overarching Message and the Reinvestment Representation such that if the Court accepted Mr Jafar's case and found that they had been made or implied and had induced Mr Jafar to advance the Loans nonetheless Mr Jafar was prevented from bringing an action based on them because they had not been made in writing and signed by the Funds.

Section 6 and the authorities that consider its meaning and effect

758. Section 6 states as follows:

"No action shall be brought, whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods thereupon, unless such representation or assurance is made in writing, signed by the party to be charged therewith."

759. Section 6 replicates section 6 of the UK's Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act) (the **1828 Act**). Representations within the ambit of the section are only actionable if made in writing and signed by the defendant. The section had been interpreted as applying and held to apply only to representations made fraudulently (despite its apparently broad terms).

760. In *Lindsay* (at [93]) Mr Justice Flaux (as he then was) noted the mischief of section 6 of the 1828 Act in light of which it should be construed. He said that "[t]he mischief which [section 6 of the 1828 Act] was designed to address was that, at the time the Act was passed, potential

claimants were seeking to bring actions for misrepresentation against defendants who had made casual statements about other people's financial standing or probity in conversation or otherwise orally, whether in City coffee houses or elsewhere. This purpose of the section was explained by Gurney B in his judgment in Lyde v Barnard (1836) 1 M. & W. 101 at 103...."

761. The authorities have emphasised that the mischief at which section 6 is directed is ensuring that the relevant representation is proved by evidence and it is not concerned with excusing fraudulent conduct (see Lord Justice Waller in *Contex Drouzhba Ltd v Wiseman* [2008] B.C.C. 301 at [16] – the purpose of enacting the section was to stop plaintiffs evading the provision of the Statute of Frauds, which prevented enforcement of a guarantee that was not in writing, by suing the would-be surety for fraudulent misrepresentation as to the debtor's credit instead).
762. Section 6 applies only to representations as to creditworthiness. To be caught by the section the representation must be one made with the intent or purpose that another person may obtain money or goods upon credit. A deceit practised in order that a payment obligation should be deferred or not enforced (for example, by dishonestly representing that the third party will soon be in a position to pay) does not therefore engage the protection afforded by the section. The representation must also be as to “*character, conduct, credit, ability, trade or dealings*” of the would-be debtor, so far as relevant to the obtaining of credit; that is, it must concern the creditworthiness of the would-be debtor—his ability to satisfy his pecuniary obligations.
763. A representation will satisfy the requirement of being “*made in writing*” if it can be implied from a document, just as much as if it is expressed in it; but not, it would appear, if it can be inferred only from conduct (*Contex* at [10]–[12] per Waller LJ and *Lindsay* at [107]–[108] per Flaux J).
764. The requirement for signed writing is satisfied if the representation is contained in an email, provided (it would appear) that the email contains an electronic signature or is signed by

typing the name of the sender after words such as “regards”. The mere fact that the sender is identified by the email address from which the email is sent would not suffice for these purposes. As Flaux J said in *Lindsay* at [95]:

“In a modern context, the section will clearly be satisfied if the representation is contained in an email, provided that the email includes a written indication of who is sending the email. It seems that it is not enough that the email comes from a person’s email address without his having “signed” it in the sense of either including an electronic signature or concluding words such as “regards” accompanied by the typed name of the sender of the email: see the decision of H.H. Judge Pelling QC (sitting as a High Court Judge) in J Pereira Fernandes SA v Mehta [2006] 1 W.L.R. 1543.”

765. A representation is signed by a company (which is a “person” for the purposes of the section) if it is signed by its duly authorised agent acting within the scope of his authority, since it is only by an agent that a company can sign at all but because a partnership does not have separate corporate personality, partners (like other individuals) will generally be entitled to the protection of the section unless they themselves have signed. Where a representation is contained in a document (such as a contract) signed by a director on behalf of his company, if the circumstances are such that the director would otherwise be liable personally for deceit by making the relevant representation, his signature satisfies the requirements of the Act for the purposes of a claim in deceit against him personally, even though it was placed on the document as agent for the company.

766. The position and treatment of representations and documents made by directors is helpfully discussed in *Civil Fraud* (Sweet & Maxwell, 1st ed., 2018) General Editors Thomas Grant KC and David Mumford KC at [1.044] (my underlining):

“By extension of this reasoning it has been held that a director, who executes a contract on behalf of a company by which the company promises payment at some future date, knowing that the company will in fact not be able to make the payment, can be personally liable in deceit: by so doing the director impliedly represents that the company has the capacity to meet its obligations under the contract, knowing that representation to be false. This may be particularly significant where the company is insolvent, such that any claim in breach of contract is of limited value. At first blush this seems surprising. That by entering the contract the company impliedly represents that it has the present intention, and capacity, to perform its obligations can be understood; but that the director who does no more than sign the contract on the

company's behalf makes a similar representation, personally, as to what the company intends and is able to do would seem to make a significant inroad into the principles of separate corporate personality and limited liability. It may be wondered why, if this is correct, there is not in every case of a contract entered into by a company also, in principle at least, a potential personal liability on the part of the director or other agent through whom the company acted. Nevertheless, the proposition has Court of Appeal support [Comtex Drouzbha Ltd v Wiseman [2007] EWCA Civ 1201], albeit on the proviso that any case of implied representation will necessarily turn on its facts. [Footnote 80: The point on appeal was strictly concerned with the application of Lord Tenterden's Act to the claim (see below, at para.1-073); but the decision below as to the implied representation was endorsed, at [24], per Waller LJ."]

767. It is also worth noting that the authorities establish that a person who sits down in a restaurant and orders a meal impliedly represents that he has the means to pay: *Ray v Sempers* [1974] A.C. 370. It is well established that a mere ordering of goods in the course of business carries a representation that the buyer is not aware that he will be unable to pay for them: *Re Shackleton Ex p. Whittaker* (1874-75) L.R. 10 Ch. App. 446; *Re Gerald Cooper Chemicals Ltd* [1978] Ch. 262; *Ray v Sempers* [1974] A.C. 370.

The GHF Parties' submissions

768. The GHF Parties argued that Mr Jafar's allegation against them was that they, through Mr Naqvi, communicated the Overarching Message and the Reinvestment Representation to Mr Jafar in order to induce Mr Jafar to lend money (i.e., advance credit) to AH and AIML. These representations were therefore representations as to the creditworthiness of AH and AIML in that:

- (a). These representations were alleged to have been made in the context of Mr Naqvi seeking to induce Mr Jafar to lend money to AH and AIML and to reassure Mr Jafar that AH and AIML would be able to repay the Loans.
- (b). On Mr Jafar's case, as set out in Jafar 1 at [42], he considered that the making of the Loans was a "safe transaction". By "safe transaction" he had clearly intended to convey that the Loans would be repaid by their due dates. That this was the case was further confirmed by the Letter Before Action in which it was said that (the GHF

Parties' underlining) "[i]n assessing the prospect of being repaid, Mr Jafar attached particular significance to the representation that, save for short term liquidity issues, the Abraaj Group was solvent and not at any risk of becoming insolvent, and also to the implied representation that the Abraaj Group operated legally and in accordance with proper corporate governance principles."

- (c). As regards the Reinvestment Representation, the Letter Before Action (at [106.6]) stated that Mr Naqvi had reassured Mr Jafar that investors would return Uninvested Capital, and had said that "*Therefore, the loans would comfortably be repaid by 31 January 2018.*"
- (d). Whilst Mr Jafar's pleaded case (at [26] of the RRASOC) alleged that representations were made concerning the proper management and governance of the Fund Parties, and as to the nature of the liquidity issues they allegedly faced, the only conceivable relevance of those representations was that they informed and were directed towards the likelihood of AH and AIML making repayment under the Loans. If AH and AIML were going to repay the Loans in any event, Mr Jafar would have no reason to care about or give consideration to the proper governance and management of the Fund Parties or the nature of their alleged liquidity issues.
- (e). The counterparties to the Loans, and the only entities under a contractual obligation to repay the Loans, were AH and AIML. Therefore, any representation or reassurance provided by Mr Naqvi that the transactions were "*safe*" ones under which Mr Jafar would be "*repaid*" was a representation or reassurance that AH and AIML were good for the money and would be able to repay the Loans. The GHF Parties submitted that the representations asserted by Mr Jafar were representations or reassurances as to the creditworthiness of AH and AIML. The case advanced by Mr Jafar therefore fell squarely within section 6 and his claims were barred. A third party (Mr Naqvi, allegedly acting for and on behalf of the GHF Parties) had made oral representations (or representations in writing that were not signed by or on behalf of the GHF Parties)

to the lender (Mr Jafar) in relation to the creditworthiness of the borrowers (AH and AIML).

769. GP8 adopted the GHF Parties' submissions on this issue.

Mr Jafar's submissions

770. Mr Jafar denied that Section 6 was engaged. He submitted that it was inapplicable to his pleaded case and therefore he did not need to satisfy the formality requirements of the section because the representations pleaded and that he relied on were not representations as to creditworthiness, nor were they representations as to the creditworthiness of "[an]other person." He also, in the alternative, argued that the Overarching Message was repeated in various written documents produced in December 2017 so that there had been compliance with the formality requirements imposed by Section 6 as regards the Overarching Message.

771. As Mr Krsljanin put it in his oral closing submissions, there were three criteria which the Fund Parties must meet and satisfy in order to succeed: (a) the representation must be made by a person about any other person; (b) the representation must be one relating to creditworthiness and (c) the representation must not have been made in writing and signed by the party to be charged.

772. Mr Jafar's case was that (a) the Overarching Message and the Reinvestment Representation were not representations by a person about another person. They were representations by the former general partner of AGHF and by GP8 about themselves and they were made jointly with representations that AH and AIML had made about themselves. This was therefore a single joint tort and that was outside the scope of the section. Insofar as the Fund Parties were representing anything about AH and AIML that was part of that same single indivisible joint tort; (b) neither the Overarching Message nor the Reinvestment Representation was on an objective analysis a representation relating to creditworthiness. They were not directly or specifically about that, and (c) insofar as any part of the actionable representations was not covered by these grounds for section 6 not being engaged or applicable, the requirements of

the section were satisfied because there had been a repetition of any representation deemed to be about creditworthiness in a number of documents written and signed by Mr Naqvi acting in his capacity as agent, director or controlling mind and will of the Fund Parties. Whether individually or collectively those documents satisfied the third requirement of section 6.

773. Mr Krsljanin submitted that section 6 is a provision with a narrow purpose and accordingly must be construed narrowly so that it gives effect to that purpose and does not overreach and undermine the law of deceit as a whole. He relied on a number of authorities in support of this proposition. He relied first on what was said about the construction of section 6 of the 1828 Act by the English Court of Appeal's decision in *Roder v Titan Marquees* [2012] QB 752 in the following passage from the judgment of Lord Justice Longmore at [1]:

"Every law student knows that section 4 of the Statute of Frauds Act 1677 (29 Car 2, c 3) required (and still requires) a guarantee to be in writing if it is to be enforceable. What every law student may not know, however, is that Pasley v Freeman (1789) 3 Durn & E 51 decided that a representation by one person that another person was creditworthy was actionable if made fraudulently. Since oral guarantees would often have been preceded by some representation of creditworthiness, many cases were brought alleging that such a representation had been made, which the maker knew to be false. Not only was this an easy way round the Statute of Frauds but it led to litigation about oral representations or promises which the statute had intended to keep out of court. Parliament decided to intervene by enacting section 6 of the Statute of Frauds Amendment Act 1828. Abbott CJ as Chief Justice of the King's Bench took an active interest in the matter and appears to have drafted the Act which was passed soon after he became Lord Tenterden and it is always known as Lord Tenterden's Act. Section 6 provides:..."

774. Mr Krsljanin submitted that Longmore LJ was saying that section 6 of the 1828 Act existed solely as a supplement to the 1667 Statute of Frauds and to ensure that that prior Act was not stripped of purpose and utility. There were obvious cases that were intended to be covered, for example where A was considering whether to make a loan to C and B says to A "*C is good for the money, I will give a guarantee, please take what I have just said as a guarantee.*" What was intended to be covered were claims on oral guarantees which were being dressed up and disguised as being claims on oral representations. He noted that Longmore LJ had approved the statement made by Parke B in *Lyde v Barnard* (1836) 1 M & W 101 that Lord

Tenterden's object was "*merely to prevent evasion of the Statute of Frauds*" and this was "*a key for the construction of the [section]*." Mr Krsljanin argued that when considering whether section 6 is engaged the Court must at all times have regard to that narrow purpose and ask, as a litmus test, whether the claim before it was a guarantee claim dressed up as a representation claim in order to circumvent the 1677 Act? That and that alone was the target of section 6.

775. Mr Krsljanin relied on the first instance judgment of Irwin J in *Contex Drouzhba* as confirmation of the need to give section 6 a narrow interpretation and as a helpful guide to understanding how the Court deals with a situation where an agent makes a representation on behalf of an entity and in particular where a representation can be said to be made by multiple persons but only about one. In that case the claimant was a Bulgarian clothes manufacturer that for many years had supplied goods to a company called Scott Daniel, referred to in the judgment as "SD." The first defendant, Mr Wiseman, was a director of SD. For many years SD had been late in paying for goods which it had received on credit from the claimant. In January 1998 the claimant entered into a framework agreement with SD acting via its director Mr Wiseman under which SD would acquire goods on credit. The claimant's case was that by entering into the framework agreement Mr Wiseman, the director, and the company, made an implied representation that SD could perform the agreement and that it could repay or rather pay for goods received on credit. Irwin J noted that "*[o]ne might add that, irrespective of any effect of the European Convention on Human Rights, the common law would always have construed such a technical defence [under section 6] to fraud narrowly, given the underlying policy of the law.*"

776. Mr Krsljanin said that the context was that Mr Wiseman had made no representation as to his own creditworthiness, but he was the one, the first defendant, being sued, so that one of his defences was to say that "*I was making a representation about another person*". Mr Justice Irwin concluded that this could not furnish Mr Wiseman with a defence. It was correct that he did not make a representation as to his own creditworthiness – he was speaking about the creditworthiness of the company – but he did so also as the company. This was a joint

tort, a single act of fraud. The position was then that in reality a representation was being made by a person about himself/itself. Irwin J said this at [108] (my underlining):

“The Defendant has argued that any signature by the First Defendant on behalf of SD “is not in law a signature by the Party to be charged for the purposes of the 1828 Act”. The reasoning is suggested to be that “a signature by an authorised agent on behalf of a company is the signature of the company for the purposes of the Act”. In my judgment this misses the point which I have made above: the Defendants here were joint tortfeasors. If Mr Wiseman fraudulently signed on behalf of the company, then both he individually and the company, as a legal person, committed the same act of fraud at the same moment with the same signature, whilst representing that the company had good credit.”

777. Mr Krsljanin argued that the judgment of the Court of Appeal ([2007] EWCA Civ 1201) upheld the decision and reasoning of Irwin J and supported his case. He referred to and relied on the judgment of Waller LJ who said that (my underlining):

“10. I then pose the question as to whether if such a letter by its terms made only an implied representation to the same effect, would that make any difference? Once again, without regard to Lord Tenterden’s Act, the position would be the same, and it would be strange indeed if Lord Tenterden’s Act was construed so as to make such a fraudulent implied representation unenforceable. One can just about understand an argument that, on a strict construction of the section, the section applies to express representations but not implied ones. This seems to have been the argument in the authority much relied on by Mr Bartlett on this appeal, John Hudson & Co Ltd v Oaten unreported, June 19, 1980. But the object of such an argument was to persuade the court that the Act did not apply to implied representations, i.e. there was no need for a written document signed by the maker to enforce an implied representation. That would hardly meet the mischief at which the Act was aimed, i.e. to require writing as proof of representations as to credit or solvency. The argument was unsurprisingly rejected; see Sir David Cairns at p.10H et seq.

11. Thus the fact that a representation can only be implied from the terms of a written document rather than being an express term could not assist an argument that in some way the section provided a defence.”

...

16. It was an Act concerned with proving by evidence the existence of a representation. It was not concerned with excusing fraudulent behaviour or with differentiating between capacities in which persons put their names to documents. Having regard to the mischief at which the Act was aimed, I can see

no reason why, if a document contains a fraudulent representation being made by a director for which that director would otherwise be held personally liable, his signature on the document will not suffice to comply with Lord Tenterden's Act.

17. *The only question, which seems to me to arise on this appeal, is whether the implied representation which the judge found to be made was in writing rather than by conduct...*”

778. Mr Krsljanin submitted that *Diamond Bank v Montreal* [1979] QB 333 was not authority for the view, argued for by the GHF Parties, that section 6 must be afforded a relatively broad rather than a narrow construction when it comes to answering the question what is a representation as to creditworthiness. The consideration of section 6 in this case was *obiter*. The issue in the case concerned jurisdiction and good arguable case, which was resolved other than by reference to section 6 and the judgment of Baron Parke in *Lyde v Barnard* did not appear to have been cited. The Fund Parties had ignored the judgment of Shaw LJ (at page 18) (where he had said that “... it appears to me to be quite clear that the scope of Lord Tenterden's Act does not cover the matters relied upon by the plaintiff in this action. That statute, despite its comprehensive language applies only to representations as to creditworthiness”) which aligned with the approach in the judgments originating from Baron Parke in *Lyde v Barnard* that a narrow approach was to be taken to determining what was or was not a representation in relation to creditworthiness.

779. Mr Krsljanin also referred to the judgment of Flaux J in *Lindsay* and submitted that it showed that the Court will adopt a pragmatic approach and look at context and will be or maybe satisfied that a relevant representation, if it is a representation relating to creditworthiness has been impliedly repeated in writing, so that express words are not required. The following are the relevant passages in Flaux J's judgment (my underlining):

“101. *The thrust of Mr Keller's submissions that none of the representations in the previous paragraph had been made by the defendant was that representations of that kind should not be implied merely from the defendant, as a director and agent of FX Solutions, entering into a contract on behalf of FX Solutions with the claimant. If such representations were implied whenever contracts were made with a company when it had become insolvent, directors and employees*

would find themselves personally liable to the other contracting party where the appropriate remedy was against the insolvent company.

102. *I can see the force of that argument where a director or employee of a company which is in fact insolvent makes a contract on its behalf in ignorance of its insolvent condition. That may well be the position in the majority of cases. However, in the present case, the defendant accepted the claimant's June order knowing that FX Solutions was already insolvent in the sense that it could not pay its obligations as they fell due. I find that the defendant knew full well that, because of the parlous financial state of FX Solutions by early June 2008, the substantial sum of £185,000 which the claimant was proposing to trade would not be held in trust for the claimant until the equivalent euros were purchased but would be used in an illegitimate manner to pay other clients, which is, of course, what happened.*
103. *Against that background it seems to me that, in accepting the order and in sending the email attaching the trade note, the defendant, who was in control of both companies, was representing by implication that the currency business conducted by those companies was trading properly and legitimately, in the sense that the business was not insolvent and that funds paid by the claimant would be held on trust in accordance with the terms and conditions until paid out to purchase foreign exchange on behalf of the claimant.*
104. *It does not seem to me that it is any answer to the conclusion that the defendant made those representations by implication that, at that time in June 2008, the claimant did not know the defendant's position in the company. On the basis of the decision of the House of Lords in Standard Chartered Bank v Pakistan National Shipping Corp (No.2) [2002] UKHL 43 ... where any agent of a company commits a fraud, as the defendant did here, he will be personally liable in deceit. It follows that it is irrelevant that the victim of the fraud was unaware of the position in the company of the person who made the fraudulent misrepresentation.*
105. *Mr Keller also relied in relation to the representation alleged in para.9.2 of the particulars of claim upon s.6 of Lord Tenterden's Act, on the basis that any representation made was as to "the character, conduct, credit, ability, trade, or dealings of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon." The short answer to that submission is that the relevant implied representation as to the business of FX Solutions being conducted properly and legitimately was repeated in the sending of the email attaching the trade note. Mr Keller sought to argue that that implied representation was not pleaded because para.10.2 of the particulars of claim related only to the business of Global FX being conducted properly and legitimately. He reminded me that the court must be astute to ensure that allegations of fraudulent misrepresentation are only considered in relation to the pleaded misrepresentation, citing in that context Buxton L.J. at [404] of The*

Kriti Palm (above). Of course that must be the correct approach, particularly where fraud is alleged.

106. *However, although para.10 of the particulars of claim is not as aptly pleaded as it might be it seems to me that the plea that the defendant represented by implication that the business of FX Solutions was being carried out properly and legitimately is encompassed within the allegation in para.10.4 of the particulars of claim.*

...

107. *The fact that the relevant representation is to be implied from a written document which otherwise complies with s.6 of Lord Tenterden's Act (as the email enclosing the trade note does, because it includes the defendant's electronic signature) does not mean that it is unenforceable pursuant to that section....*

108. *Accordingly I find that, in sending the email of June 5, 2008, attaching the trade note, the defendant did impliedly represent (i) that the business of FX Solutions was being carried out properly and legitimately, in other words that the company was not insolvent, and (ii) that the claimant's moneys would be held on trust until used to buy foreign exchange for the claimant. On any view those representations were false to the knowledge of the defendant and were accordingly fraudulent, since by the time they were made on June 5, 2008, the defendant knew that FX Solutions was insolvent and that the moneys paid by the claimant would not be held on trust but would be used to pay other creditors with a view to keeping the company afloat as long as possible by "robbing Peter to pay Paul."*

780. Mr Krsljanin submitted that in this case representations were made by the Fund Parties about themselves. That was a key part of the Overarching Message. [26(2)] and [26(3)] of the RRASOC specifically identified the AGHF and [26(3)] was connected to [20(8)] which related to Fund IV. In any event, on any commonsense and logical approach this was a situation, the deceit of Mr Jafar by Mr Naqvi, where persons were talking about themselves, precisely because Mr Naqvi was their authorised voice. AH and AIML were making representations about themselves, so too were each of the Fund Parties. Insofar as any of these entities was making a representation also about another, that was immaterial for the reasons set out by Irwin J in *Context*. This was a joint tort and in effect a single indivisible representation about these entities (entities which were as a matter of reality viewed as part and parcel of a single unit). Mr Krsljanin submitted that, adopting the approach supported

by the authorities on which he relied, the proper conclusion was that this was a representation jointly made by persons about themselves. Because it was a representation jointly made it was outside the scope of section 6.

781. Mr Krsljanin submitted in the alternative that even if the representations were made by the Funds about AH and AIML, following the approach of Irwin J, because that representation was made jointly with AH and AIML who were talking about themselves, it was outside the scope of section 6 in the same way that in *Contex Drouzhba* Mr Wiseman was not making a representation about his own creditworthiness but he was making a representation about his company's creditworthiness together with his company and he personally was held liable in respect of that.
782. Mr Krsljanin further submitted that to the extent that any of the representations or any part of a representations relied on by Mr Jafar are, when properly construed, representations about creditworthiness, they were (or the relevant part was) were repeated in writing. Mr Krsljanin relied on various documents being the 21 December BOS MOU, the share pledge letter agreement, the postdated cheques and what Mr Naqvi had said in his email to Mr Nerguizian dated 20 December 2017. This was in the following terms:

“Varouj, thank you so much for this email. I am delighted that we can progress this transaction and execute the transfer tomorrow morning. However, just a few points to clarify:

- 1. If we are issuing Cheques that will be discounted, why are we also applying for a facility?*
- 2. Can we have any forms for opening accounts? If we can't open the account tomorrow in time, your idea of issuing the Cheques in your clients name and we get a cash transfer; is that something you are still exploring?*
- 3. The terms are fine, and we confirm that we will receive \$ 100 million net.*
- 4. The treasury shares to be potentially acquired in the event of repayment was a condition that was waived in conversation with Badr, copied here.*
- 5. I have copied Mr Rafique Lakhani to this email to get the process expedited and prepare any documentation you may need. Mr. Lakhani will also send you the*

exact legal name of the entity issuing the Cheques and undertaking the repayment and terms.”

783. Mr Krsljanin submitted that the email exchange between Mr Nerguizian and Mr Naqvi should be understood as follows. Mr Nerguizian was saying, "[h]ere are the terms. You will, an Abraaj entity to be decided, as recorded in Mr Nerguizian's email, repay by 20 February 2018". In the response from Mr Naqvi, he said that "*I am delighted that we can progress this transaction and execute the transfer tomorrow morning*" and that "*[t]he terms are fine ...*". Mr Krsljanin argued that what Mr Naqvi was saying by way of an implied representation which arises as a matter of necessary implication, was, "*[w]e are happy with the terms therefore we will repay.*" In context, when one looked at the email to which it was responding, that was a representation as to creditworthiness.

784. The GHF Parties argued that the suggestion that the Courts had adopted a narrow definition of what was meant by "*creditworthiness*" was not supported by the relevant authorities. They relied on the judgment of the Court of Appeal of England and Wales in *Diamond Bank v Montreal* [1979] QB 333:

- (a). In that case the plaintiff, a London commodity broker, received a reference from the defendant, a bank located in Nassau, as to the respectability of a brokerage business operating from the United States. The representative of the bank in Nassau had confirmed (see page 345C) to the London based broker, "*that there were a million tons of sugar available, that the [United States based] brokers for the sellers were respectable, that they had done deals of considerable magnitude, that he had seen the documents and all was genuine.*"
- (b). Lord Denning had noted (at page 347C) that section 6 of the 1828 Act (my underlining) "*only extends to fraudulent representations which relate in some way to the credit or creditworthiness of a person*".
- (c). Lord Denning had concluded (at page 347D) that the 1828 Act operated to protect the defendants in relation to the statement to the effect that the brokers were "*respectably*

constituted and had done deals of considerable magnitude through the defendants and were well able to undertake the contract for a million tons of sugar.” This statement, when considered in its proper context, was determined to constitute a reassurance as to the creditworthiness of the United States brokerage business and accordingly fell within the protection provided by section 6 of the 1828 Act. The decision, the GHF Parties submitted, was therefore inconsistent with any requirement for a narrow reading of “*creditworthiness*.” Rather, it showed that the proper approach to interpretation was to consider the relevant representation in its appropriate context in order to determine whether objectively it was one that “*in some way*” related to or was concerned with the notion of creditworthiness.

785. The GHF Parties also relied on the judgment of Flaux J in *Lindsay*. In that case, the plaintiff contracted with a company called FX Solutions for the conversion of sterling into euros. The defendant was the managing director and majority shareholder of FX Solutions. The plaintiff entered into a number of trades during June and August 2008, which transactions were confirmed by trade notes in the name of Global FX. The plaintiff assumed that this was a trading name under which FX Solutions did business but Global FX was in fact a separate company of which the defendant was both a director and sole shareholder. Flaux J noted that “*whether or not the court will imply a representation will depend upon all the circumstances and context is everything*” (at [87]) and went on to hold that in accepting the order and in sending the email attaching the trade note “*the defendant, who was in control of both companies, was representing by implication that the currency business conducted by those companies was trading properly and legitimately, in the sense that the business was not insolvent and that funds paid by the claimant would be held on trust in accordance with the Terms and Conditions until paid out to purchase foreign exchange on behalf of the claimant*” (at [103]). The Court found that section 6 of the 1828 Act had been complied with because the representation in question was to be implied from the terms of a written document that had been signed by the representor (at [107]). In other words, the Court accepted that the representation in question fell within the scope of the 1828 Act in that it was one that had been made by the defendant (a third party) to the plaintiff (the lender/extender of the credit)

and concerned or related to the creditworthiness of FX Solutions and Global FX (the borrowers/recipients of the credit).

786. The GHF Parties cited the passage in Civil Fraud (at 1-076) that “*the representation must also be as to “character, conduct, credit, ability, trade or dealings of the would-be debtor, so far as relevant to the obtaining of credit; that is it must concern the creditworthiness of the would-be debtor—his ability to satisfy his pecuniary obligations.”* The GHF Parties submitted that the touchstone must be, applying the guidance set out in *Marme* concerning the interpretation and actionability of implied representations, whether the objective purpose of the representation (made by the third party) was to provide an assurance as to the ability to repay on the part of the debtor (the borrower/recipient of the credit).

Discussion and decision

787. The first issue that arises is whether the Reinvestment Representation and the Overarching Message, assuming that they were made or given, were covered by section 6. Were they or did they include to use the shorthand representations as to creditworthiness?
788. Section 6 refers to a “*representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person.*” I accept that Mr Justice Flaux in *Lindsay* accepted that the representation in question fell within the scope of section 6. That was an implied representation “*as to the business of FX Solutions being conducted properly and legitimately was repeated in the sending of the email attaching the trade note.*” In addition, Lord Denning in *Diamond Bank* considered (whether or not his view on this issue was technically *obiter*) that a representation that a person was “*respectably constituted and had done deals of considerable magnitude through the defendants and were well able to undertake the contract for a million tons of sugar*” when considered in its proper context was constituted a reassurance as to the creditworthiness of the United States brokerage business and fell within section 6. It seems to me to be clear that the First Express Representation and the Third Express Representation together with the Overarching Message comprising the First Implied Representation, the Second Implied Representation

and the Third Implied Representation are to be understood and treated as representations within the scope of section 6. These express and implied representations, on Mr Jafar's case, were made with the intent and for the purpose that money be advanced upon credit and concerned the ability of the relevant Abraaj entities to satisfy the pecuniary obligations resulting from the credit (the Loans) advanced. But it does not seem to me that the Reinvestment Representation is covered.

789. The second issue, assuming that I had found that Mr Naqvi had made the Reinvestment Representation and given the Overarching Message, is whether the Overarching Message was given in respect of credit to be advanced to another person, that is a person other than the representor. Were they representations as to the creditworthiness of another person? This depends on the capacity in which Mr Naqvi was acting when he gave the Overarching Message and the proper construction of the representations that he impliedly made. Mr Krsljanin's position was that there was one self-referential representation made by Mr Naqvi jointly on behalf of all the representors, being at least AH, AIML and each of the Fund Parties (acting by AIML as their manager or their general partners). Mr Krsljanin argued that the position was essentially the same as occurred, and that the Court should follow the reasoning of Irwin J, in *Contex Drouzhba*. Where there was a single representation made jointly by two or more people which related to the creditworthiness of one of them, section 6 was not engaged.

790. In *Contex Drouzhba*, as I have noted, a director made a representation on behalf of a company. Irwin J held (at [102]) that the director (Mr Wiseman) had procured the company to make a false representation as to its own credit. At [103], the learned Judge said this (my underlining):

“...insofar as the Defendants [Mr Wiseman and the company] are joint tortfeasors in making false representations, they have acted jointly in making representations as to the credit of the company. A narrow construction of the section may well mean that representations made jointly by Mr Wiseman and the company – the company acting through Mr Wiseman – cannot in truth be representations as to the credit of “another person” since they are representations made jointly about one of the two representors. If the representations are made as to the credit of the representor – in this instance the

company – they are outwith the section. I acknowledge that such an argument is reminiscent of the Scholastics, but it is logically defensible. It is also morally defensible and aligned with what I judge to be the policy of the law where a technical defence to fraud is concerned. The situation of a corporation and a controlling director is distinguishable from that of a partner and a partnership particularly when the relevant director has the sole practical control over the affairs of the company. This is the situation which I have found to be the fact in the instant case.”

791. I note Mr Justice Irwin’s hesitation and caveats although the reference to scholastics seems to me to be an exaggeration. The analysis hardly has the complexity of Aquinas’ *Summa*. It seems to me to be sound and consistent with the policy underlying the section as set out in the case law, for the reason Irwin J gave. The basic point is that if A and B make one representation jointly as to the creditworthiness of A, then there is only a single representation and in substance one joint representor and the representation relates to the creditworthiness of one of the joint representors. This analysis applies, as in *Contex Drouzhba*, where A is acting as a director of and for B and A is a controlling director, in sole practical control. But I do not see why in principle the analysis needs to be so limited and confined. If the director is acting so as to and does bind the company, the analysis holds and makes sense. But it seems to me that the position is different in a case where A is acting in multiple capacities, for example as a director for B, C and D. In that event even if B, C and D make a representation in the same terms as to their creditworthiness there are three separate and independent representations, and each joint representor (A-B, A-C and A-D) are to be taken to be making representations not only about themselves but also about the creditworthiness of the other representors. To the extent they are doing that, so that A-B are not just making a representation about the creditworthiness of B, there is a representation about the creditworthiness of another and section 6 is engaged.
792. Mr Krsljanin’s position was, as I understood it, that Mr Naqvi made these representations on behalf of at least each of AH, AIML and each of the Fund Parties jointly (as I have already noted Mr Jafar had at some points also claimed that Mr Naqvi was making the representations on behalf of all the Abraaj entities but I have taken his case to have narrowed and for his primary submission to be that Mr Naqvi was acting for and is to be taken as having made representations on behalf of all those Abraaj entities for whose benefit he was

seeking to raise monies) and, critically, that each of these parties was only making the representations with respect and in relation to their own financial position and ability to repay what they owed (although Mr Jafar never claimed that as regards monies only on-lent to the Funds' general partners or AIML *qua* manager they assumed a direct obligation to Mr Jafar for the purpose of which the representations were given).

793. The First Express Representation referred to "*The Abraaj Group*" not being in any underlying financial trouble. On the face of it, this is a representation as to the financial position of all Abraaj entities. The First Implied Representation referred to "*the finances and management or governance of the entities for the benefit of which [Mr Naqvi] was seeking to raise monies were essentially sound and proper, and any liquidity issues which they were experiencing were short term.*"
794. If Mr Jafar were right as to the capacity in which Mr Naqvi was acting, he would have been acting for AH, AIML (*qua* manager for the Funds to the extent that the advances to AIML for the purpose of the Funds' activities and businesses) and/or the Funds' general partners. It follows that there were multiple representors. If the representations given by each of these parties (for example the Funds' general partners) related to the financial position of each and all of these parties (so that the Funds' general partners were representing that AH and AIML were creditworthy) then the joint liability analysis in *Contex Drouzhba* would not assist Mr Jafar. The basis for this analysis was that the director was not making a representation about the creditworthiness of another person because his representation was made on behalf of the person whose creditworthiness was in issue (a director and his company are jointly liable for one representation relating to the financial position of the company). Each of AH, AIML and the Funds' general partners *would* be making a representation about the creditworthiness of another person. Mr Naqvi could not say that he was only causing for example the Funds' general partners to make representations concerning their own creditworthiness.
795. However, the position would be different if the proper construction of the First Implied Representation was that each of AH, AIML and the Funds' general partners were taken to have separately made a representation only to the effect that they were each able to repay the

sums advanced to them, directly or indirectly. Mr Naqvi would then have made representations jointly with each of them only as to their own creditworthiness. That would mean that for example the Funds' general partners were representing only that they would be able to repay their own separate debt. They were saying nothing about the financial condition and creditworthiness of AH or AIML. That would mean that the First Implied Representation made by for example GP8 was to be interpreted as meaning that "*the finances and management or governance of [GP8] were essentially sound and proper, and any liquidity issues which [it was] experiencing were short term.*"

796. This reading down of the way in which the First Express Representation was pleaded involves at least a substantial refinement of the drafting (which one would have thought the drafters would have addressed). It might also be said to involve a material amendment and that reading the First Express Representation in this way would prejudice the position of the Fund Parties. However, had the issue mattered to the outcome of the case (because I had found that Mr Naqvi said the things alleged and made the representations as claimed by Mr Jafar and that Mr Jafar had relied on them) I would have been prepared to adopt this construction since (a) the case law makes it clear that in cases of fraud the Court should seek to avoid claims for fraudulent misrepresentation being struck down by the statute and; (b) it is one which is consistent with the alleged purpose of the assurances said to have been given by Mr Naqvi (that he was assuring Mr Jafar that he would be repaid because the direct and indirect borrowers were financially sound and therefore able to pay the liabilities resulting from their own direct and indirect borrowing).

797. As regards the First Express Representation, it seems to me that this also is not caught by section 6. The reference to "*The Abraaj Group*" not being in any underlying financial trouble must I think be read as a representation by each of the parties giving the representations as to the financial position of Abraaj entities other than themselves. However, this type of representation appears to me not to come within the scope and purpose of section 6 as described by Longmore LJ in *Roder*. He had said that section 6 of the 1828 Act existed solely as a supplement to the 1667 Statute of Frauds to ensure that that prior Act was not stripped of purpose and utility so that where A was considering whether to make a loan to C and B

says to A "*C is good for the money, I will give a guarantee, please take what I have just said as a guarantee.*" What was intended to be covered, Lord Justice Longmore said, were claims on oral guarantees which were being dressed up and disguised as being claims on oral representations. If it is right that the representations were being given only by (Mr Naqvi on behalf of) the direct and indirect borrowers, there was no representation as to the creditworthiness of another obligor. The First Express Representation was not in the nature of an oral guarantee to Mr Jafar of the obligations owed to him by the other Abraaj entities.

798. Accordingly, it seems to me that neither the Reinvestment Representation nor the Overarching Message engage and are within the scope of section 6. In light of these conclusions, it is unnecessary for me to go on to consider whether the Overarching Message had been confirmed in a subsequent writing.

Attribution and vicarious liability

799. Mr Jafar argued that Mr Naqvi's purpose and intention when meeting with Mr Jafar, which Mr Naqvi implicitly indicated to Mr Jafar and which was reasonably understood or inferred by Mr Jafar, was to seek the advance of loans to be used for the benefit of various members of the group, in particular the Funds; that Mr Naqvi had authority from the Funds to do that by one means or another, so that he was acting properly, at least as regards the Funds, when he carried out the purpose that he had in mind, and therefore that the Reinvestment Representation and the statements from which the Overarching Message was to be implied were made on behalf of or in his capacity as a person authorised to act for and to bind the Funds at least in relation to fund-raising. The result is that the express and implied representations made by Mr Naqvi are to be attributed to the Funds who are jointly liable in relation to the breach of the representations.

800. The following parts of the RRASOC are of particular relevance to the attribution claim (my underlining):

- “31. The actions and knowledge of Mr. Naqvi on which Mr. Jafar relies are to be attributed to AH on the basis that he was its founder, director and CEO, and because he held special status within AH as enshrined in the Memorandum and Articles of Association of AH, as adopted on 1 July 2012...
32. Further and alternatively, the actions of Mr. Naqvi on which Mr. Jafar relies, namely those pleaded at paragraphs 19-30 above, are to be attributed to [the AGHF] and [GHF] and [Fund IV] on the basis that:
- (1) Mr. Naqvi was and was held out as being a director and the CEO of AIML, the management company of [the AGHF] and [Fund IV];
 - (2) As the management company, AIML was empowered to raise monies for [the AGHF] and [Fund IV].

PARTICULARS

- (a) Clause 6.5 of the Amended and Restated Limited Partnership Agreement relating to Abraaj Growth Markets Health Fund dated 18 August 2017 provided that AIML “shall have full power and authority, on behalf of the Partnership, to do (or to direct the Partnership, acting through the General Partner to do) all such things as are, in the reasonable opinion of the Manager, necessary or desirable in connection with the operation of the Partnership, the management of the Partnership’s investment portfolio or otherwise in the furtherance of the Partnership’s business.”
- (b) Clause 5.1 of the Management Agreement relating to Abraaj Growth Markets Health Fund dated 7 July 2015 conferred on AIML all rights, powers and obligations created by the Limited Partnership Agreement for [AGHF].
- (c) Clause 5.1 (b) of the Amended and Restated Limited Partnership Deed in respect of [Fund IV], dated 28 June 2016, which provided that the General Partner of [Fund IV] entered into the Management Agreement with AIML pursuant to which (inter alia) “the Manager will carry out duties and has powers with regard to the Partnership and its business, affairs and assets mutatis mutandis similar to those applying to the General Partner hereunder and may itself delegate all management authority and power given to it ...”.
- (3) As CEO of AIML, Mr. Naqvi had and was held out as having the authority to exercise those powers of AIML. Further particulars of the manner in which Mr. Naqvi was held out as exercising, and exercised, the foregoing constitutional powers of AIML and/or in any event was understood and

accepted [AGHF GP], [GHF] and GP8 to be exercising those powers, among other powers, are pleaded below at paragraph 32(4).

- (4). *Further or alternatively, Mr. Naqvi was authorised to act (and did so act) for [the AGHF] and [Fund IV] in relation to their financial affairs. In particular, at the time he conveyed the Overarching Message, Mr. Naqvi held express or implied authority on behalf each of [AGHF GP], [GHF] and GP8 as follows: (1) to arrange and enter into agreements on behalf of them for the purpose of raising monies to address cash shortfalls in the Funds; (2) to make decisions and give such instructions or directions as he saw fit concerning the financial affairs of each of the Funds, including the distribution of cash and other assets, and the presentation of assets to third parties; (3) to make other important management decisions on behalf of the Funds, including decisions regarding their investment strategies; and (4) to communicate with Investors / Limited Partners of the Funds on behalf of those Funds. Further and in any event, he was expressly or impliedly or ostensibly authorised on behalf of each of [AGHF] and [Fund IV] to make the representations that comprised the Overarching Message. Such authority arose under the Fund entities' constitutional arrangements as particularised in this paragraph 32, and, further, because directors and/or other officers or employees or agents of [AGHF GP], [GHF] and GP8 habitually sought instructions or directions from Mr. Naqvi regarding the financial affairs and management operations of the Funds; and Mr. Naqvi gave instructions and directions as to the financial affairs and management operations of the Funds, which were habitually followed, as particularised below.*

PARTICULARS

Powers derived from constitutional documents

- (a) *Mr. Naqvi was the Chairman of the Global Investment Committee ("GIC") of the Abraaj Group which presided over the investments of [AGHF] and [Fund IV], and held a power of veto with respect to its decisions.*
- (b) *Mr. Naqvi was the Head of [AGHF] as designated in its Private Placement Memorandum dated 8 July 2016 which stated that "[a]s Head of the Fund, Mr. Naqvi has led the design of the AGHF concept and the strategy and business plan. Both Mr. Naqvi and Mr. Vettivepillai are involved in overseeing the Fund's activities," and its Partnership Agreement.*
- (c) *Mr. Naqvi was defined as an executive with "key person" or "key investment executive" status in the Partnership Agreements of [AGHF] and [Fund IV], as pleaded at paragraph 32(3)(2) above.*

- (d) *Mr. Naqvi was a signatory over bank accounts of [AGHF], as particularised in the “Schedule of Bank Accounts and Signing Powers” annexed to this Re-Amended Statement of Claim.*
- (e) *Mr. Naqvi was empowered to act on behalf of each of the Funds by way of a mandate issued by those Funds. Mr Jafar will plead further to the same following discovery.*

Particulars of Mr. Naqvi’s conduct demonstrating his authority

- (e)(i) *Mr. Naqvi gave instructions as to the drawing down of monies from Limited Partners in [Fund IV]: by an email dated 17 September 2015, Mr. Naqvi instructed Mr. Abdel-Wadood to issue [a Fund IV] drawdown of Limited Partner commitments and the amount of the drawdown, stating “We need to drawdown...Aim should be to drawdown 300 total, if we can... 300 total will give us about 200 of cash, which is what we need to get past December”. The drawdown was issued in accordance with Mr. Naqvi’s instructions.*
- (e)(ii) *Mr. Naqvi gave instructions as to the manner in which Limited Partners in [Fund IV] would be paid sale proceeds: on 1 April 2016, Mr. Naqvi emailed Mr. Lakhani, Mr. Siddique and Mr. Abdel-Wadood, in their capacities as Directors of GP8, proposing a Payment Schedule of approximately US\$ 224.4 million sales proceeds to Limited Partners between April and June 2016 that would prioritise “noise makers and those who will come back, with the latest being legacy investors and passive voices”. Payments were thereafter made in accordance with the Payment Schedule*
- (e)(iii) *Mr Naqvi gave instructions about the movement of funds from [Fund IV’s] accounts to other entities in the Abraaj Group, which were followed by [Fund IV]. On 10 May 2016, Mr. Naqvi was asked to “please approve transfer of \$47m from [Fund IV] [to AIML]... After the transfer of \$47m APEF IV will have a cash balance of \$4m”. 46 On 12 May 2016, US\$47 million was transferred from [Fund IV] to AIML, in accordance with Mr. Naqvi’s instruction.*
- (e)(iv) *Mr. Naqvi arranged loans for [Fund IV] to address cash shortfalls that had arisen in its accounts, with the knowledge and consent of its Directors. As part of procuring that fundings, Mr. Naqvi was entrusted by the GP8 Board with authority in respect of GP8’s bank account holding the relevant funds. Paragraphs 12A-12B above are repeated.*
- (e)(v) *On approximately a weekly basis during (but not limited to) 2017, Mr. Lakhani and/or Mr. Siddique provided Mr. Naqvi with a “cash*

update” identifying the cash positions of [AGHF] and [Fund IV]. In response to those “cash updates”, Mr. Naqvi routinely gave directions as to how the cash shortfalls could be concealed, which directions were acted upon by Directors of [AGHF] and [Fund IV]. Paragraphs 12A- 12I and 15A-18 above are repeated.

- (f) Mr. Naqvi arranged loans for [AGHF] to address shortfalls that had arisen prior to December 2017. Mr. Jafar relies on Mr. Naqvi’s arrangement of the loans Healthcare Air Arabia Loans pleaded at paragraphs 13-19 herein. As to the Healthcare Air Arabia Loans:*
 - (i) Mr. Jafar will rely on the fact that Mr. Naqvi did not simply provide a personal guarantee to make payment to Air Arabia if [GHF] failed to perform its obligations. Rather, he guaranteed [GHF’s] performance of its obligations, and thereby represented that he had the power to control [GHF] so as to ensure its contractual performance. Directors of [GHF], namely Mr. Siddique and Mr. Lakhani, were aware of that representation and did not ‘correct’ it but by signing the agreement, endorsed it.*
 - (ii) Neither the Board of [AGHF GP] nor the Board of [GHF] stated to Mr. Naqvi or ever asserted to him that he had no power to facilitate those arrangements on behalf of [GHF] or [AGHF]. Accordingly, the Boards, having full knowledge, permitted Mr. Naqvi’s conduct and authorised him to engage in such conduct in future.*
- (g) Mr. Naqvi was permitted to make important management decisions of the sort identified in this paragraph 32 in respect of [Fund IV], and/or gave instructions which were, with knowledge of the same, followed or adhered to by individuals acting for [Fund IV]. On 12 June 2017, Mr Naqvi approved changing [Fund IV’s] year end to 31 December and instructed senior management to “action it”, noting that the logic of changing [Fund IV’s] year end was “sellable and compelling” and instructing individuals “to get the argument properly articulated, hinge it around HLA reporting etc (sic)”. Mr Jafar will plead further to Mr. Naqvi’s making of important management decisions, if requested or required, following discovery.*
- (h)(i) As set out in paragraphs 12G-12I above, on 12 June 2017, Mr Naqvi instructed the change of [Fund IV’s] year end to 31 December so that cash shortfalls experienced by [Fund IV] would not need to be reported on 30 June 2017 and thereby made apparent to auditors.*

(h)(ii) Mr. Naqvi gave directions as to the recording of [Fund IV's] assets, which were acted upon by [Fund IV]: by an email dated 7 August 2017, Mr. Naqvi gave an instruction to Mr. Dave, Mr. Lakhani, Mr. Siddique and Mr. Abdel-Wadood (each of whom was a Director of GP8) that [a Fund IV] asset – namely, an investment in an entity called “Kudu” - should not be written down in Q2 2017: “Even little things like writing Kudu should be a no no, and we should reflect our aspirations in the others. I need a minimum of 20-25 mm profit at AH in order to keep this effing business afloat and show strength to the banks.” The investment was not written- down, such that the book value of [Fund IV's] investments remained artificially inflated. Accordingly, the Board of GP8 permitted Mr. Naqvi to give instructions with respect to the recording and presentation of financial data in respect of [Fund IV].

(h)(iii) As pleaded in paragraph 15C above, Mr. Naqvi expressly spoke on behalf of [AGHF] by his email dated 27 September 2017. Directors of [AGHF] knew that Mr. Naqvi was speaking on behalf of [AGHF] as its de facto director, and permitted him to do so.

(h)(iv) By an email dated 23 October 2017, Mr. Naqvi said to Mr. Chris Elias (a representative of the Gates Foundation), “I take my responsibility in managing this fund very seriously. I had personally committed to Bill [Gates] that I would retain personal oversight of this fund [AGHF], which is the only one I retain across The Abraaj Group”. That email was copied or forwarded to Khawar Mann; Mr. Abdel-Wadood; Mr. Siddique; and Mr. Vettivetpillai. Accordingly, [AGHF] knew via its CEO and the said Directors that Mr. Naqvi was holding himself out in this way, and did not disagree with or seek to “correct” that representation. For the avoidance of doubt, Mr. Naqvi lied to Mr. Elias insofar as he implicitly said that he did not retain personal oversight over [Fund IV]: for the reasons pleaded in these particulars, he did retain such personal oversight over [Fund IV] as well as [AGHF].

(h)(v) On 14 December 2017, Mr. Naqvi instructed Khawar Mann not to send any communication to investors in [AGHF]. Mr. Mann replied to Mr. Naqvi the same day, saying, “OK”. Mr. Mann acted on those instructions. (h)(vi) By an email dated 23 December 2017, Mr. Naqvi sent to Mr. Lakhani, Mr. Siddique and Mr. Dave an updated version of the Excel Spreadsheet entitled “Cash Projection,” and identified certain fund-raising activities which Mr. Naqvi proposed personally to “manage and deliver”. In the context of shortfalls in cash having been identified in both [AGHF] and [Fund IV], as set out in paragraphs 12A-18B above, this was a proposal that Mr. Naqvi seek to raise monies on behalf of those Funds. Mr. Lakhani, Mr. Siddique

and Mr. Dave, acting in their capacities as Directors of the Fund entities, consented to that proposal and thereby authorised Mr. Naqvi to act on behalf of the Funds for the purpose of raising monies. Accordingly, in the context pleaded at paragraphs 12A- 18D above, Mr. Lakhani, Mr. Siddique and Mr. Dave knew, by the time that Mr. Naqvi approached Mr. Jafar (20 December 2017), that Mr. Naqvi was approaching and intended to approach third parties with the intention of borrowing money for the [AGHF] and [Fund IV], and authorised him to do so.

(h)(vii) On 25 December 2017, Mr. Lakhani, acting in his capacity as Director of GP8, sought instructions from Mr. Naqvi for the transfer of funds out of GP8's bank account in order to repay a Limited Partner that had requested the return of funds. Mr. Naqvi provided those instructions and they were acted upon by the Board of GP8.

(4A) Further, because of the matters pleaded in paragraphs 12A-12B (the GP8 Air Arabia Loan), 13-18 (the Healthcare Air Arabia Loans), 18A-18D (the procuring of third party funding), 20-30 (the obtaining of the Jafar Loans) and 32(1)-(4) (the way the Abraaj Group was habitually controlled by Mr. Naqvi) above, Messrs Lakhani, Dave, Siddique and Abdel-Wadood knew that Mr. Naqvi had obtained the Jafar Loans by deceit. In those circumstances, and in light of the facts and matters pleaded in paragraph 32(1)-(4) above, the deceit committed by Mr. Naqvi is to be attributed to the Former Healthcare GP, AHG and/or GP8.

(5) The conduct in relation to which the actions and knowledge of Mr. Naqvi are to be attributed to [the AGHF] and [Fund IV] concerned [the AGHF] and [Fund IV] as pleaded in paragraphs 5-6, 12A-18B and 19-287 above and in the "Schedule of Payments and Related Arrangements" annexed to this Re- Amended Statement of Claim.

33. Further or in the alternative, AH, [the AGHF] and [Fund IV] are vicariously liable for the actions of Mr. Naqvi on which Mr. Jafar relies because:

- (1) The Overarching Message was conveyed by Mr. Naqvi for and on behalf of each of them such that the actions, intentions, and knowledge of Mr Naqvi are attributed to each of them;
- (2) The actions of Mr. Naqvi in conveying the Overarching Message were so closely connected with the role that Mr. Naqvi performed on behalf of each of them, that each of them ought fairly to be held vicariously liable in respect of his actions, for the reasons pleaded in paragraphs 32(3)-(5) above; and
- (3) Insofar as necessary, Mr. Jafar will say that by virtue of their knowledge as pleaded in sub-paragraph 32(4A) above, the Fund Directors, by permitting the monies derived from the Jafar Loans to be paid to [GHF]

and GP8's accounts as pleaded in paragraphs 5 and 6 above, ratified Mr. Naqvi's acts and/or conferred retrospective authority on him to act on behalf of each of [AGHF] and [Fund IV] with respect to the procuring of the Jafar Loans.

34. *In the premises, the Overarching Message, and the express representation pleaded at sub-paragraph 20(8) above, were conveyed by Mr. Naqvi, for and on behalf of himself and each Defendant, in circumstances where he (and, consequently, each of the Defendants) knew them to be false and/or had no belief in their truth and/or was reckless as to whether they were true. Each Defendant knew and intended for the Overarching Message and the express representation pleaded at sub-paragraph 20(8) to be so conveyed by Mr Naqvi.*
35. *The Overarching Message and the express representation pleaded at sub-paragraph 20(8) above were conveyed with the intention, on the part of Mr Naqvi and, consequently, each of the Defendants, that they it be relied on by Mr Jafar."*

801. Mr Jafar argued that his claim of attribution gave rise to three issues:

- (a). Did Mr Naqvi have authority to act for the Funds?
- (b). In which capacity did Mr Naqvi act when making the Representations?
- (c). Should Mr Naqvi's actions be attributed to the Funds by reference to the relevant rule governing attribution and its policy?

802. Before turning to Mr Jafar's submissions on the applicable law it is necessary to say something more about and to summarise the evidence relating to the legal structure of and the agreements and arrangements governing the management and operation of the Funds.

The Abraaj private equity funds

803. I have already provided a brief outline of the way in which the Abraaj private equity funds were organised and how AGHF and Fund IV were constituted but it is now necessary to consider these issues in more detail.

804. The description of the operation of these funds is based on the evidence of Mr Conway, in particular Conway 1. In Conway 1, Mr Conway noted that there were twelve funds structured regionally or thematically.
805. A separate exempted limited partnership for each fund was created by a limited partnership agreement (**LPA**). An Abraaj entity would act as the general partner of the partnership. This would be an entity (pre-existing or newly incorporated) (whose *de jure* directors Mr Jafar claimed were always drawn from Mr Naqvi's associates, labelled by Mr Jafar as Mr Naqvi's Inner Circle). The LPA (at least in the case of the Funds) provided that the general partner would have liability in respect of the partnership's "*debts, liabilities and obligations as exceed the Partnership Assets.*" The LPAs also provided that the general partner was responsible for the operations and management of the relevant fund. However, certain of the LPAs also obliged the general partner to appoint a third party "*associate*" of the general partner to act as "*Manager.*" The general partner would then appoint another Abraaj entity as investment advisor and manager of the exempted limited partnership pursuant to an investment management agreement (**IMA**).

The AGHF

806. In the case of the AGHF and Fund IV the investment advisor and manager was AIML. Mr Conway said that AIML was responsible for carrying out the portfolio management of AGHF in accordance with the investment policy contained in the AGHF LPAs.
807. As I have noted the AGHF comprised three parallel funds. Each of the three funds was registered as an exempted limited partnership under the ELPA on 25 June 2015. Each fund was constituted by an LPA governed by Cayman Islands law entered into between the AGHF GP (the predecessor in title to GHF GP, which was wholly owned by AIML as its sole shareholder) and Abraaj Growth Markets Health Fund CIP, LP (the **Healthcare Fund LPA**). Whilst there are numerous iterations of the Healthcare Fund LPA the material provisions were the same between them and so it is appropriate to use and refer to the Amended and Restated LPA for Abraaj Growth Markets Health Fund LP dated 18 August 2017. On 17

July 2015, each of Abraaj Growth Markets Health Fund LP, Abraaj Growth Markets Health Fund (B) LP and Abraaj Growth Markets Health Fund (C) LP entered into an investment management agreement pursuant to which AIML was appointed its investment manager (the ***Healthcare Fund IMA***). These three constituent funds also became limited partners of Abraaj Growth Markets Health Fund Borrower LP (the ***Borrower Partnership***), which was established in this jurisdiction in 2017. The Borrower Partnership (itself composed of the three funds that together comprise AGHF) was formed to be a party to a financing agreement (the ***OPIC Finance Agreement***) with the Overseas Private Investment Corporation (***OPIC***), which was a third-party lender to AGHF, pursuant to which the Borrower Partnership was able to draw up to US\$150m as advance(s) to be utilised on matters relating to AGHF. The Borrower Partnership indirectly owned 100% of the issued share capital in GHF which was used as an asset-holding company of AGHF.

808. AGHF GP and GHF each had a single corporate director between 11 November 2016 and 5 March 2018. This was ADV 1 Limited (***ADV 1***). The directors of ADV 1 were (during the times relevant to Mr Jafar's claim), Mr Lakhani, Mr Dave, Mr Siddique and Mr Junaid Zikar. Mr Jafar submitted that although Mr Vettivetpillai was not a *de jure* director of ADV 1 he functioned like one and was held out in private placement memoranda as having oversight over AGHF under the title of "*Head of the Fund*." Furthermore, while Mr Naqvi was also not a *de jure* director of ADV 1, Mr Conway considered that Mr Naqvi exercised control and oversight over the affairs of AGHF. He said the following at [77] of Conway 1:

"Although not a director of ADV 1, our investigations indicate that Mr Naqvi exercised control and oversight over the affairs of AGHF. For example:

- (a) Mr Naqvi was held out to investors in the Private Placement Memorandum for the AGHF ("PPM") as being "the Head of the Fund" and responsible for its inception and strategic direction. Mr Vettivetpillai was held out to investors as being responsible (together with Mr Naqvi) for oversight over the AGHF.*
- (b) While the PPM indicated that Mr Naqvi shared leadership of the AGHF with other Abraaj executives, the AGHF LPAs defined the "Fund Head" as Mr Naqvi.*
- (c) Although Mr Naqvi was not a director of AHG, prior to 5 March 2018, ADV 1 was the sole corporate director of AHG of which all four of its directors directly or indirectly reported to Mr Naqvi.*

- (d) *During this same period, the AGHF GP's only director was also ADV 1... ADV 1 had four directors during this period, all of whom reported to Mr Naqvi.*
- (e) *Both Mr Naqvi (as Chairman) and Mr Vettivetpillai were permanent members of the GIC, which considered proposed investments by the AGHF. For example, on 9 June 2015, the GIC approved a bid for the acquisition of a 72% stake in Project Care; on 26 October 2015, the GIC approved a letter of intent for Project Metro; and on 19 September 2016, the GIC approved a US\$280,000 due diligence budget for Project Nova. On each occasion, Mr Naqvi chaired the meeting.*
- (f) *[GHF] held US Dollar ("USD") and United Arab Emirates Dirham ("AED") denominated bank accounts with the Commercial Bank of Dubai PSC ("CBD"). At all material times, the signatories to these bank accounts were the individuals listed in the "Standard Existing Abraaj Signatory Matrix 14." Mr Naqvi was the only "A" Signatory in this Matrix and his authorisation was required for any transactions over US\$75 million. Mr Lakhani and Mr Siddique were the "D" Signatories, whose joint authorisation was required for any transactions over US\$5million and up to US\$50million. The "B", "C" and "D" signatories were all individuals who sat within Abraaj's Finance and Support Services Division and who reported (directly or indirectly) to Mr Naqvi. Accordingly, Mr Naqvi's approval was required for any transactions from AHG's bank accounts that exceeded US\$75 million, alongside approval from any one of the "B" or "C" or "D" signatories.*
- (g) *Mr Naqvi and Mr Vettivetpillai appear to have had the final say on whether and when drawdown notices would be issued to the investors in the AGHF.*
- (h) *Mr Naqvi communicated directly with investors regarding their commitments to the AGHF and the direction in which he intended to take its investment projects. See for example, his email to Atul Mehta at IFC dated 8 December 2017.*
- (i) *Those responsible for the day-to-day management of the AGHF consulted with Mr Naqvi in respect of prospective investments and purchases, seeking his "strategic perspective."*

809. Mr Conway noted (at [78] of Conway 1) that in contrast, Mr Khawar Mann, who was the CEO of the AGHF, and formally responsible for the AGHF's operations, was not a member of the GIC, nor a director of GHF or of ADV 1. Mr Mann did not manage or control cash management or bank transfers at the GHF level and had no signatory authority over GHF's accounts with CBD; he appeared to have been unaware of the movement of capital invested by limited partners. He also noted (at [79] of Conway 1) that Mr Naqvi, when investors in

the AGHF began questioning how the Uninvested Capital was being used, Mr Naqvi had taken control of the correspondence and overseen all investor communications.

810. The AGHF's object was prescribed in the LPAs in the terms set out in the investment policy appearing at Schedule 1 to the LPA. The first close date of AGHF was 17 July 2015 and its LPA (in all revisions) identified the term of AGHF as being 10 years from the first closing date, subject to the ability to extend for two further two-year periods. By the time of the events giving rise to Mr Jafar's claim in these proceedings the limited partners in AGHF included AH, the Gates Foundation, the International Finance Corporation of the World Bank, CFC Group PLC, the UK Development Finance Institution (CDC) and French development finance institution (Proparco).
811. One of the principal companies in the AGHF was GHF. Mr Conway said that he understood that from August 2017 the Borrower Partnership indirectly owned all the issued shares in GHF.
812. GHF was the sole shareholder of Hospitals and Diagnostics and all of the investments of the AGHF were made through companies owned by Hospitals and Diagnostics.
813. Mr Conway said that the purpose of the AGHF was set out in Schedule 1 to the Amended and Restated AGHF LPAs dated 17 July 2015 although it appeared that in practice the objectives of the AGHF were set out in quarterly presentations prepared for the Limited Partner Advisory Committee (*LPAC*) for the AGHF.
814. As regards funding, the terms of the AGHF LPAs required an initial capital contribution to be paid upon admission of an investor to the partnership as a limited partner. They also required investors to make further capital contributions when requested to do so by a drawdown notice issued to fund investment projects, to cover management fees and/or to cover other fees and expenses of the fund. Three drawdown notices were issued to AGHF investors during the life of the fund and as at 30 September 2017 the total amount drawn down from investors in respect of AGHF was US\$544.8 million.

Fund IV

815. At all material times, Fund IV's general partner was GP8. GP8 is a Cayman Islands exempted limited company.
816. At the material time (i.e. December 2017), GP8's directors were: (a) Mr Rafique Lakhani (also a director of ADV 1); (b) Mr Waqar Siddique (an executive director of AH, a director of AIML and a director of ADV 1); (c) Mr Ashish Dave (also a director of ADV 1) and (d) Mr Mustafa Abdel Wadood (also a director of AH and CEO of AIML). Mr Naqvi was not a director although he had been a director from 1 May 2008 to 1 March 2009 and from 1 June 2016 to 17 April 2017.

The management structures operating across the Abraaj entities

817. The manner in which the Abraaj entities were managed and the committees that had been established for the purpose of taking, consulting about or coordinating management decisions was dealt with in Mr Conway's evidence.
818. Mr Conway explained that AH was established as the ultimate holding company of the Abraaj entities but was not a passive entity. It had its own substantial private equity investment activities by virtue of holding, indirectly through various special purpose vehicle subsidiaries, limited partner interests (the **LP Stakes**) in at least twelve Abraaj funds.
819. At the date of the JPLs' appointment there were ten directors on the AH board (the JPLs' believed that only two of the directors were executive directors): Mr Naqvi (executive director); Mr Siddique (executive director); Mr Cleary (non-executive director); Mr Fadi Ghandour (non-executive director); Badr (non-executive director); Mr Thomas Max Schmidheiny (non-executive director); Dr John Chipman (non-executive director); Ms Jane Anne Nelson (non-executive director); Ms Wendy Yvonne Nomathemba Luhabe (non-executive director) and Mr Heizo Takenaka (non-executive director).

820. Mr Conway noted that the Abraaj entities centralised their fund management activities through AIML. It was the investment manager for over 30 Abraaj funds and managed these funds directly and by way of subsidiary managers. Mr Naqvi, as I have noted, was the CEO and an executive director of AIML.
821. Mr Conway said that the various Abraaj entities as a whole and in particular AH, AIML and Abraaj Capital Limited (*ACL*) which employed the employees, were essentially managed as a single unit, on a divisional basis, rather than on the basis of separate legal entities. Those divisions included the following:
- (a). A direct investment business, which primarily involved Abraaj entities acquiring limited LP Stakes in Abraaj funds.
 - (b). An investor engagement and coverage division, which oversaw communications and relationships with investors, potential investors and other key stakeholders, at the AH and AIML levels.
 - (c). An investment management division, conducted through AIML and/or wholly owned subsidiaries of AIML (by way of management agreements entered into between AIML and the relevant subsidiary).
822. Mr Conway noted that an organisational chart dated January 2018, which was proposed to be provided to the Dubai Financial Services Authority (*DFSA*) in response to an information request made by the DFSA on 8 March 2018, showed the structure adopted and used by the Abraaj entities (in terms of senior personnel) prior to the governance changes that were announced at the AH board meeting on 19 February 2018. The chart shows six Abraaj divisions and their lead managing partners (or partners, as the case may be), in each case reporting to Mr Naqvi as Founder and Group Chief Executive: Private Equity, led by Mr Abdel-Wadood as Managing Partner; Impact Investing, led by Mr Kito de Boer as Managing Partner; Real Estate, Venture Capital and Credit Strategies, led by Mr Carsten Jorgensen as Partner; Investor Engagement, led by Mr Mark Bourgeois as Managing Partner; Operations

and Abraaj Finance and Support Services, led by Mr Siddique as Managing Partner and the CEO's office (reporting directly to Mr Naqvi). On page 2 of the chart there is a slide setting out the membership of two management committees established, Mr Conway believed, to operate across all of the Abraaj entities, namely the Global Investment Committee (**GIC**) and the Management Executive Committee (known as **MexCom**).

823. Mr Conway noted that the operation and composition of the GIC had been explained in a document entitled "*Investment Process Manual*" dated September 2015 in the following terms

"The Global IC takes its position at the heart of The Abraaj Group with the mandate to constantly seeks [sic] to improve the rigor and quality of the Investment Process while bringing the best practices, diverse expertise and knowledge of the Group to each investment. It is responsible for all investment and divestment decisions across funds and provides approvals at every critical stage [...] of a transaction...

To ensure consistency of approach across all funds, there are four permanent members and one member who rotates annually. In addition, up to two senior members from the relevant region/thematic are included...

The four permanent member of the Investment Committee are:

- *Arif Naqvi (Chair)*
- *Mustafa Abdel-Wadood*
- *Sev Vettivetpillai*
- *Wahid Hamid*

[Mr Conway said that he understood that the fifth member of the GIC as at January 2018 was Mr Huayun Shahryar]."

824. Mr Conway said that the managerial decisions of the Abraaj entities were, in theory, overseen by MexCom which comprised representatives from each of the various divisions, all managing partners, the Chief Financial Officer of AH and the Chief Operating Officer of AH. He said that, as at January 2018, the members of the MexCom were Mr Siddique (Chair); Mr Vettivetpillai; Mr Wahid Hamid; Mr Mustafa Abdel-Wadood; Mr Ashish Dave and Mr Bisher Barazi. Mr Conway said that, based on the JOLs' investigations, his team had

learned that until February 2018 when the operations of the Abraaj entities were segregated there had been monthly meetings of MexCom, at which business updates were presented. These updates addressed matters such as operations, fund performance, strategy and budgeting.

825. Mr Conway said that his understanding was that although Mr Naqvi did not appear to have been a member of MexCom, he was responsible for its establishment and exercised control over it. The "Terms of Reference – Management Executive Committee" dated 25 January 2017. He set out what was covered by this document at [35] and [36] of Conway 1:

“35. [The Terms of References state among other things that:

- (a). MexCom was established in November 2012 by the Group Chief Executive Officer (i.e. Mr Naqvi) and reconstituted in January 2017;*
- (b) the overall mandate of MexCom is to ensure efficient functioning of the Group and effective execution of its strategy as defined by the Group CEO and "the Board" [Mr Conway said that he understood this to be a reference to the AH board because Article 154 of the AH Articles provided for the establishment of MexCom];*
- (c) MexCom is expected to provide the Group CEO input on strategy, product development, organizational structure/design, and any other strategic matters deemed appropriate;*
- (d) MexCom was empowered to allocate resources and is responsible for ensuring the effectiveness of the Abraaj Group functions, and to draw upon and empower resources from across the Abraaj Group as may be required to fulfil its remit;*
- (e) MexCom "will be responsible to take actions and implement decisions taken by the Partners Council and the Group CEO" (sic);*
- (f). all members of MexCom will be determined solely by the Group CEO (i.e. Mr Naqvi);*
- (g) the composition of MexCom can be amended from time to time by the Group CEO (i.e. Mr Naqvi);*
- (h) the Group CEO (i.e. Mr Naqvi) or any other person appointed by him will serve as the Chair of MexCom; and*

- (i) *each member of MexCom has one vote. "All decisions will be carried by unanimity except in case [sic] where there is one dissenting vote. In such a case, the matter should be referred to the Group CEO for final determination. In the event there is a 'dead-lock' on certain matters, the Group CEO will provide resolution" I understand that this means, in effect, that Mr Naqvi's had the final say on any matter before MexCom, save in cases where the vote was unanimous.*

36. *Accordingly, while Mr Naqvi was not a member of MexCom, the Committee constitutionally operated under the direction and control of Mr Naqvi, who, as made clear by the terms of reference above, formulated (notionally alongside the AH Board), the strategy for the Abraaj Group which MexCom was tasked to implement. Mr Naqvi also controlled and determined the membership of MexCom, including the Chair."*

826. Mr Conway also addressed the position of Mr Naqvi in Conway 1 and said as follows:

"38. Mr Naqvi was the founder and Group CEO of the Abraaj Group. He was held out to third parties as representing the Abraaj Group and exercised ultimate decision-making authority. It appears from our investigations that Mr Naqvi exercised top-down control over the Abraaj Group (including each of its underlying Funds) and Mr Naqvi was able to, and did, personally instruct and direct the actions and activities of the Abraaj Group (along with each of its underlying funds).

39. *At all material times, Mr Naqvi was:*

- (a) *an executive director and the CEO of AH;*
- (b) *the sole shareholder of [AE2L], the majority shareholder in AH;*
- (c) *an executive director and the CEO of AIML;*
- (d) *an authorised signatory for all bank accounts held by AIML for all transfers in excess of US\$25 million or US\$75 million depending on the account; and*
- (e) *the Chairman of the Global Investment Committee.*

40. *As set out in the AH Articles ... Mr Naqvi had the right to: (a) appoint and remove the CEO of AH (Article 152); (b) approve investment decisions for Abraaj Funds up to the maximum limit permitted under the respective Funds' mandates (Article 153.1); (c) appoint an Executive Committee of AH (Article 157); (d) appoint an advisory board, with the membership and powers that he deemed appropriate (Article 155); and (e) appoint an Investors' Council*

consisting of various important shareholders and stakeholders, and define its charter and powers (Article 156).

- 41 *Article 151 of the AH Articles also granted Mr Naqvi "full power and authority in operating [AH] and [he] shall have full authority to take all day-to-day decisions for the running and operation of [AH]."*
42. *Based on our investigations into the events leading up to the payments which form the subject matter of the JOLs' transaction avoidance claims, it is clear that Mr Naqvi exercised control over all major commercial and financial decisions within the Abraaj Group... "*

827. In addition, in Conway 1 Mr Conway identified those who assisted and worked closely with Mr Naqvi and their relationship with him:

"43 Mr Naqvi was assisted by certain trusted senior executives within the Abraaj Group, primarily:

(a) Waqar Siddique, who was:

- (i) a Senior Partner within the Abraaj Group;*
- (ii) Chief Operating Officer and an executive director of AH;*
- (iii) an executive director of AIML from 7 July 2013 to 3 April 2018; and*
- (iv) a member of MexCom....*

(b) Rafique Lakhani, who was:

- (i) a Vice President and subsequently Senior Vice President within the Abraaj Group; and*
- (ii) the Managing Director of Finance within the Abraaj Group from 1 September 2005, who, as set out below, sent regular cashflow updates for the Abraaj Group.*

(c) Mustafa Abdel-Wadood, who was:

- (i) Global Head of Private Equity;*
- (ii) a Managing Partner with the Abraaj Group, and who had primary responsibility for overseeing its operations in the Middle East and North Africa region;*

- (iii) *Vice-chair of MexCom;*
- (iv) *an executive director of AIML from 9 July 2006 to 26 February 2018;*
- (v) *an executive director of AH from 11 November 2006 to 26 February 2018;*
- (vi) *a member of the GIC; and*
- (vii) *a Managing Partner of AIML.*
- (d) *Mr Ashish Dave, who was:*
 - (i) *a partner within the Abraaj Group; and*
 - (ii) *a member of MexCom.*
- (e) *Mr Sivendran Vettivetpillai, who was:*
 - (i) *an executive director of AH from 26 March 2014 to 19 February 2018;*
 - (ii) *a Managing Partner of AIML; and*
 - (iii) *a member of the GIC.*

44 *Senior personnel in the Abraaj Group, including the individuals listed above, sent Mr Naqvi weekly updates regarding cashflow, investor relations and other matters within their respective purviews (spanning the breadth of the operational framework of the Abraaj Group) and regularly requested Mr Naqvi's instructions in relation to decisions. In an email dated 11 May 2017, Mr Naqvi described the purpose of the updates, in response to a MexCom weekly update email circulated by Mr Siddique, in the following terms:*

- "1. Timeliness every week is more important than structured content; I like to know what is happening.*
- 2. This brings me to my second point: as far as Mexcom goes, I am completely in the dark. Every other Managing Partner seeks my views informally before taking decisions, thru the weekly update. As far as I am concerned, I have ZERO knowledge of what is coming before Mexcom, what decisions are being taken, whether it is effective, etc, etc. if you freeze me out, I will take it for a while, and then go nuts if I don't know what is happening and what is being decided."*

45 *Mr Siddique responded to this email on or about 12 May 2017, confirming that he would reach out to Mr Naqvi for "any important decision".*

...

48. *Mr Naqvi made it very clear to senior managers within the Abraaj Group that he had ultimate authority for decision-making. For example, on 30 November 2017, Mr Naqvi told Mark Bourgeois, the Global Head of Investor Engagement, that he "retain[ed] the right to Moyo's [sic – mould] your responses and what you say to whom, because people give added weight to what you say because of also your closeness to me". Mr Bourgeois replied to say, "Anything like this in the future will come only to you"*

828. Mr Conway noted that a key feature of the management of the Abraaj entities was that cash was centrally managed and cash belonging to particular entities was routinely transferred from those entities' bank accounts to meet the cash requirements of other entities. He further noted that in addition to the commingling of money belonging to the Abraaj funds, the Abraaj entities also met cash shortfalls using money borrowed by AH. Between 23 July 2012 and the date of the appointment of the JPLs, AH arranged facilities with 8 different lenders, pursuant to which a total principal of US\$895 million was borrowed. While AH's borrowing was also used to fund its own investment activity (principally its own investments in the Abraaj funds), the majority of the money borrowed by AH was paid into the treasury bank accounts operated by AIML as part of the commingling. The JPLs' Commingling Report concluded that AH had been a net contributor to AIML in the approximate amount of US\$745 million. The JOLs' investigations had determined that in order to sustain this borrowing, AH had prepared inaccurate and misleading financial reports to provide to its bank lenders.

Mr Jafar's submissions

Mr Jafar's case in outline

829. Mr Jafar argued that AGHF GP and GP8 were primarily (by reason of attribution) or alternatively vicariously liable for Mr Naqvi's deceit.

830. Mr Jafar first submitted that Mr Naqvi's deceit was to be attributed to the Funds first because (pre-existing) express authority was conferred on Mr Naqvi by the Funds' constitutions; under the laws of agency; and under company law (including by reason of Mr Naqvi's status as a de facto and/or shadow director of the Funds' general partners). He acted with clearly conferred authority and was clearly committing acts within that broad authority, given that he was deceiving Mr Jafar so as to enable AGHF to repay its limited partners and to enable Fund IV to pass its audit. Thus, Mr Jafar argued, attribution arose on the basis of the straightforward and conventional authority analysis. Alternatively, if there was not pre-existing authority, Mr Naqvi's acts of deceit were ratified by the de jure directors of each of AGHF GP and GP8.
831. Mr Jafar's second submission was that Mr Naqvi had implied actual authority to act on behalf of Funds. He argued that the evidence regarding how the Funds were managed showed (or permitted the inference) that the relevant boards gave authority to Mr Naqvi to run the Funds in any way he saw fit. Authority was implied by the conduct of the de jure directors of the Funds' general partners. By their persistent course of conduct leading up to December 2017, they granted Mr Naqvi authority to make decisions on behalf of the Funds.
832. His third submission was that that Mr Naqvi had ostensible authority to act for and bind AGHF GP and GP8 and through them the Funds.
833. Mr Jafar's fourth submission was that the deceit was to be attributed to AGHF GP and GP8 because Mr Naqvi was acting as the "*controlling mind and will*" of each of AGHF GP and GP8 for the purpose of procuring the Loans.
834. Fifthly, in his Written Opening Submissions, Mr Jafar submitted that the flexible rules of attribution applied such that Mr Naqvi's acts of deceit were to be attributed to the general partners of AGHF and Fund IV because their *de jure* directors adopted or acquiesced in Mr Naqvi's deceit of Mr Jafar. Where AGHF GP's and GP8's (and ADV1's) *de jure* directors allowed Mr Naqvi to run those companies and through them the Funds as part of the overall Abraaj group and without any real regard to separate corporate personality it would

undermine the law's policy for the Fund Parties now to be permitted to rely on separations of legal personality that were not at the relevant times respected in order to evade liability. It did not lie in their mouths to use as a shield the corporate forms that they ignored as Mr Naqvi operated the Abraaj entities as a single entity for so many years. This formulation of Mr Jafar's case was not repeated in Mr Jafar's Written Closing Submissions or in Lord Falconer's oral closing submissions and I take this formulation to be another way of arguing for attribution based on the implied authority argument.

835. Sixthly and alternatively, the Fund Parties were vicariously liable because Mr Naqvi committed the acts of deceit in the scope of his actual or ostensible authority or, alternatively, the acts of deceit were ratified by the de jure directors of each of the AGHF GP and GP8. I shall deal with the vicarious liability ground separately and start by considering the issues relating to primary liability through attribution.

Mr Jafar's submissions on the applicable law

836. Mr Jafar submitted that an entity will be primarily liable for a tort where a tort committed by a natural person is attributed to it. There were essentially three stages to the analysis. Attribution may arise where (a) the tort was committed pursuant to authority, whether conferred prospectively or by ratification; or (b) where the tort is committed by the controlling mind and will of the entity for the purpose of the transaction in question, and in any event (c) the Court must consider attribution in the context for which attribution is sought and ask whether attribution would serve or undermine the policy of the law being applied (here, the law of deceit).

837. Mr Jafar noted the analysis attribution in Lord Walker's judgment in the Hong Kong Court of Final Appeal in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* [2014] HKCFA 22 at [61]. Lord Walker said that attribution was "*the process of legal reasoning by which the conduct or state of mind of one or more natural persons (that is, human beings) is treated as that of a non-natural person (that is, a company) for the purpose*

of determining the company's legal liability or rights in civil proceedings (in particular, its liability or rights in contract, in tort or for unjust enrichment) or its criminal liability."

838. Mr Jafar submitted that the leading case on attribution remained the Privy Council's decision in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413 (*Meridian*) and he relied on the judgment of Lord Hoffmann (at 418(D-E) and 419(E)) as setting out the authoritative guidance on the proper approach to be adopted by the Court (in what has become a very well-known and frequently quoted passage in Lord Hoffmann's judgment):

"The company's primary rules of attribution will generally be found in its constitution... There are also primary rules of attribution which are not expressly stated in the articles but implied by company law..."

... These primary rules of attribution are obviously not enough... Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as acts of the company...

... But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

839. Mr Jafar noted that applying those principles to the facts in *Meridian*, the Privy Council had held that the knowledge of a company's employee that the company had become a substantial security holder in a public issuer was to be attributed to the company notwithstanding that the employee had concealed the fact from his employer, the company, as this served the policy of the relevant statute (see 511C-512B). Mr Jafar also noted that in a later decision of the Hong Kong Court of Final Appeal, *HKSAR v Luk* [2016] HKCFA 81,

Lord Hoffmann had observed (at [41]) that, “*authorities since Meridian [including] Bilta v Nazir [[2016] AC 1] make it clear that in every case the criteria for attribution must be such as will give effect to the purpose and policy of the relevant substantive rule, whether that rule is contained in a statute or in the common law*” and had rejected the suggestion that there were “*uniform common law principles by which one will attribute acts, knowledge, states of mind etc*” to a company.

840. Mr Jafar submitted that accordingly, the Court must always have regard to the policy of the rule of law in question: “*The question in each case is whether attribution is required to promote the policy of the substantive rule, or (to put it negatively) whether, if attribution is denied, that policy will be frustrated*” (per Mr Justice Dyson, as he then was, in *McNicholas Construction Co Ltd v Customs and Excise Comrs* [2000] STC 553, cited with approval in *Bilta (UK) Ltd (in liquidation) v Nazir* [2016] AC 1). By way of illustration, in *Bank of India v Morris* [2005] 2 BCLC 328 the Court of Appeal in England had attributed knowledge for the purpose of a claim under section 213 of the Insolvency Act 1986 because “[t]he paramount purpose of the provision... [was to compensate those who had suffered loss as a result of the fraudulent trading]... If knowledge were not attributed to an outsider company in cases such as this the purpose of imposing liability upon such a company to pay compensation would be emasculated” (see [111]-[112]).

Authority conferred by the constitution

841. Mr Jafar argued that whether authority was conferred by the constitution of an entity was a matter of construction of the relevant constitutional documents. The usual rules of contractual construction applied.

Authority conferred by company law

842. Mr Jafar argued that subject to the constitution, an entity's directors had authority to bind the entity. This applied with respect to *de jure* directors but also *de facto* and shadow directors.

843. Guidance on how to identify *de facto* directors was given by the Supreme Court's judgment in *Revenue and Customs Commissioners v Holland* [2010] 1 WLR 2793, which had been conveniently summarised by HHJ Pelling in *Energenics Holdings v Hazarika* [2014] EWHC 1845 (Ch) at [88] (*Energetics Holdings*) (my underlining):

"The substantive guidance contained in Holland is that in deciding whether a person is a de facto director the court takes into account all the relevant factors in deciding whether the person concerned at the relevant time in substance assumed to act as a director or exercised the powers and discharged the functions of a director. This will include considering:

- i) Whether the person concerned was concerned with the management of the company's affairs;*
- ii) Whether the tasks that he undertook were tasks that could properly be performed by a manager below board level;*
- iii) Whether the person concerned was at least equally with others directing the affairs of the company;*
- iv) Whether the company held the person out as being in substance a director;*
- v) Whether the individual concerned held him or herself out as being in substance a director;*
- vi) Whether the individual had access to proper information on which to base decisions – access to accounts is likely to be particularly relevant where it is alleged that the person concerned is authorising the use of company funds;*
- vii) Whether the individual took major decisions in the name of the company;*
- viii) Whether the individual was part of the corporate governing structure or exercised real influence on the corporate governance of the structure; and*
- ix) Whether the individual assumed a role sufficient to justify imposing on him a fiduciary duty and make him responsible for the misuse of assets."*

844. Mr Jafar said that since the question was always one of fact the guidance in *Holland* was not exhaustive or absolute. The Court must take a realistic approach and was entitled to have regard to the realities of an entity's corporate governing structure or lack thereof. Mr Jafar pointed out that HHJ Hodge in *Re MSD Cash and Carry plc* [2018] EWHC 1325 (Ch) (***MSD Cash and Carry***) had had to consider whether an individual should be treated as a *de facto* director, and how to apply the tests and analysis in *Holland*, in a case where there had never been any formal corporate governance structure. The learned Judge had said this (my underlining):

“104 *In the present case, only one of the three tests identified by Lord Collins at paragraph 91 of his judgment is directly relevant. That, it seems to me, is the first of those tests. Here, there was never any holding out by the company of Surjit as a director, and he never used the title. However, I find that that is explicable by reference to Surjit's past criminal convictions and disqualification from acting as a company director. Here, there was no formal corporate governing structure. Mrs Basi was only ever a director in name only. After 6 June 2011, MSD had no director at all, and there was no corporate governing structure. The focus upon participation in corporate governance is understandable in Holland, where the relevant defendant had done no more than discharge his duties and responsibilities as a director of the corporate director. The facts of the Holland case are very different from those of the instant case.*

105 *In the context of the present case, where there was never any observed formal corporate governing structure, and where, after 6 June 2011, there were no directors at all for MSD, I find a focus on corporate governance to be of less relevance and assistance. I find some assistance from Arden LJ's focus in the Mumtaz case upon the identification of one or more "nerve centres" from which "the activities of the company radiated."*

106. *Mr Cousins submits that neither the application, nor the evidence in this case, begin to address the tests posed by Lord Collins in [91] of his judgment in Holland so as to demonstrate that Surjit had assumed the duties of a director or was part of MSD's corporate governing structure. It was for the liquidator to prove that Surjit had assumed such a role sufficient to impose such a responsibility upon him, and that he had used his position to misuse MSD's assets."*

845. HHJ Hodge referred to [91] of the judgment of Lord Collins in *Holland* which is worth setting out in full (my underlining) (both Lord Hope and Lord Collins were in the majority in *Holland*):

“Once the concept of de facto director was divorced from the unlawful holding of office, there were two consequences. The first consequence was that the distinction between de facto directors and shadow directors was eroded. A shadow director is “a person in accordance with whose directions or instructions the directors of the company are accustomed to act”: see Companies Act 1985, section 741(2); Companies Act 2006, section 251(1). In In re Hydrodam [1994] 2 BCLC 180, 183, Millett J said that de facto and shadow directorship “do not overlap. They are alternatives, and in most and perhaps all cases are mutually exclusive.” But the distinction was impossible to maintain with the extension of the concept of de facto directorship and the consideration of such matters as the taking of major decisions by the individual, which might be through instructions to the de jure directors, and the evaluation of his real influence in the affairs of the company: see In re Kaytech International plc [1999] 2 BCLC 351, 424, per Robert Walker LJ. The second consequence is that the courts were confronted with the very difficult problem of identifying what functions were in essence the sole responsibility of a director or board of directors. A number of tests have been suggested of which the following are the most relevant. First, whether the person was the sole person directing the affairs of the company (or acting with others equally lacking in a valid appointment), or if there were others who were true directors, whether he was acting on an equal footing with the others in directing its affairs: In re Richborough Furniture Ltd [1996] 1 BCLC 507. Second, whether there was a holding out by the company of the individual as a director, and whether the individual used the title: Secretary of State for Trade and Industry v Tjolle [1998] 1 BCLC 333. Third, taking all the circumstances into account, whether the individual was part of “the corporate governing structure”: see Secretary of State for Trade and Industry v Tjolle, at pp 343—344, approved in In re Kaytech International plc [1999] 2 BCLC 351, 423, where Robert Walker LJ also approved the way in which Jacob J in the Tjolle case had declined to formulate a single test. He also said, at p 424 that the concepts of shadow director and de facto director had in common “that an individual who was not a de jure director is alleged to have exercised real influence (otherwise than as a professional adviser) in the corporate governance of a Company”. See also especially In re Mea Corp Ltd [2007] 1 BCLC 618 (Lewison J); Ultraframe (UK) Ltd v Fielding (No 2) [2006] FSR 293 (Lewison J); Secretary of State for Trade and Industry v Hollier [2007] Bus LR 352 (Etherton J). In fact it is just as difficult to define “corporate governance” as it is to identify those activities which are essentially the sole responsibility of a director or board of directors, although perhaps the most quoted definition is that of the Cadbury Report: “Corporate governance is the system by which companies are directed and controlled” (Report of the Committee on the Financial Aspects of Corporate Governance, 1992, para 2.5).”

846. Mr Jafar also noted that *Holland* had been considered by Mr Justice Hildyard in his *magnum opus* in *ACL Netherlands B.V. & ors v Lynch and Hussain* [2022] EWHC 1178 (Ch) (*ACL Netherlands*). That case arose from the acquisition of a company known as Autonomy which was said to have been procured by misrepresentation and deceit by its directors. One of the

claimants, ASL, a wholly owned subsidiary of Autonomy, brought claims against Dr Lynch, the CEO of Autonomy, alleging that he had breached fiduciary duties owed to ASL. Dr Lynch was not a *de jure* director of ASL but he was the director and CEO of Autonomy, its parent company. ASL alleged that he was a *de facto* and/or shadow director of ASL. The evidence in support of the claimants' case, described at [3519] of the judgment, emphasised that (a) Dr Lynch exercised an unusual level of control over the subsidiaries of Autonomy and approved all purchases made by subsidiaries in excess of \$30,000 and (b) ASL's board of directors did not appear to take "*important decisions regarding its affairs*", these having been taken by executives at Autonomy including Dr Lynch. Hildyard J accepted that Dr Lynch had acted as *de facto* and a shadow director of ASL. Mr Justice Hildyard had set out his reasoning at [3525(3)-(4)] as follows (my underlining):

- “(3) *Dr Lynch's answer in the course of his cross-examination that "I wouldn't know which contracting company was being used, unless I went and looked at the paperwork which I didn't normally" illustrates how subsidiaries within the Autonomy Group were "used" as contracting parties without regard to their separate interests and at the direction of senior management with Dr Lynch at its apex.*
- (4) *Although the mere fact that his approval was sought for large transactions by subsidiary companies would not of itself support the conclusion that he was a de facto or shadow director of the transacting subsidiary, the reality was that (a) the absence of any evidence that any of the subsidiaries had a functioning board of directors which actually made any decision confirms that the power of management in fact resided elsewhere than the board; (b) Dr Lynch was at least on a par with the de jure directors, and (c) the need for his final approval connoted that Dr Lynch had the ultimate decision-making power and was in fact first among them.*”

847. Mr Jafar noted that a shadow director was defined in section 89 of the Companies Act as “*any person in accordance with whose directions or instructions the directors of the company are accustomed to act, but the person is not deemed to be a shadow director by reason only that the directors act on advice given by that person in a professional capacity.*” Mr Jafar submitted that the concepts of *de facto* and shadow directors were distinct although there was a substantial overlap between them (citing *Smithton Ltd v Naggar and others* [2015] 1 W.L.R. 189 per Arden LJ at [34]-[43] and *ACL Netherlands* at [3516(4)]).

Liability based on the general principles of agency law

848. Mr Jafar submitted the core rule is that a principal is liable for his agent's tort committed pursuant to his authority (*Lloyd v Grace, Smith & Co* [1912] AC 716, 731 as recently affirmed in *Ivy Technology* at [391]-[428]).
849. Actual authority could be express or implied and may arise by inference from an examination of the nature of a relationship between parties (see *Haringey v Ahmed* [2018] HLR 9, per Hamblen LJ at [25]-[26]).
850. Authority could also be ostensible. The principle was set out in the judgment of Mr Justice Hamblen (as he then was) in *Nayyar and others v Denton Wilde Sapte and another* [2009] EWHC 3218 (QB) (*Nayyar*):

“131. Ostensible authority is based upon a representation by the principal to the effect that the apparent agent has their authority to act, even if the apparent agent did not in fact have that authority. It is not generally possible for the apparent agent to clothe themselves with ostensible authority by making representations to the effect that they have authority.

.....

134. As to ostensible/apparent authority:

- (1) the general principle is usefully summarised in Bowstead & Reynolds at paragraph 8-013:*

“Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority”

- (2) there must be a representation by the principal to the third party (which can be express, or implied from a course of dealing, or made by permitting the agent to act in some way in the conduct of the principal's business with other persons) - see Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, Armagas v. Mundogas SA [1986] 1 A.C. 717 (HL) and Bowstead & Reynolds at paragraph 8-017;*

- (3) *a person without actual authority cannot generally clothe himself with ostensible authority by representing that he has that authority - See Freeman & Lockyer at 505;*
- (4) *since ostensible authority involves a representation by the principal as to the extent of the agent's authority, no representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal – see Attorney-General for Ceylon v. Silva [1953] A.C. 461 at 479."*

851. I would note and add that the judgment of Mr Justice Henshaw in *Ivy Technology* is authority for the proposition that liability in a deceit case can be founded both on the basis of actual and ostensible authority. At [421] Henshaw J said this:

"However, these cases do not in my view lay down any rule of law that liability in a deceit case can be founded only on ostensible, as opposed to actual, authority. That would be inconsistent with the reasoning of the House of Lords in Lloyd v Grace Smith, based as it is, at least in part, on actual authority. It would also be inconsistent with Briess, where the House of Lords' conclusion on the question of authority was premised solely on the actual authority derived from the general meeting (as evidenced in the minute of it), and there was no evidence or reasoning based on reliance or ostensible authority. There is no sign that the shareholders had in fact held Mr Rosher out as having authority to negotiate on their behalf, and nor would his position as managing director involve ostensible authority to negotiate a sale of shares by a shareholder in the company. Mr Bell accepted, in his written closing (§§ 187 and 190), that liability in deceit can be founded on either the actual or the ostensible authority of the agent."

852. Mr Jafar said that a closely related concept is estoppel by acquiescence, which will arise as described in *AJU Remicon Co Ltd v Alida Shipping Co Ltd* [2007] EWHC 2246 (Comm) at [15] per HHJ Chambers QC (sitting as a High Court Judge):

"Where a person "P" has power to authorise a person "A" to perform an act, and A represents himself as exercising such authority in circumstances of which P has knowledge but remains silent, P will be treated as having held out A as having the relevant authority where there is no actual authority, see The Wave [1981] 1 Lloyd's Rep 521."

853. Mr Jafar submitted that if there was no preceding authority "[t]he relationship of principal and agent may be constituted... retrospectively, by subsequent ratification by the principal of acts done on the principal's behalf" (Bowstead & Reynolds on Agency, 22nd Ed., Ch.2,

[2-001]). Ratification may be express or implied, provided there was clear evidence that the principal had adopted or recognised the act (ibid at [2-074]).

The scope of the authority

854. Mr Jafar submitted that where authority was express the Court would consider the instrument or instruments by which authority was conferred and by a process of conventional construction ascertain the scope of authority that was conferred by the principal. “[W]here authority of an agent is general or given by an instrument not under seal or orally then it is construed liberally, with regard to the object of the authority and to the usages of trade or business” (Nayyar at [132]). In addition, it was settled that “[a]n agent has implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of the agent’s express authority in the usual way.” (Bowstead & Reynolds on Agency at [3-022]).

855. Mr Jafar also submitted that it was settled that courts were resistant to arguments that a company’s agent had authority to conduct negotiations but not to act unlawfully, citing the judgment of Sir Montague Smith in the Privy Council in *Mackay v Commercial Bank of New Brunswick* (1874) L.R. 5 P.C. 394 at 411:

“[I]t may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond “the scope of the agent’s authority” in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds...”

856. Mr Jafar submitted that it was “sufficient [to establish a principal’s liability] for the fraudulent misrepresentation to have been made in the course of a negotiation which the agent had the principal’s actual or ostensible authority to carry out” – it was not necessary that the principal had “authorised it specifically or ... given specific authority to make fraudulent misrepresentations in general” (Henshaw J in *Ivy Technology* at [428]).

857. Mr Jafar argued that the same objective approach was applied in the context of *de facto* or shadow directors to determine whether specific knowledge or acts were within the scope of a director's authority such that they were to be attributed to the entity. He cited the following observations of Hildyard J at [3518] in *ACL Netherlands* as being instructive:

- “(1) *Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence*
- (2) *such directions or instructions do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them, and nor furthermore is it necessary to the recognition of a shadow director that he should lurk in the shadows;*
- ...
- (4) *[I]t is not necessary that the person in question should be able to influence every member of a board: a person at whose direction a governing majority of the board is accustomed to act is capable of being a shadow director.”*

858. Mr Jafar argued that the knowledge and acts of both *de facto* and shadow directors will fall to be attributed to the entities they direct. Where an individual is the “*nerve centre*” of an entity, their knowledge and acts are those of the entity (citing Lord Denning MR in *H.L. Bolton (Engineering) Co. Ltd v T.J. Graham & Sons* [1957] 1 QB 159, at page 171 and *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [98]).

859. Mr Jafar submitted that it was also settled that an agent or director of multiple entities may have his/her knowledge attributed to multiple entities (citing *Belmont Finance Corporation v Williams Furniture Limited and others (No 2)* [1980] 1 All ER 393 (CA) at page 404 per Buckley LJ). When considering the knowledge or acts of an agent that are to be attributed to a principal (a) where an agent has been afforded wide authority, the agent may represent the principal to such an extent that knowledge/acts of the agent are necessarily to be treated as those of the principal (see *Blackburn Low & Co v Vigors* (12 App Cas 531) at 537); (b) the Court does not take an artificial view in compartmentalising an agent's knowledge and the knowledge of an agent who is acting for more than one party to the same transaction is not generally compartmentalised and was likely to be imputed to both (or more) principals.

Controlling mind and will

860. Mr Jafar submitted that attribution will also arise where an individual is the “*controlling mind and will*” of the relevant entity for the purposes of the transaction in question.

861. Mr Jafar relied on the following passage in the judgment of Nourse LJ in *El Ajou v Dollar Land Holdings* [1994] BCC 143 (EWCA) at 150F-151A as setting out the basis for the controlling mind and will doctrine (my underlining):

“This doctrine, sometimes known as the alter ego doctrine, has been developed, with no divergence of approach, in both criminal and civil jurisdictions, the authorities in each being cited indifferently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires mens rea as a constituent of the crime, and the civil law intention or knowledge as an ingredient of the cause of action or defence ...

...The doctrine attributes to the company the mind and will of the natural person or persons who manage and control its actions. At that point, in the words of Millett, J. ([1993] 3 All E.R. 717 at 740): 'Their minds are its mind; their intention its intention; their knowledge its knowledge.' It is important to emphasise that management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point.”

862. In his Written Closing Submissions Mr Jafar said that his case on controlling mind and will was not mutually exclusive of his case by reference to authority. The origin of the controlling mind and will doctrine was broader (as was said by Lord Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, page 713, “*its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation*”). The value and appropriateness of the doctrine was that it enabled the Court to recognise the realities and look behind a formal constitutional power structure and determine a true controller who may not be labelled as such. Whilst Mr Naqvi was constitutionally empowered as set out above the important point, Mr Jafar submitted, was that his domineering power was in reality even more powerful than one might suppose on an abstract reading of the LPAs and IMAs. He

not only had authority, he used it to the utmost. Mr Jafar cited and relied on the judgment of Justice Clifford at first instance in *In Re Weaving Macro Fund Fixed Income Ltd* (Clifford J) [2015] (2) CILR 278 at [53] for an analysis of how the controlling mind and will doctrine sat alongside constitutional powers. Justice Clifford said this (my underlining):

“The answer to this, it seems to me, is that the evidence shows that the directors, in effect, delegated authority, including authority in relation to redemption payments, to Magnus Peterson, which they were entitled to do pursuant to arts. 144 and 145. Even if there was not any formal delegation of authority for this purpose, there is a compelling weight of evidence to the effect that the board permitted Magnus Peterson to act as a de facto director and, in effect, delegated their powers to him as they were entitled to do pursuant to the articles referred to. It is probably not even a question of deciding whether this amounted to ostensible authority. In my view, it is clear that the board allowed Magnus Peterson to act on its behalf in performing all the functions necessary for the payment of redemptions. The necessary implication is that Magnus Peterson had the board’s actual authority for this purpose. There is no requirement, in my view, that s.145 of the Law requires express actual delegated authority. Magnus Peterson was allowed to act on behalf of the board for relevant purposes and clearly had authority to do so.”

863. Mr Jafar also submitted that it was sufficient that an individual “largely guide” particular functions. The doctrine did not require that a person perform every part of ‘day-to-day management’ in order to be considered the controlling mind and will for the purpose of attributing specific knowledge and/or acts.

864. Mr Jafar said that the concept of controlling mind and will may be especially pertinent in cases of entities that do not conform to a proper or conventional governance structure. He submitted that *El Ajou* established that the question must always be whether a person was the controlling mind and will of an entity for a specific transaction. However, if an individual is the controlling or directing mind and will of a corporate entity generally, that may justify a conclusion that the individual’s knowledge and acts are to be attributed to that entity when that individual acted in connection with that entity’s business.

865. Mr Jafar noted that the principles identified above had been expressly adopted by this Court by Justice Henderson in *Sagicor General Insurance (Cayman) Ltd v Crawford Adjustors*

(*Cayman Ltd*) [2011 (1) CILR 130] at [8] and [9] and by the Cayman Islands Court of Appeal in *AHAB CICA* at [834] and [844]-[846], in particular [845]-[846] (my underlining):

“845 “we hold that, if AHAB can establish in relation to any Respondent company that Al Sanea was the directing mind and will of that company in relation to any particular activity of the company relied upon, e.g. receipt of monies, agreement to a conspiracy, or the provision of dishonest assistance, then Al Sanea’s knowledge of his misappropriation of funds belonging to the Money Exchange may be attributed to the company in question.

846 As outlined above, the concept of the directing mind and will – or, as Lord Walker put it, the relevant responsible director – has to be considered in relation to any particular activity relied upon. But it is of course possible, in the case of some companies, to show that a particular person is the controlling mind and will of the company generally, i.e. in connection with all activities undertaken by that company. If that is established, a court may, depending on the circumstances, infer that the person in question was the directing mind and will of the company in respect of a particular activity even if there is no direct evidence in relation to that activity...”

866. Mr Jafar also relied on the judgment of Lord Justice Mummery in *Re BCCI (No. 15)* at [130] where he said that “*the (i) seniority of a figure; and (ii) his “freedom to act” will make it “easier... to attribute.*” Mr Jafar submitted that Mr Naqvi had total freedom to act and did act for and on behalf of the Funds by gathering monies to meet their imminent demands. It did not matter, he argued, that Mr Naqvi was not involved in every single day-to-day management decision. What mattered was that he plainly had the freedom to act as and when he wanted to do so. Mr Jafar submitted that Mr Naqvi had exercised that freedom from September 2017 onwards, during which time he controlled – and was permitted by the Funds’ directors (and in the case of AGHF by Mr Mann) – to exercise that control (there had been several occasions on which Mr Mann had either stood by and let Mr Naqvi make a decision or had explicitly asked for his approval and made clear he would not act without it).

Attribution – Mr Jafar’s response to the GHF Parties’ pleading point regarding attribution in relation to the exempt limited partnerships (ELPs)

867. Mr Jafar noted that the GHF Parties had argued (as I explain and discuss below) that there could be no attribution to an ELP (because it was not a legal entity *per se*) and that Mr Jafar

had not pleaded that Mr Naqvi's actions were attributable to AGHF GP. Mr Jafar said that this claim was unfounded and wrong since it was obvious what his pleading meant. It was clear that he (Mr Jafar) had pleaded that the deceit should be attributed to the relevant general partners. The GHF Parties had overlooked the definitions section of the RRASOC which referred (at [1(3)]) to the Second Defendant, GHF GP, as the general partner of two exempt limited partnerships, GHF Fund LP and GHF Fund (B) LP (which were operated collectively under the name "the Healthcare Fund"). The definition of the Healthcare Fund (AGHF) therefore encompassed the general partner of the AGHF in its role as operator of the partnership. This definition meant that every time Mr Jafar pleaded that [x] was to be attributed to the Healthcare Fund (the AGHF), he was saying that [x] was to be attributed to the general partner (of the AGHF) in its capacity as general partner of the partnership, i.e. as agent for all of the limited Partners. That pleading, and the approach taken by Mr Jafar in his submissions, reflected the language of the AGHF LPA (I take it that Mr Jafar was referring to clause 6.5 dealing with the authority of the Manager, that is AIML) (Mr Jafar's underlining):

"[the Manager shall have] ... full power and authority, on behalf of the Partnership, to do (or to direct the Partnership, acting through the General Partner to do) all such things as are, in the reasonable opinion of the Manager, necessary or desirable in connection with the operation of the Partnership..."

868. Mr Jafar submitted that it was obvious what this meant, namely that an act is committed "*on behalf of the partnership*" if it is an act of the general partner (through which the partnership acts) or AIML or any other authorised agent. A general partner of an exempted limited partnership was the agent of each of the limited partners (*Neoma Manager Mauritius Ltd v Abraaj ABOF IV SPV Ltd* (unreported, 10 March 2023) at [51]). Mr Jafar also noted that similar language was used in the relevant company law. Section 14 (2) of the ELPA referred to "*[a]ll letters, contracts, deeds, instruments or documents whatsoever shall be entered into by or on behalf of the general partner (or any agent or delegate of the general partner) on behalf of the exempted limited partnership*" and section 16(2) of the ELPA stated that "*[a]ny debt or obligation incurred by a general partner in the conduct of the business of an*

exempted limited partnership shall be a debt or obligation of the exempted limited partnership.”

869. Mr Jafar argued that in any event, the complaint that he had not pleaded that Mr Naqvi’s actions were attributable to AGHF GP was misguided since the RRASOC made clear that he was referring to authority being derived from AGHF GP. So, for example, [19] of the RRASOC pleads that “... Mr Naqvi made this approach [to Mr Jafar] with the authority and/or agreement and/or knowledge of AH, the [AGHF GP], [GHF] and GP8”; [32(3)] pleads that “... Mr Naqvi was held out as exercising, and exercised, the foregoing constitutional powers of AIML and/or in any event was understood and accepted by [AGHF GP], [GHF] and GP8 to be exercising those powers...”; [32(4)] pleads that “Mr Naqvi was authorised to act (and did so act) for the [AGHF] and [Fund IV] in relation to their financial affairs. In particular, at the time he conveyed the Overarching Message, Mr Naqvi held express or implied authority on behalf each of [AGHF GP], [GHF] and GP8.” In addition, at [32(4A)] of the RRASOC it is pleaded that “Messrs Lakhani, Dave, Siddique and Abdel-Wadood knew that Mr Naqvi had obtained the Jafar Loans by deceit. In those circumstances, and in light of the facts and matters pleaded in paragraph 32(1)-(4) above, the deceit committed by Mr Naqvi is to be attributed to [AGHF GP], [GHF] and/or GP8.”

870. Mr Jafar submitted that it was once again obvious what was meant by this pleading. Mr Jafar was claiming and asserting that Mr Naqvi was acting with the authority of the general partners. Because of that authority, his acts of deceit were to be attributed to the general partner as the agent for all of the limited partners, i.e. they were to be attributed to the partnership entities.

871. Mr Jafar noted that the GHF Parties had said that if he had pleaded his case differently they might have contended that Mr Naqvi’s deceit (and liability therefore) could not be attributed to (and treated as a liability of) the AGHF because it was arguable the general partner (AGHF GP) was not acting “in the conduct of the [partnership’s] business.” Mr Jafar also noted that GP8 had made the same point, to the effect that Fund IV would not be liable for Mr Naqvi’s deceit even if Mr Naqvi’s fraudulent misrepresentations could be attributed to GP8 and if

GP8 was liable to Mr Jafar in respect of the deceit because GP8 was not in the circumstances acting in the ordinary course of its or Fund IV's business.

872. Mr Jafar submitted that even if that point were taken it would be meritless. If it was established that Mr Naqvi was acting with the authority (or as the controlling mind and will) of the relevant general partner for the purpose of negotiating and seeking the Loans it followed that this activity involved, and amounted to the general partner acting in the conduct of its and the partnership's business. Mr Naqvi would be causing the general partner of the AGHF and Fund IV to raise monies for the partnerships and this was clearly within the ordinary course of the general partners' and the partnerships' businesses. Each general partner was formed for the sole purpose of conducting the business of the relevant Fund. The only business it conducted was Fund business. For what other purpose, Mr Jafar asked rhetorically, could the relevant general partner conceivably have been acting? Moreover, Mr Jafar submitted, the authorities to which he had made reference confirmed that the Court will be very wary of a submission that a principal could evade liability because an agent that committed a deceit was acting outside the scope of its authority.

Attribution - Mr Jafar's submissions on the evidence and the application of the law to the facts

The way in which the Abraaj entities were managed

873. Mr Jafar submitted that the evidence showed that the Abraaj entities were operated as a single unit and Mr Naqvi was both constitutionally empowered to exercise power over the general partners of AGHF and Fund IV and therefore over the Funds themselves (of which each general partner was agent) and Mr Naqvi was free to exercise unfettered control over AGHF and Fund IV (as a matter of deeply-ingrained practice).
874. Mr Jafar submitted that the evidence demonstrated that Mr Naqvi was surrounded by a group of loyal and obedient followers (which Mr Jafar labelled the ***Inner Circle***, a term I shall also use for ease of reference). These were Mr Lakhani, Mr Siddique (Mr Naqvi's brother-in-

law), Mr Abdel-Wadood, Mr Dave and Mr Vettivetpillai. The members of the Inner Circle were trusted by Mr Naqvi and installed by him in senior executive positions and directed by him. He confided in them about the secrets of his Ponzi scheme and they assisted him in committing numerous deceits. They treated him as the “Boss,” the most senior figure in the Abraaj hierarchy and deferred to him and permitted him to direct them in any task related to Abraaj business (including the management and operations of the Funds). The Inner Circle were the majority of the de jure directors of ADV 1 and the complete set of directors of GP8. Mr Siddique, Mr Abdel-Wadood, Mr Dave and Mr Vettivetpillai were also directors of AH and Mr Abdel-Wadood and Mr Siddique were directors of AIML.

875. Mr Jafar submitted that the evidence showed that while Mr Naqvi may have trusted the Inner Circle, he controlled them and, via them, the Funds whose General Partners they directed. Once Mr Naqvi had made a decision, that was final, and Mr Naqvi did not tolerate the directors of the general partners of the Funds deviating or dissenting from his directions.
876. Mr Jafar argued that the true position was encapsulated by Mr Cleary’s uncontradicted oral evidence during his cross-examination (Day 11, page 108) which the Court was invited to accept:

“[W]hat I understood is that the group as a whole was effectively managed from one locale and that locale was the chief executive/founder at various times acting chairman. So there was conceptually, I think, in Arif Naqvi's mind, no core distinction between different components. On a formal legal level, Abraaj Holdings was quite clearly distinct from AIML, it was quite clearly distinct from anything under AIML, including funds and its immediate entities. But he thought of Abraaj as one integrated entity.”

877. Mr Jafar argued that (a) the very structure of the Abraaj entities was designed so that each of them including the Funds (via their general partners) operated as part of a single unit rather than as discrete entities (b) Mr Naqvi exercised control over AH, the top entity which was the ultimate owner, directly or indirectly, of virtually every Abraaj entity, (c) Mr Naqvi exercised control of AIML, the fund management entity which was contractually empowered to manage/operate each of the Funds and which was used to centralise power, and the

distribution of cash and (d) Mr Naqvi and his Inner Circle controlled the bank accounts of AH, AIML and the Funds.

Did Mr Naqvi have authority to act for the Funds?

878. As I have noted, Mr Jafar (in his Written Closing Submissions and oral closing submissions) relied on a number of different grounds to support his case that Mr Naqvi had authority to make the Reinvestment Representation and the Overarching Message on behalf of AGHF and Fund IV:

- (a). Mr Naqvi had express actual authority by reason of and pursuant to the terms of the relevant LPAs and IMAs.
- (b). Mr Naqvi had implied actual authority because the boards of the Funds' general partners gave him authority to Mr Naqvi to run the Funds in any way he saw fit. Authority was implied by the conduct of those directors. As Lord Falconer put it in his oral closing submissions there was implied authority because the *de jure* directors just left Mr Naqvi in charge to get on with running the business and operations of the general partners and the Funds.
- (c). Mr Naqvi had ostensible authority to act for the general partners of the Funds and through them the Funds because they held him out as having authority to act for them, in particular by reason of the private placement memoranda (discussed below) which they issued and which referred to Mr Naqvi as being the key manager and decision maker.
- (d). Mr Naqvi was a *de facto* or shadow director of the general partners of the Funds and in that capacity able to bind them and, through them, the Funds. As I note below the Fund Parties argued that this ground had not been pleaded and was therefore not open to Mr Jafar.

- (e). Mr Naqvi was the controlling mind and will of the general partners of the Fund and therefore his acts (and the representations made by him when acting in relation to the businesses of, or for the benefit of, the Funds) were to be attributed to those general partners and the Funds. Once again, as I note below the Fund Parties argued that this ground had also not been pleaded and was therefore not open to Mr Jafar.

Express actual authority

879. In his oral closing submissions Lord Falconer succinctly summarised Mr Jafar's case on this point as follows (Day 25, page 135): “.... the [relevant] agreements [LPAs and IMAs] specifically say that the manager, which is AIML, can act via a responsible officer, and that is clause 6(6) of the [AGHF] LPA, and there is no doubt that Mr Naqvi [was] a responsible officer, [and] that [was] sufficient to give him the authority to seek to raise loans on behalf of the Funds.”

880. Mr Jafar argued that Mr Naqvi had express actual authority derived from the hardwiring of the governance and management structures of the Abraaj entities, the contracts that gave powers to individuals including Mr Naqvi and the Inner Circle with regard to the management and operations of Abraaj entities. Mr Jafar submitted that the constitutional powers were clear and it was clear that the way in which the Funds' general partners operated meant that Mr Naqvi had actual, implied authority to do whatever he wanted. He was the Boss.

881. Mr Jafar submitted that the relevant documents and agreements according to which the Funds were to be managed and operated, including by their manager AIML (which Mr Naqvi controlled), showed that Mr Naqvi had actual express authority to act on behalf of the Funds. This was established by an examination of the terms of the relevant LPAs and IMAs.

882. As regards the AGHF:

- (a). Pursuant to clauses 34.3 and 33.3 of each of AGHF GP's and GP8's memoranda and articles of association, the GIC was a committee to which the directors of those entities

delegated their powers and authorities with respect to the making of investment strategy decisions. As set out at [13] in Mr Mann's statement to the DFSA dated 11 August 2022:

"[I]nvestments made by [AGHF] and the amount invested were approved by the Investment Committee (IC) of Abraaj Group based on recommendations of the [AGHF] Investment Team. Similarly, each of the drawdown requests would be sent after IC approval based on investment memos drafted by the [AGHF] team. The IC consisted of four permanent members, namely Mr Naqvi, Mr Wadood, Mr Vettivetpillai, Mr Wahid Hamid and one rotating member."

- (b). The contemporaneous documents were replete with examples of the GIC making such investment decisions on behalf of AGHF. On each occasion, Mr Naqvi chaired and called the shots at the GIC meetings. One contemporaneous document (an email from Mr Naqvi dated 1 October 2017) showed that when Mr Abdel-Wadood questioned a proposal approved by the GIC he was fiercely chastised by Mr Naqvi: *"If you were part of a goddamn cabinet and expressed your dissent after the cabinet had taken a decision, you would be expected to resign or be fired."* Mr Abdel-Wadood, chastened, replied: *"I think it is fair to say decision taken and everyone has to support, or any other message that you [Mr Naqvi] feel is appropriate."* At Mr Naqvi's instruction, Mr Abdel-Wadood then emailed the rest of the GIC to express support for the proposal he had, minutes before, doubted.
- (c). The managerial decisions of the Abraaj entities were, in theory, overseen by MexCom, which comprised representatives from each of the various divisions, all managing partners, the Chief Financial Officer of AH and the Chief Operating Officer of AH. Mr Naqvi had significant power over the MexCom. He had founded it and constituted it in accordance with AH's articles (Article 154) which conferred on him the express power to do so. He chaired the MexCom and had a deciding vote in all instances where the members of the MexCom were not unanimous. Pursuant to Article 154, the mandate of the MexCom was to ensure the efficient functioning of the Abraaj entities and execution of its strategy as defined by the Group CEO, namely Mr Naqvi, and the AH Board. MexCom was expected to play an advisory role, providing input to the

Group CEO, Mr Naqvi and to implement decisions taken by the Group CEO. Mr Naqvi (as Group CEO) determined the members of the MexCom and had power to amend its composition.

- (d). Given the vast powers conferred on Mr Naqvi and the committees he controlled, other committees and boards were left with little power and little information.
- (e). As regards the AGHF, the LPAs conferred very significant management powers on AIML as manager. Of particular note were clauses 6.5 and 6.6 (my underlining):

“6.5 Subject to the other provisions of this Agreement and subject at all times to the Law, the Manager [AIML] shall have full power and authority, on behalf of the Partnership, to do (or to direct the Partnership, acting through the General Partner to do) all such things as are, in the reasonable opinion of the Manager, necessary or desirable in connection with the operation of the Partnership, the management of the Partnership’s investment portfolio or otherwise in the furtherance of the Partnership’s business, including (without limitation):

...

- (f) to borrow money (either directly or through an Investment Holding Company including the OPIC Borrowings under the OPIC Facility)*
- ...”

6.6 The Manager may, in the execution and exercise of all or any of the rights, powers or obligations accorded to it by this Agreement, act by a responsible officer for the time being of the Manager, and the Manager may also delegate... to any person or persons or fluctuating body of persons all or any of the rights, powers or obligations accorded to the Manager by this Agreement and such delegation may be made upon such terms and conditions... as the Manager may think fit.”

- (f). The effects of clauses 6.5 and 6.6 were that (i) under AIML’s constitution, Mr Naqvi was expressly empowered to act single-handedly and in his absolute discretion on behalf of AIML. By virtue of clause 6.5, Mr Naqvi was in turn empowered to act without limitation on behalf of AGHF via AIML and (ii) in any event, even if that were not the case, by virtue of clause 6.6, Mr Naqvi – being a “*responsible officer*” of AIML

– was granted the freestanding power by AGHF’s constitution to exercise “*all or any of the rights, powers or obligations*” accorded to AIML, acting entirely by himself.

- (g). These provisions of AGHF’s LPA were mirrored in the terms of the IMA between the AGHF and AIML:

“5.1 The Manager shall have all the rights, powers (including the power to effect borrowings) and obligations accorded to the Manager by the Partnership Agreements, and no other person (including, for the avoidance of doubt, the General Partner) shall be entitled to exercise any such rights or powers, or be subject to any such obligations, for so long as this Agreement is in force ...

5.2 In particular, but without limitation, the Manager shall:

*...
(b) do all acts necessary for the carrying on of the business of the Partnerships and the ongoing operation of the Partnerships ...*

...

9.1 The Manager may, in the execution and exercise of all or any of its rights, powers or obligations under this Agreement, act by a responsible officer for the time being of the Manager and the Manager may also delegate (by power of attorney or otherwise) to any person or persons or fluctuating body of persons all or any of its rights, powers or obligations under this Agreement and such delegation may be made upon such terms and conditions (including power to sub-delegate) as the Manager may think fit.”

- (h). It followed that under the AGHF’s constitution (and in particular clauses 6.5 and 6.6 of the LPA, mirrored by clauses 5.1, 5.2 and 9.1 of the IMA) a single responsible officer of AIML was empowered to exercise full power and authority on behalf of the AGHF including with regard to the borrowing of money for the AGHF. The provisions permitting delegation (clauses 6.6 of the LPA and 9.1 of the IMA respectively) were also used to confer management powers on Mr Naqvi.
- (i). In addition, under the AGHF’s LPA, Mr Naqvi was defined as “*Fund Head*.” He was also featured in the definitions of “*Fund Executives*”, “*Senior Abraaj Executives*” and

“*Key Person Event*.” These – notably the definitions for “*Fund Executives*”, “*Fund Head*” and “*Senior Abraaj Executives*” – were plainly intended to make crystal clear to the limited partners (and anyone else who might read the AGHF LPA) who was in charge of AGHF. The relevance of the definition of a “*Key Person Event*” was that it was plainly integral to the operation and management of AGHF that Mr Naqvi and others of the “*Senior Abraaj Executives*” would be heavily involved in operation and management of AGHF. Under clause 7.8 of the AGHF LPA a “*Key Person Event*” would trigger an automatic “*Suspension Period*” such that AGHF would cease to make new investments. Accordingly, if Mr Naqvi and other defined executives ceased to be heavily involved in the operation of AGHF that would trigger a process by which a new operation and management structure and mechanism would need to be implemented.

- (j). Mr Naqvi also held significant powers with respect to AGHF’s bank accounts. He was the only “A” signatory listed in the “*Standard Existing Abraaj Signatory Matrix*” and his authorisation was required for all transactions over US\$75 million. AGHF’s CEO, Mr Mann, was not a signatory for any of AGHF’s bank accounts and in any event had no access to them.
- (k). It was important to emphasise that under the LPAs, the limited partners had no constitutional powers whatsoever when it came to the management of AGHF (see clause 6.4 and clauses 28.23 and 28.24 of the AGHF LPA – by the last two provisions each limited partner granted a power of attorney to the General Partner “*to do all acts and things necessary to give effect to the terms of this Agreement*”). This was an important component of the attribution analysis since if the limited partners, by definition, were incapable of operating, managing or controlling AGHF then the proper analysis of attribution must look to the individual(s) that had constitutional power, and power in practice, to operate, manage and control AGHF, namely Mr Naqvi (under whose control the de jure directors operated).

- (l). A private placement memorandum (**PPM**) was issued to potential investors on behalf of AGHF from time to time. Each PPM was approved by the directors of ADV 1 (the sole corporate director of AGHF GP) and must be viewed as a representation (or set of representations) made by or on behalf of the general partner. Each PPM was further evidence of the way that each Fund delegated authority or power to Mr Naqvi. Separately from this holding out, the PPMs also reflected the inner reality of how AGHF (via its general partner and manager) was to be managed and operated. The PPM records the clear conferral of constitutional power on Mr Naqvi to act on behalf of AGHF, as enshrined in the LPAs, IMA and AGHF GP articles. The PPM dated April 2016 (**AGHF PPM**) provided a structure chart detailing the manner in which AGHF was to be operated. The top level of the chart was the GIC, followed by the “*Fund Head*” namely Mr Naqvi. The AGHF PPM also stated as follows (my underlining):

“*AGHF Team*

The activities of the Fund are being led by three senior members of Abraaj, namely Arif Naqvi (Founder & Group CEO), Sev Vettivetpillai (Head of Thematic Businesses) and Khawar Mann (COO of the Fund). As Head of the Fund, Mr. Naqvi has led the design of the AGHF concept and the strategy and business plan. Both Mr. Naqvi and Mr. Vettivetpillai are involved in overseeing the Fund’s activities. The day-to-day operations are being managed by Khawar Mann 65, who brings over 20 years of healthcare investing and operating experience to the Fund. Mr. Mann joined Abraaj in 2014 and was recruited specifically to be COO of the Fund.”

- (m). Appendix II to the AGHF PPM listed the “*Team Biographies*.” Mr Naqvi came first, with the description (my underlining): “*Founder and Group Chief Executive, Chair Investment Committee, AGHF Head*.” Mr Naqvi was, Mr Jafar said, therefore literally placed front and centre when it came to explaining how AGHF was managed and operated. Any reasonable reader of the AGHF PPM could be in no doubt that Mr Naqvi was the man in charge. The AGHF PPM also included under the heading “*10. Principal Terms*” definitions and explanations of who was the “*General Partner*” and “*Manager*” of AGHF. Any reader of the AGHF PPM would have been left in no doubt that AIML (itself headed and controlled by Mr Naqvi) was responsible for the

management and operation of AGHF (“on a fully discretionary basis”) and that Mr Naqvi, the “Fund Head” would himself lead the management and operations of AGHF.

883. As regards Fund IV:

- (a). The position in relation to Fund IV was similar to that applicable to AGHF. Once again, AIML was the Manager of Fund IV pursuant to the Fund IV IMA.
- (b). The Fund IV LPA included the following definitions and provisions mirroring the AGHF LPA (my underlining):

“5.1(a) The General Partner shall have exclusive responsibility for the management and control of the business and affairs of the Partnership (save as expressly contemplated in this Deed) and shall have the power and authority to do all things necessary to carry out the purposes of the Partnership, shall devote as much of its time and attention thereto as shall reasonably be required for the management of the business of the Partnership... The General Partner may delegate its management authority and power given to it pursuant to this Deed to such persons as it shall reasonably decide (and such person may itself delegate all management authority and power given to it)...

5.1(b) The General Partner has entered into the Management Agreement with the Manager [AIML] pursuant to which the Manager will carry out duties and has powers with regard to the Partnership and its business, affairs and assets mutatis mutandis similar to those applying to the General Partner hereunder and may itself delegate all management authority and power given to it provided that the Manager and/or any delegate shall at all times during the course of its Appointment...

...

5.2 [T]he General Partner and/or its agents or delegates, shall have full power and authority on behalf of the Partnership and with the power to bind the Partnership thereby and without prior consultation with any of the Limited Partners... [(g)] to enter into, make and perform such contracts, agreements and other undertakings and to do all such other acts as it may deem necessary and advisable for or as may be incidental to the conduct of the business of the Partnership...

(h) ...to borrow money... for any of the purposes of the Partnership..."

- (c). The general partner did duly delegate its powers to a Manager, as clause 5.1(a) expressly envisaged and permitted. This was done by the IMA ("the ***Fund IV IMA***") (my underlining):

"[2.1] the General Partner hereby delegates to the Manager certain powers, duties and discretions to manage the Partnerships and their businesses, affairs or assets and to deal with the Limited Partners and the limited partners of each of the Additional Partnerships (the "Fund Investors"), including the power and authority to execute agreements on behalf of the Partnerships subject, at all times to the review of, and if applicable, subject to any directions from, the General Partner. The Manager hereby agrees with the General Partner to act as such manager and to accept and carry out such management responsibilities and duties otherwise imposed by the Partnership Deed (or the relevant provision of the agreements constituting each of the other Partnerships) and the Private Placement Memorandum on the General Partner.

...

2.2(c)the Manager may engage employees, independent agents, lawyers, accountants, custodians, paying and collecting agents and financial and other advisers and consultants as it may deem necessary or advisable in relation to the affairs of the Partnerships...

...

2.4 The Manager shall have power and authority to act for, represent and bind the Partnerships only to the extent specifically provided in this Deed. The General Partner hereby undertakes (at the General Partner's expense) to provide the Manager with a power of attorney setting out that the Manager has power and authority to act for, represent and bind the Partnerships, in the event that this is required either by (i) a contractual counterparty; or (ii) a regulator or other supervisory or governing body.

...

5 The Manager shall be entitled to delegate its functions, rights and obligations set out in this Deed (including without limitation, the day-to-day investment management) in accordance with clause 5.1(b) of the Partnership Deed and applicable law and regulation. The Manager shall be liable to the General Partner for any act or

omission of the Sub-Manager or any Affiliate to which duties under this Deed have been delegated to the same extent as if such act or omission had been caused by the Manager.”

- (d). While different language was used to that in the AGHF LPA’s “*Key Person Event*” definition and related provisions, very similar provisions reinforcing the powers of Mr Naqvi and certain executives were contained in the Fund IV LPA, so that if Mr Naqvi (and any other “*Key Investment Executive*” did not devote sufficient time to Fund IV, there would be a change in its management structure) so that once again the terms of the Fund IV LPA signalled to any reader that Mr Naqvi and (inter alia) Messrs Abdel-Wadood and Siddique were instrumental to the operations of Fund IV. Once again, Mr Naqvi held significant powers with respect to Fund IV’s bank accounts.
- (e). As with the AGHF LPA, the Fund IV LPA expressly provided that the limited partners had no constitutional powers regarding the management of Fund IV (see clause 5.1(c)).
- (f). GP8’s articles conferred upon GP8’s directors broad powers to delegate their powers and otherwise to appoint agents and officers (under clauses 33.1, 33.3 and 33.5 mirroring the delegation powers set out in the LPA at clause 5). Accordingly, GP8’s constitution permitted management/governance to be delegated to Mr Naqvi as set out above by reference to the LPAs and IMAs.
- (g). A PPM was also issued to potential investors on behalf of Fund IV from time to time. Each PPM was approved by the directors of GP8 and so was a representation (or set of representations) made by or on behalf of GP8 as the general partner. Mr Jafar argued that, as with the AGHF PPM, each of the Fund IV PPMs were not only a holding out as to the manner in which Fund IV would be operated but was also further evidence of the way that Fund IV delegated authority or power to Mr Naqvi. The PPM reflected the clear conferral of constitutional power on Mr Naqvi to act on behalf of Fund IV. The Fund IV PPM

defined Mr Naqvi as “*Founder, Vice Chairman and Group Chief Executive Officer, Abraaj Capital Limited*” and describing the way that Fund IV would be operated under his purview, the Fund IV PPM said as follows:

“Reporting to Arif Naqvi, the CEO, are eleven Executive Directors leading a deeply resourced multi-disciplinary group of investment professionals. organised as two teams, according to specific skill sets, that work seamlessly together through all stages of an investment:

...Abraaj Investment Management [AIML] is a team of 50 highly qualified investment professionals with primary responsibility for deal structuring, acquisition transactions and exit management...”

- (h). The Fund IV PPM also described Mr Naqvi as one of the “*investment professionals*” listing him first under that heading with the structure chart which identified the hierarchy of team members placing Mr Naqvi at the top of the tree.
- (i). The Fund IV PPM also provided that “*Abraaj’s core team, led by Arif Naqvi, the Founder and Group CEO, have been investing in MENASA for over 18 years...*” and identified Mr Naqvi as a “*Key Investment Executive*” and “*Key Man*” reflecting the definitions in the Fund IV LPA. The Fund IV PPM also identified the “*Key Man*” events reflecting the definition in the LPA.
- (j). Under the heading “*12. Principal Terms*” the Fund IV PPM stated that “*Abraaj Investment Management Limited will act as the manager of the Fund.*”

Implied actual authority

884. Mr Jafar submitted that, in addition, the evidence regarding how the Funds were managed showed (or permitted the inference) that the relevant boards gave authority to Mr Naqvi to run the Funds in any way he saw fit. Authority was implied by the conduct of the *de jure* directors of the Funds’ general partners. By their persistent course of conduct leading up to December 2017, they granted Mr Naqvi authority to make decisions on behalf of the Funds.

885. Mr Jafar submitted that the following constituted evidence in support of there having been such implied authority:

- (a). The issuing of drawdown notices to collect funds from limited partners was a matter that required Mr Naqvi's approval. As Mr Vettivetpillai said in an email dated 16 November 2016, whether or not drawdowns would be issued was "*subject to Arif agreeing [to] it.*"
- (b). So too was the decision to make payments to limited partners. The payment of distributions to Fund IV's limited partners was expressly subject to Mr Naqvi's approval. Mr Jafar referred to an email exchange on 16 July 2017 between Mr Siddique and Mr Lakhani in which Mr Siddique said that "*We have already communicated to US team and others that the distribution will be in August based on Arif approval to do so.*"
- (c). Mr Naqvi's approval was needed in order for general partner reports to be finalised by ADV 1 and GP8 and then be issued to limited partners. In his email dated 10 August 2017 Mr Dave requested Mr Naqvi's approval to "*include ... valuations in the GP report and start the process of finalizing the GP reports.*"
- (d). If Mr Naqvi's approval was not given to take a particular step it would not be taken. For example, in Mr Dave's email to Mr Naqvi dated 21 November 2017 regarding payment of interest on one of the Air Arabia loans Mr Dave said that "*I have just had a chaser [from Air Arabia]... As I have not heard from you I have not processed the payment.*"
- (e). Further, Mr Naqvi's approval was required before any steps could be taken in connection with fund-raising such as arranging loans. Mr Jafar noted the email dated 16 April 2017 from Mr Dave in which he said, in connection with a request for a two year loan extension to CBD, that "*Arif is aware but should we take his approval as we generally take?*" Mr Jafar also noted that Mr Naqvi gave directions as to when distribution notices would be issued to limited partners.

(f). Mr Jafar submitted that the evidence showed that Mr Naqvi controlled the entire structure by which AGHF's finances were to be operated. He referred to the email dated 23 April 2017 (the *Finance Function Email*) recording Mr Naqvi's instruction that the finance functions of AGHF were to be operated centrally, under the purview of Abraaj Finance & Support Services (*AFSS*) (and therefore well within his control). Mr Jafar also relied on Mr Mann's DFSA witness statement sworn on 11 August 2022 which he submitted confirmed that Mr Naqvi's power to give direction was accepted and followed without hesitation. Mr Mann referred to the fact that he reported to Mr Naqvi and Mr Siddique and to various directions being given by Mr Naqvi regarding whether bank statements could be shown to investors. Mr Jafar noted that even Mr Mann (AGHF CEO) was precluded from viewing the Fund's bank statements, and was instead reliant on being fed information by AFSS. Mr Jafar said that this was corroborated by the email sent by Mr Siddique to Mr Naqvi on 8 May 2017 in which he acknowledged, "*As per your email [i.e. the Finance Function Email] the finance function for [AGHF] is to be staffed by AFSS team members.*"

886. Mr Jafar submitted that this evidence confirmed and reflected that all individuals working for the Abraaj entities, including the *de jure* directors of the Funds' general partners, recognised Mr Naqvi as having ultimate authority to take the important decisions. Mr Jafar says that Mr Naqvi was obviously exercising that authority, and acting for AGHF and Fund IV at the time he procured the Loans. Mr Naqvi's authority was broad and unfettered. The evidence showed that the *de jure* directors of the Funds' general partners were content for Mr Naqvi to do whatever he wanted.

887. Furthermore, those *de jure* directors authorised Mr Naqvi in the broadest possible terms by assenting to his cashflow spreadsheet in which he identified fund-raising activities as "*actions managed and delivered by AMN.*" Mr Jafar submitted that in any event, those *de jure* directors authorised him to act unlawfully. By December 2017, and the time of the representations that found Mr Jafar's claim in deceit, lies and deception to third parties were part of the Funds' standard operating procedure. Throughout at least the second half of 2017, and by no later than 12 June 2017 when Mr Naqvi directed Mr Lakhani to change the

financial year end for Fund IV, the directors of the Funds' general partners were in a constant state of concealment and deception. They consciously chose not to disclose to the limited partners in AGHF or Fund IV the true financial position of either Fund at any time in 2017. They were also privy to (and/or participated in) various misleading and deceptive conduct including:

- (a). The deceptive use of a confirmation dated 13 August 2017 provided by CBD as to the outstanding balances in its AGHF accounts (the ***CBD Audit Confirmation***). Mr Jafar said that although Mr Naqvi had managed successfully to stall Fund IV's audit and thus scrutiny into Fund IV's finances (by changing Fund IV's financial year and thereby extending the date by which the audit had to be completed), cash problems continued with AGHF, whose financial year-end could not be changed. In order to conceal cash problems from auditors in June 2017 Mr Naqvi gave instructions for false and misleading bank statement to be generated for audit purposes. The origins of this plan were set out in Mr Naqvi's email to Mr Lakhani dated 4 June 2017 where he said *"How much did we borrow from Air Arabia last year over the year end? We will do the same this year."* Under that direction, Mr Lakhani had contacted Mr Manish Agarwal (Treasurer of Air Arabia) and sought a loan of US\$195 million to be paid to GHF. He asked in an email dated 21 June 2017 that Air Arabia *"[p]lease mention 'Potential Co-Investment' as purpose for the payment."* Mr Lakhani said the funds would be returned on 20th July. The amount of the facility was then increased to US\$196 million on 21 June 2017 and pursuant to these exchanges an agreement was reached for a *"short-term"* facility of US\$196 million to be made by Air Arabia to AGHF GP on 21 June 2017. On 28 June 2017, AGHF had requested that CBD place a fixed deposit of US\$224 million into GHF's account with CBD for a 7-day period. AGHF only had that amount of money thanks to the payment received from Air Arabia on 22 June 2017 and a transfer from AIML. Immediately after the request was made, also on 28 June 2017, the sum of US\$224 million was transferred out of GHF's account into AIML's account, leaving GHF with a mere US\$399,434.08 in its account. As at 29 June 2017, given its need to repay the Air Arabia Loan, GHF's cash shortfall was at least US\$196m. On 13 August 2017 CBD provided the CBD Audit Confirmation

stating that “*We hereby confirm that the balances outstanding in our books, as on June 30, 2017, for [The Abraaj Healthcare Group Limited] are...USD 224,000,000 [in time deposits].*” This was subsequently used on several occasions falsely to represent to third parties that AGHF had substantial cash holdings. On 20 September 2017, Mr Dave sent Mr Naqvi an email which drew to Mr Naqvi’s attention that Mr Farnum (on behalf of the Gates Foundation) had been asking what had happened to monies that had been drawn down from limited partners but not invested and Mr Dave proposed to Mr Naqvi that they send Mr Farnum the misleading CBD Audit Confirmation. Mr Naqvi approved the plan and it was executed in accordance with his direction. Mr Farnum received the CBD Audit Confirmation on 21 September 2017 and, having read it, believed that this meant that AGHF had approximately US\$224 million in its CBD account and that limited partners’ monies were where they should be (see Farnum 1 at [27]).

- (b). The false representations made to Indorama and the false representations to Dr Schmidheiny by way of the false and misleading audited financial statements and JP Morgan indicative valuation.
- (c). Mr Lakhani signed the post-dated AIML cheques for the Loans.

888. Mr Jafar submitted that the evidence showed that the *de jure* directors knew that when Mr Naqvi set about approaching third parties like Mr Jafar to procure funding for AGHF and Fund IV he would or could use deceitful methods and representations to achieve that aim. They had in fact authorised him to do so. The contemporaneous documents showed that Mr Naqvi had carefully discussed his plans with the Inner Circle. An example was Mr Naqvi’s email dated 13 December 2017 to Mr Lakhani and Mr Siddique in which he asked for their “*ideas*” on how best to mislead the IFC (who had asked for copies of the AGHF’s/GHF’s actual bank statements) and on the same day Mr Naqvi had arranged a meeting with Mr Lakhani at which they would (as Mr Naqvi said in his email) “*play with numbers*” in an attempt to resolve the cash shortfall issues faced in December 2017.

889. Mr Jafar also submitted that AGHF GP and GP8 must be taken to have ratified the deceit of Mr Jafar. He said that in light of the urgent need for funds to be raised and given that deception had been deployed in the period immediately preceding Mr Naqvi's approach to Mr Jafar, including to procure the Indorama SPA and the Schmidheiny SPA, it was to be inferred that each of Mr Lakhani, Mr Siddique, Mr Dave and Mr Abdel-Wadood knew that Mr Naqvi would use deceit to procure monies from Mr Jafar. The Inner Circle knew that the AH audited financial statements (which were false and misleading) were habitually presented to banks to obtain funding. This inference also arises from the clear evidence showing that Mr Naqvi closely discussed how to deal with the December 2017 crisis with the Inner Circle. They were in regular communication throughout December 2017 including, for example, a 'huddle' on 25 December 2017 (in an email dated 24 December 2017 Mr Naqvi had sent an email to, *inter alia*, Mr Siddique, Mr Dave, Mr Lakhani and Mr Mann saying, "*Can we have a huddle on this tomorrow afternoon folks?*") Mr Jafar submitted that given the clear pattern of evidence showing that Mr Naqvi and the Inner Circle discussed plans – including plans to procure funding by deceit and/or otherwise to mislead or misrepresent – it was obvious that Mr Naqvi must have discussed with them his plan to get monies from Mr Jafar. He argued that this was rendered inescapable by an email from Mr Naqvi dated 23 December 2017 in which he provided Mr Siddique, Mr Dave and Mr Lakhani with an updated cashflow spreadsheet showing US\$100 million coming in from BOS.
890. Mr Jafar also submitted that there was clear evidence of the Inner Circle being involved in or otherwise having knowledge of the relevant events. Mr Lakhani (a director of ADV1 and GP8) was intimately involved in making the arrangements for the Loans to be paid to AH and AIML. On 20 December 2017, Mr Naqvi had forwarded to Mr Lakhani Mr Nerguizian's email which outlined the First Loan and Mr Lakhani had not asked what the email was all about. Clearly, he already knew because Mr Naqvi must have told him and it was to be inferred that all of the Inner Circle had also been told. On 20 December 2017, Mr Lakhani sent an email to Mr Naqvi in which he alluded to the possibility of presenting the AH audited financial statements to Mr Jafar and BOS, as they had previously presented those statement to banks to get funding and he had even drafted a letter to be sent to Mr Nerguizian presenting the false financial statements. Mr Lakhani knew that (as before) misrepresentations had been

made and/or would be made to secure the Loans. Mr Lakhani's knowledge was to be attributed to ADV 1 and GP8. Mr Dave (also a director of ADV1 and GP8) was also involved in seeking to arrange the ENBD loan and communicated with ENBD about the security that Mr Naqvi could pledge. Mr Dave must therefore have been told when the ENBD deal did not progress and must have been told that the US\$200 million once sought from ENBD would instead be taken from Mr Jafar. He was also involved in email correspondence relating to the arrangements for the Loans and signed distribution notices shortly after the First Loan was obtained. Mr Jafar submitted that given the circumstances and the knowledge that Mr Dave had about the prior use of deceit/misleading representations, he would obviously have known that Mr Jafar was being deceived. Mr Dave's knowledge was to be attributed to ADV 1 and GP8. Various emails showed that Mr Dave, Mr Siddique and Mr Lakhani were having regular calls about the sources of funds from which the Healthcare Investors would be repaid and must have discussed the procuring of the Loans.

891. Mr Jafar further submitted that when the Loans were paid to AH and AIML these individuals must have known that such substantial sums of money could only have been obtained by way of loans on the basis of deceit as to the financial soundness of Abraaj entities. There was no reason for them to believe that Mr Naqvi had departed from what had become standard operating procedure. They positively acted to ratify the deceit by taking steps to transfer the monies derived from the Loans to other entities and acquiesced in and so ratified the deceit by failing to return the monies. Mr Jafar noted that none of the directors of the Funds had given witness evidence to contradict this account.

Ostensible authority

892. In his oral closing submissions Lord Falconer summarised Mr Jafar's case on this point as follows. Ostensible authority arose where a principal held out a person as their authorised agent and then in reliance on that holding out by the principal third parties treated the putative agent as authorised to act on behalf of the principal. Then the principal was bound by those acts covered by the holding out. The evidence in this case was, Lord Falconer, submitted clear. The PPMs and other documentation relating to the Funds (as summarised above)

referred to Mr Naqvi as the key manager and decision maker and this constituted a holding out and representation to the whole world as to Mr Naqvi's role. It was also a representation that had in any event percolated through to Mr Jafar, who like everyone else regarded Mr Naqvi as authorised to speak on behalf of the Funds and every other Abraaj entity.

893. Lord Falconer submitted that there could be no real doubt that the Funds by each of their PPMs had boasted of the fact that Mr Naqvi was at the helm and this was plainly reflected in the internal reality not just as to how the Abraaj entities were actually run, but how the various Abraaj entities including the general partners of the Funds, held out Mr Naqvi as being the person who ran the Funds.

De facto and/or shadow director

894. As Lord Falconer put it in his oral closing submissions, Mr Jafar submitted that a *de facto* director was somebody who acted as if he was a director even though he had not been formally appointed and a shadow director was someone who gave instructions to the real and duly appointed directors and told them what to do, and Mr Naqvi satisfied the requirements for both roles. Lord Falconer submitted that the evidence was that Mr Naqvi acted as the boss and gave instructions to the Inner Circle who were the duly appointed directors. All decisions of any import were decided effectively by Mr Naqvi and he gave the necessary instructions to achieve that. The evidence of Mr Naqvi's conduct and decision making, and his relationship with the *de jure* directors of AGHF GP and GP8 (and GHF) relied on by Mr Jafar in support of his claim that Mr Naqvi had implied authority to act for AGHF GP and GP8 was also relied on in support of his claim that Mr Naqvi was a *de facto* director and a shadow director of the Funds' general partners. Mr Jafar argued that a *de facto* and a shadow director were to be treated as agents of and were able to act for and bind their company.
895. As regards the pleading points raised by the Fund Parties (which I discuss below), Mr Jafar submitted that there were clearly pleaded facts that supported a case on *de facto*/shadow directorship, including references to the habitual following of instructions given, and the

exercise of control, by Mr Naqvi. Lord Falconer said that Mr Jafar's pleading provided a sufficient foundation and basis for the claim that Mr Naqvi was a *de facto* and/or a shadow director. He said that while those terms were not used (although as the GHF Parties noted in their written closing submissions there is a reference to Mr Naqvi being and an averment that Mr Naqvi was a *de facto* director of AGHF GP, at [32(4) (h)(iii)] of the RRASOC where particulars are given of the averment that Mr Naqvi was authorised empowered to act and did so act for AGHF as he held express or implied authority on behalf each of AGHF GP and GP8) all the facts which needed to be found in order to establish that Mr Naqvi was to be treated as a *de facto* or shadow director had been pleaded. At [9A] and [10] of the RRASOC it was averred that:

"9A As to the relationships between Mr. Naqvi and [AGHF GP], [GHF] and GP8:

- (a) Whilst Mr. Naqvi was not a de jure director of the [AGHF GP], [GHF] or GP8 at the time of the events giving rise to Mr. Jafar's claim, as particularised below in paragraph 32(4), he was habitually enabled by the de jure directors set out in sub-paragraphs 1(4A) and (5) above to exercise control over those entities as though he was a de jure director. Whatever the terms of the de jure arrangements for [AGHF GP], [GHF] or GP8, Mr. Naqvi was regarded by their de jure Directors, other officers and/or employees as holding in practice the highest form of power to control these entities. In the premises, the Boards of [AGHF GP], [GHF] and GP8 and/or their Directors delegated their authority to Mr. Naqvi to make the decisions referred to hereafter in this Re-Amended Statement of Claim - namely, decisions concerned with addressing cash shortfalls in these entities as pleaded in paragraphs 12A-18B below, the representations pleaded at paragraphs 19-27 below, and the further decisions set out in paragraph 32(4) below - and/or they agreed that he should make those decisions and/or they acquiesced in him making those decisions. He was, further, authorised to speak on behalf of the [AGHF] and [Fund IV].*
- (b) For the avoidance of any doubt, in support of the assertions made in sub-paragraph 11(9A)(a) above, Mr. Jafar will rely on the facts and matters pleaded in paragraphs 12A-18B and 32(4) below.*
- (c) As particularised in sub-paragraphs 32(1)-(3) below, Mr. Naqvi was also authorised to act on behalf of the [AGHF GP], [GHF] and GP8 in connection with the matters giving rise to Mr. Jafar's claim in his capacity as the CEO of AIML.*

(10) *He was generally seen as such being in control of all of the Abraaj Group entities, and in particular the [AGHF GP], [GHF] and GP8, by the interested public.”*

896. Lord Falconer said, in response to a question from me, that the RRASOC did not plead that Mr Naqvi was a director of the Funds’ general partners. But he said that the pleading was sufficient to ground a finding that Mr Naqvi was such a *de facto* director and/or a shadow director because it averred that he exercised control over those entities as though he was a *de jure* director (which was in substance an averment that Mr Naqvi was a *de facto* director) and that whatever the terms of the *de jure* arrangements for AGHF GP and GP8 Mr Naqvi was regarded by their *de jure* directors as holding in practice the highest form of power to control these entities and that he took decisions with respect to the business and affairs of the Funds (and was to be treated as having done so via and on behalf of the general partners so that he was a *de facto* director of AGHF GP and GP8) and furthermore those *de jure* directors followed his instructions at all times (so that and this was this an averment that Mr Naqvi was a shadow director).

Controlling mind and will

897. Mr Jafar submitted that the Court should have regard to the reality of the way in which the Abraaj entities and the Funds were run (as regards the Funds by their general partners), namely as though a single unit, without regard for divisions between separate legal personalities, with Mr Naqvi as the nerve centre, assisted by his Inner Circle spread across both the Fund’s general partners and the divisions to which the Funds delegated decision-making. The LPAs and IMAs (and general partners memoranda and articles) collapsed any boundaries that might otherwise have existed between separate legal personalities and, in accordance with that, the habitual realities of the way the Abraaj entities were operated was clear. Mr Naqvi was generally the controlling mind and will of all the Abraaj entities including AGHF GP and GP8, and AGHF and Fund IV.

898. In any event, Mr Jafar said, Mr Naqvi was acting as the controlling mind and will of AGHF and Fund IV in relation to the specific transactions by which the Loans were procured for

the benefit of AGHF and Fund IV. In the many documents before the Court, there was not a single instance of a director of one of the general partners of the Funds saying no to Mr Naqvi's instruction or departing from it (as might be expected in the case of a consultant). His directions seem to have been unanimously followed. Like Dr Lynch in *ASL Netherlands* Mr. Naqvi "*treated [each of the Funds' general partners] as his own and nothing of consequence happened without his say so.*" Accordingly, the Court was entitled to conclude that Mr Naqvi was generally the controlling mind and will, or alter ego, of both AGHF and Fund IV. Applying the ratio at of *AHAB CICA* at [846] it could then be inferred that, as the general controlling mind and will of those entities, Mr Naqvi must logically have been acting as their controlling mind and will at the time that he procured the Loans since the monies derived from those Loans were intended to be, and were, diverted to each of AGHF and Fund IV.

899. Mr Jafar argued that in any event Mr Naqvi was acting as the controlling mind and will of AGHF and Fund IV for the specific purpose of the Loans because on behalf of AGHF he had pledged the return of monies to the Healthcare Investors and this was clearly a decision taken by Mr Naqvi as the controlling mind and will of AGHF (nobody else made that decision on behalf of AGHF). Obtaining monies from Mr Jafar was integral to fulfilling this pledge. On behalf of Fund IV, Mr Naqvi had directed the change of its financial year end from 30 June to 31 December 2017 and the consequence of that was that, in order to conceal the misappropriations from or shortfalls within Fund IV, it was essential for Fund IV to obtain monies for audit purposes. As Mr Lakhani had said on 11 December 2017, "\$174.7m – need to transfer this amount to [Fund] IV for their yearend audit." As such, Mr Naqvi must have been acting on behalf of Fund IV in securing the monies necessary for the preparation of audited accounts.

900. Lord Falconer submitted that the claim that Mr Naqvi was the controlling mind and will of the general partners of the Funds (and of the Funds themselves) was properly made and adequately pleaded in the RRASOC. He referred to and relied on [10]-[12] of the RRASOC (which referred to and incorporated by reference other relevant averments including in relation to the Air Arabia loans, which were indicative of the detailed control being exercised

by Mr Naqvi). Lord Falconer relied on GCR O.18, r 7 which stipulated that a pleading must only contain a statement in a summary form of the *material facts* on which the party pleading relied for their claim. There was no need, and indeed it was not permissible, to plead a point of law. In any event, the question that arose when there was a challenge to a pleading was whether the defendants were taken by surprise by a claim, in this case that Mr Naqvi was the controlling mind and will of the Funds. Lord Falconer submitted that the Fund Parties were not. If they had been in any doubt about the position before, they could have been in no doubt about the position after they saw Conway 1 which made it absolutely clear that the JOLs considered that Mr Naqvi controlled the whole operation of the Funds' general partners and of the Funds.

Capacity: on whose behalf was Mr Naqvi acting when he made the representations? – hat wearing

901. During his oral closing submissions Lord Falconer, in an exchange with me, helpfully confirmed Mr Jafar's case on the issue of on whose behalf Mr Naqvi was acting or is to be treated as having acted. Lord Falconer said as follows (Day 25, pages 131-134):

JUSTICE SEGAL: I should have asked you earlier, just remind me, your case on the question as to which entities the representations were made on behalf of, is it still your case that you say Mr Naqvi was making representations on before of each and every member of the group or only the borrowers and the funds as recipients?

LORD FALCONER: I say that he was making the representations on behalf of the whole group but certainly on behalf of the funds.

JUSTICE SEGAL: And the borrowers?

LORD FALCONER: The borrower, and AIML and AH as well.

JUSTICE SEGAL: That alternative submission is on the basis that he is to be taken as having made representations in this case because he was asking for money for the purpose of those funds being paid indirectly to the funds?

LORD FALCONER: Yes. I put my case in relation to hat identification, namely he was acting on behalf of the funds, which is the key question on this simple basis. The question your Lordship is asking is on whose behalf was the tort of deceit committed. You have seen

very, very extensive evidence of the position of Mr Naqvi before he went into the room on 20 December. What he was doing on 20 December when he was talking to Mr Jafar was going to get money primarily but not exclusively to fill the holes in the two defendant funds' balance sheets. He was specifically focused on that because he had been specifically told by the relevant members of the Inner Circle, who were the de jure directors of the two funds, these are the holes, we need them filled, please solve our problem. And that was what he was trying to do in substantial part when he went in there. And as he went into the room it was always envisaged by him that if he had got the money he would give a substantial part of it to the two funds in order to deal with the particular holes in their balance sheets. What's more, and separately, the way that AH and AIML were used was simply as a means to circulate the money round the group. For the Court to say that it is the circulators rather than the substantive beneficiaries of the fraud who should be regarded as the people on whose behalf the fraud is only committed, I say obviously it was committed on their behalf as well because they are the borrowers, but that would be to deny all the circumstances that you have before you. My Lord, I say that the correct approach to "hat identification" is by looking at all the circumstances and it is a factual question. I say that the Court should not simply focus on what Mr Jafar might have believed the situation was because that would be to allow the fraudster to have his way with the fraud. Plainly, if I come into a room and say, "I'm authorised to act on behalf of Mr Atherton, would you lend Mr Atherton £1 million" and you say, "Of course I would" and in fact me and Mr Ayres are in cahoots and I want the £1 million for Mr Ayres, the fact you thought I was acting on behalf of Mr Atherton doesn't make Mr Atherton liable. What you do is you look and see all of the circumstances and see on whose behalf I was acting. That is how I put my case on hat identification. I would respectfully submit it is the most sensible way to look at it and it is a way that avoids legal difficulties. If the position were that actually you should not treat the deceit as being committed on behalf of the funds then you have a situation where presumably, based upon what the funds are saying, you limit it to the borrowers, the borrowers immediately unload the money to the funds, which is what they did in relation to two-thirds of the money and then they are clear of deceit, to which the answer comes, "Well, maybe they would have a claim in knowing receipt". Not according to the experts in relation to UAE law. The obvious person on whose behalf these frauds

were committed was at least the two funds because they were envisaged to be the beneficiaries.

JUSTICE SEGAL: I think you say, don't you, yes, what was Mr Naqvi doing? He was fundraising .. and in the process he was doing that fraudulently and the question is: well, if that was what he was doing, on whose behalf was he was doing it? You say he was doing it for those who would receive the money directly and indirectly, as a minimum.

LORD FALCONER: That is exactly what I say. I say that's what the law is."

902. Mr Jafar in his Written Closing Submissions submitted that the question of capacity was a question of fact and that the Court was entitled to take into account all of the circumstances of the case when determining whether a person acted in a particular capacity. He relied on the following passage in the judgment of Lady Justice Arden (as she then was) in *Smithton v Naggar* [2015] 1 WLR 189 at [46]-[66]. Mr Jafar quoted [46] and [52] from Lady Justice Arden's judgment and I have added some other passages to make her reasoning clear (my underlining):

"46. As Mr Naggar held many directorships, the judge approached the question of de facto and shadow directorship as one of "hat" identification. In other words she approached the matter on the basis that he had a hat for each office he held and that the question to be decided was which hat he was wearing at any particular point in time. This meant looking at what he actually did. She gave less weight to incidents before the incorporation of Hobart. She accepted Mr Marshall's concession that Mr Naggar's actions before 31 October 2007 were not evidence to support him being a de facto director of Hobart after its incorporation but continued to influence how the business was run. She also accepted his submission that it was important to examine the way the company was governed, citing my judgment in Re Mumtaz Properties Ltd [2011] EWCA Civ 610; [2012] 2 B.C.L.C. 109 in these terms:

"51. Subsequent to the Holland case was Re Mumtaz Properties Ltd [2011] EWCA Civ 610; [2012] 2 B.C.L.C. 109. In that case Arden L.J. (with whom Aikens and Patten L.JJ. agreed) said that the first step in approaching the question of whether a person is a de facto director is to examine the governance structure of the company. That case concerned a family company which was '... run with a high degree of informality with decisions not necessarily being taken at board meetings but whenever relevant family members were in communication with each other.'

52. *Arden L.J. held that the judge had been entitled to be satisfied looking at the evidence as a whole that the respondent was part of the corporate governance structure of the company. In her words he was 'one of the nerve centres from which the activities of the company radiated' (see [47] of her judgment)."*

...

59. *Mr Marshall's first submission is that the judge failed to make findings about the corporate governance structure of Hobart and to take it into account. She was right to say that the Hobart board did not make the important decisions. As in the Mumtaz case [2012] 2 BCLC 109, Hobart's business had been run informally and major corporate decisions had been taken by Mr Naggar and Mr Townsley, who had operated like partners in Hobart's business. There was only one board minute. There was not even a board meeting to deal with the interim dividend. There were meetings of a board committee called Exco. That was set up before Hobart was incorporated and while it was still a division of DD Brokers. But, submits Mr Marshall, that committee did not deal with any important matters.*
60. *Mr Marshall submits that the de jure directors of Hobart did not make any significant decision, whether as to IT, investment, staffing, premises or otherwise, without Mr Naggar's agreement. Mr Naggar received regular information and gave regular instruction concerning the day-to-day operation of Hobart's business. Mr Naggar for instance exercised considerable control over the hiring and firing of staff.*
61. *In my judgment, Mr Marshall is correct to say that the judge focused on "hat identification" rather than on ascertaining the corporate governance system of Hobart. He is also correct in his submission that determining whether Mr Naggar was part of the corporate governance system was an important step in deciding whether he had assumed the responsibility of a director. The corporate governance system will vary from company to company. Therefore in the normal course, it is vital that the trial judge makes findings about the role which the defendant played in running the company in question.*
62. *However, in this case, Mr Naggar did not at trial dispute that he performed directorial acts. He sought to run his defence on the basis of "hat identification" i.e. that he had multiple roles and that he had acted in a different capacity at all times from that of a Hobart director. In those circumstances, there is no material error of law on the judge's part in not seeking to meet a defence which was not run.*

Second submission: "hat identification"

63. *Mr Marshall's second submission is that the judge was wrong in her approach to "hat identification". He submits that the judge proceeded on the basis that, if a person could possibly have acted wearing some other hat than that of director, his acts should be attributed to the role represented by that hat. This, he submits, was an error of*

principle. Mr Marshall submits that the weight which the judge gave to the position as a representative investor meant that the act could not also make him liable as de facto director. The correct approach would have been to determine in what capacity any act was actually done.

64. The judge's conclusion was not in terms that at the material times Mr Nagggar acted as chairman of DDI or as an investor but rather that nothing which the judge had seen "goes beyond the involvement one would expect to see from a person who combined the roles of major client and chairman of the majority shareholder" ..
65. Mr Marshall interprets this as a holding that all the acts were ones to be expected of a client and chairman of the major shareholder and that they were to be attributed to that capacity without considering whether they were actually done in that capacity. While I accept that those words read on their own can be interpreted in this way, in my judgment they have to be read in the context of the judgment as a whole. In particular the judge took the view that in the light of the JVA and the need for directors of Hobart to be authorised by the FSA it was unlikely that Hobart would have permitted Mr Nagggar to act as a de facto director: ... In other words, the passage on which Mr Marshall relies is to be read as saying that she had considered Mr Nagggar's involvement objectively against the conduct to be expected of a major client and chairman of the majority shareholder, that his involvement was consistent with that conduct and that he had in fact acted in that capacity. So read, her conclusion is in my judgment unassailable.
66. The assessment of the capacity in which a person acts is one of fact and degree and all the circumstances must be taken into account. Mr Marshall relies on this appeal on passages in his closing submissions in respect of a considerable number of specific categories of acts or specific episodes as showing that the judge came to the wrong conclusion. He does not contend that the judge was not entitled to come to the conclusion to which she came, and so it is clear that the challenge is in reality a disagreement with the judge's findings. As such, it does not amount to a good ground of appeal. "
903. Mr Jafar argued that since "all the circumstances must be taken into account" it followed that the Court was not confined to considering what was known by the parties at the time of a deceit but was entitled to take into account everything that was known at the time of the trial about them. That was, he submitted, logical given that the very essence of a deceit was that important circumstances were concealed from one party.
904. In his written closing submissions Mr Jafar said that the essential question in this case was – in the context of Mr Naqvi having power over the Fund Parties and having exercised that power in their management/operations – for whom Mr Naqvi went to get the money. He

submitted that the following could serve as useful – though non-exhaustive – indicia of capacity:

- (a). What powers does the agent have vis-a-vis the principal?
- (b). In what area are those powers (e.g. finance, management, administrative, etc)?
- (c). What needs does the principal have at the time of the act?
- (d). Does the principal request help?
- (e). For what purpose does the agent act?
- (f). Who benefits and what is the benefit?
- (g). What did the (i) representor and (ii) representee think?
- (h). What is the commercial reality?

905. Lord Falconer submitted that on the facts of this case, where the representor was acting hand in glove with the Funds and thinking of ways to deceive third parties into advancing money, the question of on whose behalf the representor was acting when committing the tort will inevitably focus much more on the internal arrangements rather than the perception of the counterparty. He accepted that neither Mr Jafar nor Mr Naqvi were thinking at the time of the meeting on 20 December 2017 in terms of specific corporate entities. Mr Jafar's evidence had been consistent in that he, much like everyone else at the time, simply regarded Mr Naqvi as Mr Abraaj. It was unreal, Lord Falconer submitted, to suggest that Mr Jafar would have been consciously mindful of the specific Abraaj corporate vehicle that Mr Naqvi happened to be using at the time or was focusing upon or on whose behalf he was acting. If this would not have been present in Mr Naqvi's mind either, and the obvious conclusion must be that it was not, how could Mr Jafar be expected to have considered it? Lord Falconer said that the likelihood was that they were not considering it. Lord Falconer submitted that at

some stage after the conversation AH and AIML were given as the names of the entities to whom the funds were to be sent and he accepted, as was clear from Mr Jafar's pleadings, that therefore they were the borrowers. But, Lord Falconer argued, there were three reasons why Mr Naqvi had had to use these borrowers was really threefold. First, he could not seek a loan direct to the Fund because he needed more than the amount covered by the Uninvested Capital. Mr Naqvi was lying about the amount he needed because he needed more than just to deal with the money that was going to go back to the Healthcare Investors. If he revealed that money had come from a loan from Mr Jafar, that would have indicated that he had got a more funds. Secondly, if he received monies directly into the AGHF the limited partners would have spotted that the funds came from a loan and not from money being recovered from the Abraaj treasury, which is where they thought it was. But Mr Naqvi needed more than the amounts to be used to repay the Healthcare Investors (two-thirds are to go to the two Funds and one-third are to go to other places). Finally, AIML and AH were no more than conduits for the circulation of the money.

906. During his oral closing submissions, Lord Falconer returned to the eight indicia of capacity referred to in Mr Jafar's Written Closing Submissions and said this (my underlining):

"What powers does the agent have vis-a-vis the principal." Full power and in particular powers to raise money. That is the answer to indicia 1. Then: "In what area are those powers ..." Answer, they extended to all areas of the Funds' operation, including raising money. Indicia number 3: "What needs does the principal have at the time of the act?" The principal has the need to fill the gaps in its balance sheets respectively. Question number 4: "Does the principal request help?" Had the Fund Parties requested help? Yes, they did. See by way of example Mr Lakhani's email dated 11 December 2017 where he specifically asks Mr Naqvi for help. If you look at the email, Mr Lakhani sets out the need at this particular point. At the bottom and then over the page, he is setting it all out. If you go back, the answer at the top of the page from Mr Arif Naqvi: "Under control, we will deal with it, let's discuss Wednesday." Then indicia number 5: "For what purpose does the agent act?" As mentioned already, to address the significant cash holes that had by now developed within the [AGFH] and [Fund] IV. Indicia number 6: Who benefits? And what is the benefit?" ... the Funds benefited. See appendix D to our written opening submissions. ... The money that came from the loans went almost immediately to the Fund Parties. It is plain therefore that at the point Mr Naqvi met Mr Jafar at Crescent Tower, it was his intention to send the money he obtained directly and speedily to the Fund Parties. If your Lordship goes to paragraph 335 of our closing submissions, you can see the speed with which the money left..... Indicia number 7: "What did the representor and the representee think?" On

the facts of this case, where the representor is acting hand in glove with the Funds and thinking of ways to deceive third parties into advancing money, the question of on whose behalf he is acting when committing the tort will inevitably focus much more on the internal arrangements rather than the perception of the counterparty. Neither Mr Jafar nor Mr Naqvi were thinking at the time of the meeting on 20 December 2017 in terms of specific corporate entities. Mr Jafar's evidence has been consistent in that he, much like everyone else at the time, simply regarded Mr Naqvi as Mr Abraaj. It is unreal to suggest that Mr Jafar would have been consciously mindful of the specific Abraaj corporate vehicle that Mr Naqvi happened to be using at the time or was focusing upon or on whose behalf he was acting. If this would not have been present in Mr Naqvi's mind either, and we say the obvious conclusion must be it was not, how could Mr Jafar be expected to have considered it? The likelihood is they weren't considering it. At some stage after the conversation, AH and AIML are the names given for the people to whom the money is to be sent and we accept, as we have accepted in our pleadings, therefore they are, as it were, the borrowers. We don't dispute that. But the reason he [Mr Naqvi] had to use them, those borrowers, was really threefold. First of all, he couldn't seek a loan direct to the Fund because he needed more than the amount covered by the Uninvested Capital. He was lying about the amount he needed because he needed more than just to deal with the money that was going to go back to the Healthcare Investors. So if he revealed that money had come from a loan from Mr Jafar, that would have indicated that he had got a more - that this is the amount of the loan. If he did it direct to the Funds, the LPs [limited partners] would have spotted it came from a loan, not from the money being recovered from the Abraaj treasury, which is where they thought it was. Thirdly, he had needs other than for the Funds, because it is two-thirds that go to the two funds and one-third that goes to other places. Finally, AIML and AH were no more than conduits for the circulation of the money. If your Lordship looks at our [Written] closing [Submissions] at paragraph 101 to 103 it is happenstance as to where money enters the system... The last indicia is: "What is the commercial reality?" Your Lordship answered - you said, in my respectful submission, exactly what the position is, that he was fundraising for the Funds. That's the commercial reality. It should be on their behalf. But he was acting when he went into the room. What is the answer that the Funds give to this? They say the question is ultimately to be determined objectively and will be heavily context dependent. I agree with that. [The Funds say that] however, there is an obvious and simple logic to the proposition that where an agent for multiple entities makes representations to induce another person to contract with one of those entities specifically, the agent acts in his capacity as agent for the contracting party. No, that is not making the mistake of suggesting that the test is on whose behalf was the contract made. That is not the question. The question is on whose behalf was the tort committed. When it is being said that lies were being told to this extent then to say it's part and parcel of an ordinary loan is to completely miss the point."

Attribution – GP8’s submissions

907. In their written closing submissions GP8 argued that Mr Jafar’s case on attribution ultimately depended on the principles of agency and turned on whether Mr Naqvi had actual or ostensible authority to act as GP8’s agent and whether he was in fact acting in that capacity (and not some other capacity) during the course of the negotiations in December 2017 with Mr Jafar. If Mr Naqvi was not authorised to act on behalf of GP8 or was not in fact acting on behalf of GP8 then Mr Jafar’s case failed. GP8 argued that it was not sufficient for Mr Jafar simply to show that Mr Naqvi was authorised to act on behalf of GP8 in some general sense. It was necessary to demonstrate that Mr Naqvi was in fact acting in the capacity as agent for GP8 in the context of the particular transaction in question.
908. This, GP8 said, could be put colloquially as a hat identification question – when Mr Naqvi did something actionable (assuming he did) what hat was he wearing? GP8 noted that it was not uncommon for a single person to have authority to act on behalf of several principals and the case of a person holding multiple directorships was an obvious example. But it was clearly wrong to say that such an individual was necessarily always acting on behalf of all those entities whenever he is negotiating or entering into a transaction with a third party. Fund IV’s position in relation to the hat wearing question was that even assuming that Mr Naqvi could be said to have had some authority to act on behalf of GP8, he was not exercising and not purporting to exercise that authority when he was negotiating with Mr Jafar in December 2017. He was acting on his own behalf and in his capacity as agent for AIML and AH, the prospective loan counterparties. GP8 was not seeking to borrow any money from Mr Jafar in December 2017 and was not, and never intended to be, the counterparty to any loans obtained from Mr Jafar. GP8 and Fund IV were not even mentioned in the relevant December 2017 communications and there was no case or even suggestion that Mr Jafar thought he was negotiating with GP8. The simple point was that Mr Jafar was not negotiating with GP8 or Fund IV in December 2017 and there was no reason for GP8 or Fund IV to be in the room during Mr Naqvi’s discussions with him. After all, GP8 said, Mr Naqvi could achieve everything he needed to achieve by acting in his own capacity and as agent for AIML and AH.

909. GP8 noted that Mr Jafar had asserted that funds needed to be raised for Fund IV specifically for the purposes of its year end audit. But, GP8 argued, even if true this failed to appreciate that the monies had to be raised by the entities which had taken funds from Fund IV in the first place – AH and AIML – so that they could settle the intercompany receivable owed to Fund IV before year-end. In those circumstances, it was still AH/AIML that were negotiating with Mr Jafar and needed to be the borrowers so that there was still no reason or need for GP8 or Fund IV to be in the room negotiating with Mr Jafar in December 2017. At best, assertions of this nature conflated a question of motive (e.g. why are AH and AIML seeking to borrow money) with the relevant question of capacity (e.g. is Mr Naqvi acting in his capacity as agent for AH and AIML in obtaining loans for them so that they can settle the intercompany receivable owed to GP8 / Fund IV).
910. GP8 submitted that the arguments relied on by Mr Jafar relating to the authority of Mr Naqvi to act on behalf of GP8 should all be rejected. The key arguments were as follows:
- (a). The argument based on the terms on which AIML was appointed by GP8 to carry out certain management functions. This was pleaded at [32(1)-(3)] of the RRASOC. (the *AIML Authority Argument*).
 - (b). The unpleaded assertion that Mr Naqvi was a “*de facto and[/or] shadow director*” of GP8 (the *De Facto/Shadow Director Argument*).
 - (c). The alleged authority (actual or ostensible) of Mr Naqvi to act on behalf of GP8 (the *Naqvi Authority Argument*).
 - (d). The argument that attribution arises pursuant to the knowledge and conduct of the Funds' general partners' de jure directors (the *GP8 Directors Argument* and the *Ratification Argument*).

The AIML Authority Argument

911. GP8 submitted that this argument relied on the terms on which AIML was appointed by GP8 to carry out certain management functions pursuant to a management agreement entered into in 2008 (this is the *Fund IV IMA*). GP8 noted that Mr Jafar argued that “*AIML was empowered to raise monies for [Fund IV]*” (RRASOC [32(2)]); (b) Mr Naqvi was a director of AIML at the relevant time (RRASOC [32(1)]) and Mr Naqvi had authority, in his capacity as a director of AIML, to exercise the powers delegated to AIML (RRASOC [32(3)]). The essence of this argument, GP8 said, was that when Mr Naqvi was negotiating the Loans in December 2017 he was exercising “*money raising*” powers delegated to AIML by GP8 under the terms of the Fund IV Management Agreement. Mr Jafar had claimed that, in those circumstances, any statements or representations made by Mr Naqvi/AIML during the course of those negotiations fall to be attributed to GP8.
912. GP8 submitted that the fundamental flaw in the AIML Authority Argument was that Mr Naqvi was not exercising or purporting to exercise any powers under the Fund IV IMA when negotiating the terms of the Loans with Mr Jafar in December 2017. The Fund IV LPA set out the terms on which the business of the partnership fell to be conducted and clause 5.1 provided that GP8 “*shall have the power and authority to do all things necessary to carry out the purposes of the Partnership.*” The purposes of the partnership were defined in clause 2.4 of the LP Agreement as being “*to carry on the business of investing and in particular to make investments (and to monitor the same) which shall include investments in buy-outs, growth capital opportunities, greenfield projects and privatisations...in accordance with the investment restrictions set out in Schedule 1.*” Clause 5.2 of the Fund IV LPA specified the powers and authorities exercisable by GP8 “*on behalf of the Partnership and with the power to bind the Partnership thereby*” which included (at 5.2(h)) a power “*to borrow money (or to cause a special purpose vehicle of the Fund Partnerships to borrow such money) for any of the purposes of the Partnership.*” Clause 5.2(h) the stated that: “*Any borrowings, guarantees, indemnities, covenants or undertakings given may be secured on any of the Partnership Assets.*” Pursuant to the Fund IV IMA (clause 2.1), GP8 delegated to AIML “*certain powers, duties and discretions to manage the Partnerships and their businesses,*

affairs or assets...including the power and authority to execute agreements on behalf of the Partnerships” and AIML agreed “*to act as such manager and to accept and carry out such management responsibilities and duties otherwise imposed by the Partnership Deed.*” Accordingly, GP8 argued, the effect of the Fund IV IMA was to authorise AIML to exercise, on behalf of GP8, certain powers conferred on GP8 under the Fund IV LPA including the power “*to borrow money...for any purposes of the Partnership.*” Importantly, however, the counterparty to any loan entered into pursuant to the exercise by AIML of those delegated powers would be GP8 (and not AIML in its own personal capacity). AIML would be exercising GP8’s power to borrow for the purposes of the partnership and any resulting liability must be that of GP8 as borrower. Clause 2.1 of the Fund IV IMA operated by way of a delegation to AIML of GP8’s borrowing power. However, GP8 said, it has never been alleged by Mr Jafar that GP8 was the borrower in respect of any of the Loans negotiated by Mr Naqvi. GP8 said that AIML was the counterparty to the First Loan and AH was the counterparty to the Second Loan. Moreover, none of the proceeds of the First Loan were ever received by GP8. They were paid over to AGHF for the purposes of repaying the Healthcare Investors before any payments were made to GP8.

913. GP8 argued that it was irrelevant for these purposes that Mr Naqvi might have been seeking money from Mr Jafar in order to enable Fund IV to pass its audit for the year ending 31 December 2017 with an apparent clean bill of health and had taken the first step to achieve this by changing GP8’s year-end (on behalf of GP8) so that borrowing the First Loan and the Second Loan was the second necessary step which must be treated as having been taken on behalf of GP8. The fact that GP8 and Fund IV may have had some interest in funding being provided to AH (AIML) did not mean that Mr Naqvi was exercising GP8’s money-raising powers when seeking to obtain a loan from Mr Jafar to AH/AIML. At best, it provided a motive or an explanation for why part of that funding was being sought by AH.

The De Facto/Shadow Director Argument

914. GP8 submitted that this argument failed because first it had not been properly pleaded and secondly because even if Mr Jafar was right and could prove that Mr Naqvi regularly gave

directions to the *de jure* directors of GP8 which were regularly followed, this did not establish that GP8 expressly or impliedly conferred authority on Mr Naqvi to act on its behalf.

915. GP8 relied on the explanation of the distinction between a *de facto* and a shadow director given by Millett J (as he then was) in *Re Hydrodan* [1994] B.C.C. 161 at 163D-E. GP8 said that in summary a *de facto* director was someone who claimed to act and purported to act as a director, although not validly appointed as such. In order to establish a person is a *de facto* director “*it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company’s affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.*” A shadow director was different because he did not act or purport to act on behalf of the company. He acted through the authorised agents, but not as one.
916. GP8 argued that Mr Jafar had not included in the RRASOC a pleaded allegation that Mr Naqvi was a *de facto* director of GP8 or a pleading of the functions undertaken by Mr Naqvi that could be discharged only by a director. Accordingly, it was not open to Mr Jafar to advance a case in closing that Mr Naqvi had authority to act on behalf of GP8 by reason of being a *de facto* director. GP8 said that [32(4)] was the relevant part of Mr Jafar’s pleading. The first part of that sub-paragraph dealt with the scope of Mr Naqvi’s alleged authority (what he had authority to do). The asserted basis for the existence of the authority was addressed in the second part of the sub-paragraph: “*Such authority arose under the Fund entities’ constitutional arrangements as particularised in this paragraph 32, and, further, because directors and/or other officers or employees or agents of [AGHF GP], [GHF] and GP8 habitually sought instructions or directions from Mr. Naqvi regarding the financial affairs and management operations of the Funds; and Mr. Naqvi gave instructions and directions as to the financial affairs and management operations of the Funds, which were habitually followed.*” GP8 said that therefore Mr Jafar’s pleaded case was that Mr Naqvi had authority to act on behalf of GP8 (a) because of the terms of Fund IV’s constitutional documents and (ii) because Mr Naqvi was accustomed to give directions or instructions to

the de jure directors/other officers and agents of GP8, which were habitually followed. As regards the latter ground, there was no allegation that Mr Naqvi was a *de facto* director of GP8 and, more significantly, no pleading of functions undertaken by Mr Naqvi that could only be discharged by a director. All that was pleaded were examples of Mr Naqvi supposedly giving instructions or directions to de jure directors, which was not relevant to establishing de facto directorship.

917. Mr Jafar had also failed to plead that Mr Naqvi was a shadow director of GP8 and, in any event, that concept was irrelevant to these proceedings because a shadow director was a statutory construct serving limited purposes in the context of Part V of the Companies Act. Its only relevance was to impose liability on shadow directors in connection with certain statutory offences committed in anticipation of or in the course of a winding up (see, for example, section 89 of the Companies Act).

918. Beyond these pleading points, GP8 said that the De Facto/Shadow Director Argument was based on an obvious error in reasoning. It did not follow from the fact that a person gave directions to a company's duly appointed agents that he must therefore also be an agent of the company or authorised to act on its behalf. A person in that position stands apart from the ordinary governance of the company, operating through the company's agents, but not as one. This was the analysis under English law of a shadow director who have been held not to act as agents for the company. In *Stocznia Gdanska SA v Latvia Shipping Co & Ors* [2001] C.L.C. 1290 (*Stocznia Gdanska*) Thomas J held at [251] that "*Shadow directors are not part of the ordinary governance of a company; they give directions to it; they do not act as agents for the company and are therefore outside the principle in Said v Butt.*"

The Naqvi Authority Argument

919. GP8 submitted that Mr Naqvi had no actual or ostensible authority to act on behalf of GP8 in December 2017 (in any event he was not acting or purporting to act on behalf of GP8 at that time).

920. GP8's first point was that the terms of Fund IV's constitutional documents did not confer any authority upon Mr Naqvi to act on behalf of GP8 whether "*in relation to its financial affairs*" "*to make the representations that comprised the Overarching Message*" or otherwise.
921. Mr Jafar's pleaded case in support of his claim that Fund IV's constitutional documents conferred the requisite authority on Mr Naqvi relied, GP8 submitted, on two allegations. The first was an allegation that Mr Naqvi was the Chairman of the GIC "*which presided over the investments of... [Fund IV] and held a power of veto with respect to its decisions.*" But, GP8 argued, the existence of a power of veto over the de jure directors' decisions provided no support for the contention that GP8 conferred authority on Mr Naqvi to act on its behalf. The second was an allegation that "*Mr Naqvi was defined as an executive with 'key person' or 'key investment executive' status in the [Fund IV LP Agreement].*" But, GP8 submitted, the relevant provision relied on (clause 5.7(a) of the Fund IV LP Agreement) simply provided that the Investors' Council was entitled to suspend further investments by the partnerships if "*less than 50% of the Key Investment Executives... are devoting substantially all their business time to the business of the Manager*" (clause 5.7(c) identified Mr Naqvi as one of ten Key Investment Executives). GP8 said that the fact that Mr Naqvi was identified as a Key Investment Executive of AIML for the purposes of determining when the Investors' Council could exercise a power to suspend further investments by Fund IV provided no support for the contention that GP8 conferred authority on Mr Naqvi to act on its behalf whether "*in relation to its financial affairs*", "*to make the representations that comprised the Overarching Message*" or otherwise.
922. GP8's second point was that Mr Naqvi was not a *de jure* director of GP8 at the time of the Loans. He had stepped down as director on 17 April 2017. GP8 submitted that the fact that Mr Naqvi was not a director – having formerly been one – was a strong indicator that he was no longer authorised to act on behalf of GP8, and that GP8 did not intend for him to do so.
923. GP8's third point was that, as it had argued in response to the De Facto/Shadow Director Argument, even assuming that Mr Naqvi was accustomed to giving directions or instructions

to the de jure directors which were habitually followed, that provided no support for the contention that GP8 conferred authority on Mr Naqvi to act on its behalf.

924. GP8's fourth point was that the "*particulars of Mr. Naqvi's conduct demonstrating his authority*" at RRASOC [32(4)(e)(i)–(h)(vii)] did not provide any particulars of Mr Naqvi acting on behalf of GP8 in its dealings with third parties or ever having had authority to do so. Most showed, at their highest, isolated instances of Mr Naqvi giving instructions to GP8's de jure directors.
925. As regards the allegation at RRASOC [32(4)(e)(iv)], by reference to RRASOC [12A]–[12B], that "*Mr Naqvi arranged loans for [Fund IV] to address cash shortfalls that had arisen in its accounts, with the knowledge and consent of its Directors*" by way of the US\$ 195 million loan (the **2016 Air Arabia Loan**) provided in June 2016 by Air Arabia PJSC (**Air Arabia**) to Menasa Capital Management Holdings Limited (**Menasa**), an entity controlled by Mr Naqvi, GP8 said that neither the 2016 Air Arabia Loan itself, nor the circumstances surrounding it provided any support for the contention that Mr Naqvi was authorised by GP8 "*to arrange loans*" for GP8. The 2016 Air Arabia Loan had been guaranteed by Mr Naqvi and GP8 was not a borrower or other obligor in respect of the 2016 Air Arabia Loan. It was only a party to the agreement because the proceeds of the loan were to be paid into a GP8 bank account, and the agreement required Mr Naqvi to be included as an authorised signatory in respect of that account. The agreement was signed by, among others, Mr Naqvi (on his own behalf and on behalf of AIML) and Mr Lakhani on behalf of GP8. When negotiating the terms of the 2016 Air Arabia Loan, Mr Naqvi was doing so on behalf of Menasa (as borrower) and on his own behalf (as guarantor). It was signed on behalf of GP8 by Mr Lakhani. None of that required or involved any conferral of authority by GP8 on Mr Naqvi to act on GP8's behalf in June 2016, let alone in December 2017. GP8 said that in any event, even if Mr Naqvi was somehow acting on behalf of GP8 in June 2016 he was, at that time, a de jure director.
926. As regards the allegation at RRASOC [32(4)(h)(vi)] that an email from Mr Naqvi dated 23 December 2017 ("*Gents, I have reworked the cash flows extensively, and reached a point I am comfortable we will get to Inshallah. The support from friends and sale of shares has*

given me a lot of confidence. Can you rework the Jan and Feb numbers into 1-15 and 16-31 ... to try and match cash flows even more accurately”) attaching an Excel Spreadsheet entitled “*Cash Projection*” (identifying the projected cash position of the Abraaj entities for December 2017 and January-February 2018 with figures for total projected cash outflows and the closing balances and listing a cash projection, expenses, interest and borrowing and investments) contained a proposal from Mr Naqvi to GP8’s directors that he take steps “*to raise monies on behalf of*” Fund IV, and that “*Mr. Lakhani, Mr. Siddique and Mr. Dave, acting in their capacities as Directors of the Fund entities, consented to that proposal and thereby authorised Mr. Naqvi to act on behalf of the Funds for the purpose of raising monies,*” GP8 argued that the spreadsheet simply showed how funds being raised by Mr Naqvi on behalf of other Abraaj entities (such as AH) would be distributed between those entities to meet GP8’s funding requirements. Mr Naqvi did not need, and was not seeking, any authority from GP8 to raise funds on behalf of other Abraaj entities. GP8 also argued that since the email in question was sent on 23 December 2017, after the statements alleged by Mr Jafar had been made, it provided no basis for an allegation that GP8 had authorised Mr Naqvi to act on its behalf on 20 December 2017.

927. GP8 argued that the reality was that Mr Naqvi was not authorised to act, did not act, was not held out as acting and was not understood by Mr Jafar to be acting on behalf of GP8 during the course of the negotiations for the Loans in December 2017. In those circumstances, Mr Jafar’s case on attribution and vicarious liability must both fail.
928. GP8’s fifth point was that GP8 was not seeking to raise any money from Mr Jafar in December 2017 so there was no reason or need for GP8 to have conferred any authority on Mr Naqvi to act on its behalf in December 2017 and no basis to conclude that it did so. The monies were being raised by AIML (as the borrower in respect of the First Loan) and AH (as the borrower in respect of the Second Loan) so that while AIML/AH may have needed to make representations to Mr Jafar in order to obtain funding, there was no need or occasion for GP8 to participate in those negotiations, and no need for GP8 itself to make any statements or representations to Mr Jafar.

929. GP8's sixth point was that the conferral of authority by GP8 on Mr Naqvi could not be inferred from the circumstances in which the Loans were made. That was an argument of implication of agency through conduct and the relevant legal principles were set out at [29] of the judgment of Leggatt J (as he then was) in *The Magellan Spirit* [2016] 2 Lloyd's Rep 1. These were that (a) Mr Jafar must establish conduct from which a reasonable person in his position would have understood that Mr Naqvi was authorised to act on GP8's behalf and enter into the Loans on behalf of GP8 and to make representations for which GP8 was liable; (b) the conduct in question must only be consistent with such an agreement of agency and inconsistent with any other intended relationship between Mr Naqvi, AIML and GP8 and (c) in this respect "*it must be fatal to the implication of an agency relationship if the parties would have or might have acted as they did in the absence of such a relationship.*" GP8 argued that Mr Naqvi did not require any authority from GP8 to negotiate the Loans with Mr Jafar and would have made the same statements or representations irrespective of whether he had such authority. The conduct involved in obtaining the Loans could be said to have been "*only consistent with*" an agreement or mutual intention to confer authority on Mr Naqvi to act on GP8's behalf. That, GP8 submitted, was fatal to the implication of any agency relationship.
930. GP8's seventh point was that Mr Jafar's case based on the Mr Naqvi having ostensible authority also failed. GP8 argued that to succeed Mr Jafar had to demonstrate (a) that there was a representation by GP8 (and not by Mr Naqvi himself) that Mr Naqvi had authority to conduct negotiations on its behalf; (b) that any such representation was made by a person with actual authority to manage the business of GP8 and (c) that he (Mr Jafar) relied on that representation when making the Loans to AH/AIML. GP8 argued that there was no indication that Mr Jafar thought he was negotiating with GP8 in December 2017 (he was not even aware of its existence at that time). There was also no evidence that GP8's directors represented or held Mr Naqvi out to Mr Jafar as having authority to make statements or representations on its behalf and there was no evidence to suggest that Mr Jafar relied on any such representation in any relevant way. GP8 submitted that the reality was that (to the extent Mr Jafar turned his mind to the question at all) he believed and understood that the

negotiations in December 2017 were taking place between him and Mr Naqvi acting in his personal capacity or (at best) as agent for the loan counterparties (i.e. AIML/AH).

The GP8 Directors Argument

931. This argument was pleaded at [32(4A)] of the RRASOC. GP8 argued that it was not alleged, and there was no evidence to suggest, that GP8's directors knew the content of the discussions between Mr Naqvi and Mr Jafar in December 2017. As such, there was no basis for the allegation that they knew that Mr Naqvi had obtained the Loans by deceit (assuming he did). Mr Jafar was not entitled and should not be permitted to trespass beyond his pleaded case.

932. GP8 noted that to the extent that Mr Jafar relied on an inference that each of Mr Lakhani, Mr Siddique, Mr Dave and Mr Abdel-Wadood knew that Mr Naqvi would use deceit to procure monies from Mr Jafar, there was no basis for the inference in Mr Jafar's pleaded case and so it was not open to him to rely on the inference. In any event, the bases for the inference on which Mr Jafar appeared to rely were insufficient. Mr Jafar sought to support the inference by claiming that GP8's directors knew that the AH audited financial statements (which were false and misleading) were habitually presented to banks to obtain funding. However, there was no evidence to suggest that GP8's directors knew that the AH audited financial statements were presented to Mr Jafar. In any event, Mr Jafar's case was not based upon a representation made through the presentation of AH's audited financial statements. Further, Mr Jafar relied on the allegation that Mr Naqvi was supposedly discussing closely how to deal with the crisis at Abraaj with the GP8 directors but the documents relied on to support that allegation (at [588] of Mr Jafar's Written Opening) only showed that Mr Naqvi was discussing the cash position at Abraaj with Mr Lakhani and others (i.e., working out how much money was required in the abstract – and how to address the concerns of the Healthcare Investors). They did not go any further than that. In addition, Mr Jafar relied on the allegation that Mr Naqvi was in regular communication with GP8's directors, referring, in particular to an email from Mr Naqvi dated 24 December 2017 in which he requests a “huddle.” However, GP8 argued, the existence of regular communications between Mr

Naqvi and GP8's directors was insufficient to support the conclusion that they knew that Mr Naqvi had made dishonest representations to Mr Jafar (assuming he did so) and the requested "huddle" was to discuss interest on income to AGHF before year-end (as was obvious from the subject line of the email in question: "*Interest income into AGHF before year end?*"). None of this, GP8 argued, provided any evidential basis for a conclusion that Mr Naqvi had discussed with the de jure directors how he was planning to raise the funds, still less the detail of proposed or past negotiations.

933. GP8 also argued that there was nothing in any of the email communications between Mr Naqvi and the Inner Circle to suggest that they were apprised of the alleged deceit on the part of Mr Naqvi upon Mr Jafar. The mere fact that they were aware of the Loans to AH and AIML did not mean that they knew that those Loans had been procured by the alleged representations in issue in these proceedings.

934. In any event, the allegation was hopeless as a matter of law. The circumstances in which the actions (here, statements and representations) of a natural person (Mr Naqvi) can be attributed to a legal person (GP8) are governed by the principles of agency. Even assuming that Mr Naqvi had obtained the Loans by deceit, and even assuming that GP8's directors knew that to have been the case, that did not demonstrate that Mr Naqvi had authority to act or was acting on behalf of GP8 in December 2017. The fact that person (A) knows that person (B) has deceived person (C) provides no support for an allegation that person (A) (through the doctrine of attribution) also deceived person (C). To hold otherwise would be to create an entirely new and unprincipled category of imputed liability.

The Ratification Argument

935. This was pleaded at [33(3)] of the RRASOC. That paragraph asserted that "*by virtue of their knowledge as pleaded in sub-paragraph 32(4A) above, the Fund Directors, by permitting the monies derived from the Jafar Loans to be paid to [GHF] and GP8's accounts... ratified Mr. Naqvi's acts and/or conferred retrospective authority on him to act on behalf of each of [AGHF] and [Fund IV] with respect to the procuring of the Jafar Loans.*"

936. GP8 submitted that the relevant legal principles were summarised in Bowstead & Reynolds on Agency (22nd ed.) as follows:

- (a). *“Where an act is done purportedly in the name or on behalf of another by a person who has no actual authority to do that act, the person in whose name or on whose behalf the act is done may, if the third party believed the act to be authorised, by ratifying the act, make it as valid and effectual... as if it had been done by his authority”* (at [2-047]).
- (b). *“In order that a person may be held to have ratified an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done, unless he intended to ratify the act and take the risk whatever the circumstances may have been”* (at [2-071]).
- (c). Ratification may be express or implied: *“Express ratification will however be comparatively rare, and a ratification will more often be implied from words or conduct. Such words or conduct must be unequivocal: they must not be such as that they could be accounted for by other interpretations”* (at [2-077]).

937. GP8 argued that the Ratification Argument failed for the following reasons:

- (a). Mr Naqvi was not purporting to act on behalf of GP8 during the course of his negotiations with Mr Jafar in December 2017.
- (b). It had not been alleged, and there was no evidence to suggest, that GP8’s directors knew the content of the discussions between Mr Naqvi and Mr Jafar in December 2017. In particular, it was not alleged that the GP8 directors knew that Mr Jafar made the (implied) Overarching Message, still less the Reinvestment.
- (c). The funds received by GP8 from AH were paid to discharge an intercompany receivable. It was impossible to infer from that receipt that GP8 intended to ratify and

thereby adopt representations and statements made by Mr Naqvi when negotiating the provision of Loans from Mr Jafar to AH/AIML.

- (d). There was no need or occasion for GP8 to ratify any statements or representations made by Mr Naqvi and no reason why it would have done so.
- (e). Any ratification in the context of representations must necessarily occur before reliance because any later ratification would be irrelevant to the causation of loss. There was no case that ratification took place between any misrepresentations and the payments.

Fund IV not liable in any event

938. GP8 also argued that if it were liable for the tort of deceit that would still not be a liability of the Fund IV partnership unless GP8 was "*acting in the ordinary course of the business*" of the partnership when Mr Naqvi said and did the things that were to be attributed to GP8 (see section 11 of the Partnership Act (2025 Revision) which is applied to exempted limited partnerships by virtue of section 3 of the ELPA). However, GP8 would not have been acting in the ordinary course of the partnership's business because it formed no part of Fund IV's business to make representations about AH and AIML's ability to repay the Loans. Given that GP8 only had power to borrow money for the purposes of the partnership it could hardly be within the ordinary course of its business to make representations about someone else's ability to repay a loan. Put differently, GP8 said, the conduct alleged was not "*so closely connected*" with acts that GP8 was authorised to do that it may "*properly and fairly be regarded*" as being done (if it was done) by GP8 while acting in the ordinary course of the partnership's business (see the speech of Lord Nicholls in *Dubai Aluminium v Salaam* [2003] 2 A.C. 366 at [23]-[34]).

Attribution – the GHF Parties’ submissions

939. The GHF Parties’ submissions followed many of the submissions made by GP8. But there are some separate issues and arguments that require separate review.

940. The GHF Parties’ main point followed the case made by GP8. Mr Jafar’s case foundered for a core reason. When Mr Naqvi met with Mr Jafar he was acting on behalf of AH and AIML, the counterparties to the Loans, only. On the case put by Mr Jafar, there was nothing to suggest that Mr Naqvi was acting for the GHF Parties or any other entity when making the representations he was alleged to have made. As a result, Mr Jafar’s case in so far as it concerned the attribution of Mr Naqvi’s alleged representations, and the knowledge of their falsity, to the GHF Parties, failed.

The evidence

941. The GHF Parties relied on the evidence of Mr Farnum and Mr Cleary, both of whom they submitted were honest and reliable witnesses.

942. The GHF Parties noted that Mr Farnum had accepted that he had no insight into the specific operations of the GIC and had said that his statement focused on the individuals with whom he had interactions on a day-to-day basis, rather than the detail of the legal structure of AGHF and the activities and role of AIML. He had also accepted, fairly, that he did not know what was going on behind the scenes. The GHF Parties submitted that the most important aspect of Mr Farnum’s evidence was his explanation of the roles and decision-making responsibilities of Mr Naqvi, Mr Mann, and Mr Vettivetpillai in the context of his understanding of the operation of AGHF. They submitted that the upshot of his evidence was that, whilst Mr Naqvi was the overall head of what was referred to as the “*Abraaj Group*” and was responsible for the underlying concept on which the “*Abraaj Group*” did business, Mr Naqvi had little practical involvement with the day-to-day running of AGHF. This, the GHF Parties submitted, was unsurprising in circumstances where Mr Naqvi was head of a large corporate group. It simply would not have been practically possible for one

person to have been involved with the detail of each of the individual funds in a group as large, amorphous and ill-defined as the “*Abraaj Group*.” Mr Farnum had explained that Mr Naqvi was very important as regards the design of the AGHF concept and the strategy behind the concept and business plan but that Mr Naqvi was not involved in any sort of day-to-day or regular basis after that: Mr Farnum had said during his cross-examination (on Day 15, page 15) that “*I think the distinction is important between coming up with the design of the concept and the strategy and the actual day-to-day execution once the fund is in place.*” Conversely, Mr Farnum emphasised that, contrary to the suggestion that Mr Mann was someone with little practical control of AGHF, he was “*very much*” in control of AGHF and he “*was the most important person in [AGHF]*” (Day 15, page 28). The GHF Parties submitted that this was consistent with the clear distinction that Mr Farnum had drawn between Mr Naqvi’s influence on overall design and strategy but his lack of involvement with the operation and management of AGHF.

943. The GHF Parties submitted that Mr Farnum’s evidence therefore showed Mr Naqvi to be the overall figurehead of the “*Abraaj Group*” but not someone who had responsibility or control of AGHF’s day-to-day workings. For instance, in relation to Mr Naqvi’s email of 22 October 2017, in which Mr Naqvi purported to discuss AGHF matters, Mr Farnum had noted that this showed that Mr Naqvi, “*had no idea what was going on in [AGHF]*” and that this showed his real “*disconnect*” from the AGHF on the part of Mr Naqvi (Day 15, page 64). The GHF Parties said that Mr Farnum had been consistent in his view of Mr Naqvi’s role that he had latterly (“*as the noose was circling around Mr Naqvi*”) taken control of the process of managing the discussions with the Healthcare Investors. He had to do so in order to maintain the cover-up of the fraud given the questions that the Healthcare Investors had started to ask. As Mr Farnum summarised the position as follows during his cross-examination (Day 15, page 78): “*... we all know why this is the case. He was perpetrating the fraud, it’s weeks away from collapsing, he’s in a dispute with the most important investors, not just in the healthcare fund but across all of his funds. It would be very surprising, I can’t imagine a world in which Arif was not involved in reviewing this, given a dispute with investors who are critically important to [AH] as a whole.*”

944. As regards Mr Cleary's evidence, the GHF Parties submitted that he had given useful evidence as regards the role played by Mr Naqvi in AH, and Mr Naqvi's relationship with other AH board members. Mr Cleary had been frank as to the limits upon his evidence, in that his direct experience of Mr Naqvi's role and approach to governance was only by reference to matters within the purview of the AH board. But, the GHF Parties submitted, Mr Cleary's experience of Mr Naqvi's management style in relation to the AH board was totally at odds with Mr Jafar's case that formal governance processes were "*collapsed*" by Mr Naqvi, such that Mr Naqvi was merely the alter ego of all "*Abraaj Group*" entities. Mr Cleary had accepted that Mr Naqvi was a dominant figure at AH board meetings and that no-one was in doubt that he was "*in charge*." However, Mr Cleary did not consider this to be out of the ordinary as regards the manner in which the CEO of a company might conduct themselves. It is also clear from his evidence that AH's constitutional limits and procedures were respected. For example, Mr Cleary had discussed the appointment of directors to the AH board and confirmed that if other board members had objected to the appointment of a particular director they would have expressed that view in emphatic terms and that in his view Mr Naqvi prudently would have consulted with his fellow shareholders prior to bringing a matter to the wider board. Mr Cleary had said that "*there was no doubt whatever that the CEO [Mr Naqvi] [was] consulting the board prior to the appointment of a director. He couldn't have appointed the director in terms of the articles of association on his own in any event.*"

945. Mr Cleary had summarised the role of Mr Naqvi by noting that there was nothing, to his mind, unusual about the level of control and influence that he had exercised and that there was also nothing concerning about it. He had said that "*And I don't think in this particular regard that there was any huge difference between the way in which this board functioned and the way in which another board with a dominant CEO would have functioned. The only point that I'm making is that Mr Naqvi, throughout this particular period, is known as the founder and group CEO, he is acting functionally at every meeting as the chairman*" (Day 11, pages 30-31).

946. Mr Cleary had also described the way in which, in practice, he would and was able to manage Mr Naqvi by getting Mr Siddique to speak to Mr Naqvi before Mr Cleary would then deliver a given message in blunter language. Mr Cleary had said when cross-examined by Mr Atherton as follows (Day 11, page 50):

“Mr Cleary Somebody needed to go to Arif first, to say, “This is a good idea, otherwise you are going to have a revolt from independent non-execs” and then after that I could then use my somewhat blunter language with Arif and it worked quite well.

Q. That is an example of the board functioning in the way a board should?

A. Yes. I think under ordinary circumstances I would have, certainly in the few other boards that I have direct experience of, been able to go directly to the chief executive or to the chairman of the board, I wouldn’t have gone through his brother-in-law. But with that exception, yes.”

947. The GHF Parties argued that these responses were revealing as they showed both that the board of AH (certainly the non-executive directors) would be willing to revolt if it (they) did not like Mr Naqvi’s suggestions or approve of his conduct and that board members were able to exert influence over Mr Naqvi. In short, the picture of Mr Naqvi’s role at AH was that he was the dominant and influential force, as one might expect for a CEO, but someone whose role was nevertheless circumscribed by the proper limitations set out in AH’s constitution and the supervision of the board of directors of AH, in particular the non-executive directors. Mr Cleary’s evidence supported the GHF Parties’ case that Mr Jafar’s depiction of Mr Naqvi as the alter ego of AH and the “*Abraaj Group*” who could do as he wished untrammelled by the formalities of the corporate structures and constitutions, was a fiction, designed to overcome the obvious difficulties in his case

The AIML Authority Argument

948. The GHF Parties adopted and endorsed the points made by GP8 on this point. Mr Naqvi was not purporting to raise money on GHF’s (or AGHF GP’s) behalf pursuant to AIML’s powers of management under the AGHF IMA because the management powers delegated to AIML

the power and authority to execute agreements on behalf of AGHF and no agreement on behalf of the GHF Parties was reached or even sought. The Loans were between Mr Jafar and AH and AIML (as borrowers) with the ability to use the proceeds for their own purposes (certain of which included the use of the proceeds to make repayments to investors in AGHF of monies that had been misappropriated from them by AH and AIML).

The Naqvi Authority Argument

949. The GHF Parties' case followed that of GP8 transposed where necessary to the AGHF context and documents.

950. The GHF Parties argued that Mr Jafar's case based on the relevant constitutional documents relied to two core allegations, namely (a) that Mr Naqvi held authority to act on behalf of the GHF Parties by reason of his position as chairman of the GIC including a power of veto in respect of decisions relating to AGHF and (b) that Mr Naqvi was identified as having "*key person*" status under the AGHF LPA. The GHF Parties argued that both claims were hopeless on the face of the documents and had not been (indeed could not have been) improved by evidence given in the course of the trial.

951. The GHF Parties argued that:

- (a). Mr Naqvi had no authority to act for the AGHF in relation to the AGHF's "*financial affairs*" by reason of being one member of the GIC, even if he was the Chair.
- (b). In any event, when viewed in context, the GIC was simply one of a number of management committees which in so far as AGHF was concerned was involved alongside a number of other committees and designated teams and individuals that were involved in the investment process in respect of all the funds related to "*Abraaj*."
- (c). Mr Naqvi had no authority to act for AGHF in relation to AGHF's "*financial affairs*" by reason of him having been defined as "Head of the Fund" or "Fund Head" in the

AGHF PPM and the AGHF LPA. Neither Head of the Fund nor Fund Head was a real position at AGHF (it was merely a label) and, to the extent it was a position, it conferred no authority on Mr Naqvi to act on behalf of AGHF. Further, and in any event, the label did not reflect the reality, which was that Mr Mann was the head of AGHF.

- (d). Mr Naqvi had no authority to act for AGHF in relation to the AGHF's "*financial affairs*" by reason of the Key Man Clause contained in the relevant LPA. Furthermore, the significance of Mr Naqvi's inclusion as a "*Trigger*" in that clause was minimal in circumstances where Mr Naqvi was principally obliged to devote his time to the General Partner Group as opposed to AGHF; by mid-late 2017, proposals were made to revise the Key Man Clause to reflect the fact that Mr Naqvi's involvement in AGHF had essentially tapered off and (iii) this designation did not bestow any special or specific status or authority on Mr Naqvi in relation to the management of AGHF.
- (e). Mr Naqvi had no authority to act for the AGHF in relation to the AGHF's "*financial affairs*" courtesy of his signatory authority over GHF's bank account (and AGHF GP did not have a bank account). In any event holding a mandate in respect of an entity's bank account could not form the basis for a credible assertion that such a person had a more general and far-reaching authority to cause another party to enter into binding legal obligations or by making representations on its behalf.

952. As regards Mr Jafar's claim that Mr Naqvi had authority in fact on the basis of the habitual obedience Mr Naqvi enjoyed from those alleged to be officers of the GHF Parties, the GHF Parties argued that Mr Jafar's approach, both in his pleaded case and in his Written Submissions, had been to bombard the Court with communications in which Mr Naqvi could, broadly speaking, be said to be issuing instructions and to invite the Court to conclude thereby that Mr Naqvi had a general authority to act as the GHF Parties' representative in relation to third parties. The GHF Parties submitted that this was a *non-sequitur*. Mr Jafar had relied on the hearsay evidence of Mr Abdel-Wadood to the effect that, when it came to any matter of operational control, it was "[Mr Naqvi's] firm and [Mr Naqvi's] decision" (in an email from Mr Abdel-Wood to Mr Naqvi dated 11 August 2016 in which it must be said

that he was responding to and subsequently received some serious abuse from Mr Naqvi). But, the GHF Parties argued, Mr Abdel-Wadood had not given evidence and his analysis had not been tested in cross-examination. Further, he was not a director of ADV 1 and so it is unclear what he knew or did not know about the governance of the GHF Parties. The GHF Parties said that his comments are also obviously self-serving as it was clearly in his interest to distance himself from any wrongdoing and an obvious way to do that would be to assert that Mr Naqvi was responsible for everything. The GHF Parties submitted that far from being compelling contemporaneous evidence the Court should give no weight to these comments.

953. The GHF Parties argued that the allegation that Mr Naqvi exercised operational control was implausible in circumstances where although a rather amorphous and ill-defined concept, the corporate and other entities which were said to comprise the “*Abraaj Group*” had properly and well defined contractual structures and constitutions, as did AGHF in particular. Mr Naqvi had no formal role in relation to the GHF Parties. If it had been intended that Mr Naqvi would have general authority to act on behalf of the GHF Parties it would have been easy for him to have been made a director of a relevant entity e.g. ADV 1. In this respect, the quotation from *Re MSD Cash and Carry* relied on by Mr Jafar was inapt since this (the GHF Parties and AGHF) was not a case in which there was no formal corporate governing structure in which the Court should be ready to infer that Mr Naqvi was the nerve centre from which every decision radiated, rather there was in relation to AGHF and its related corporate and partnership entities a properly functioning structure that included detailed constitutions and contractual arrangements to enable AGHF to function as an impact investment fund. This was a state of affairs that was the exact antithesis of the type of informal arrangement that was referred to in and the court there was having to deal with in *Re MSD Cash and Carry*.

954. The GHF Parties submitted that in these circumstances, where there was an elaborate, highly-formalised governing and functioning structure, there must be a strong presumption that the formal corporate and partnership structures reflected reality, which they did and Mr Jafar’s attempts to portray the structure in place and which governed the existence, nature and operation of AGHF on the basis of little more than Mr Naqvi’s evidently important role

as overall founder, as being some sort of one-man band under which Mr Naqvi was the alter ego of the GHF Parties was a dangerous fiction that should be rejected.

The De Facto/Shadow Director Argument

955. The GHF Parties followed GP8's position and also argued that it was not open to Mr Jafar on his pleadings to claim that Mr Naqvi had been a *de facto* director or shadow director. They also relied on Mr Justice Thomas' dictum in *Stocznia Gdanska* at [251] that shadow directors were not agents ("*[s]hadow directors are not part of the ordinary governance of a company; they give directions to it; they do not act as agents for the company*"). They argued that the entire point of a shadow director was that it was someone who gave instructions internally to the company but did not hold himself out as a director or agent as regards third parties.

956. The GHF Parties said that they did not shy away from the fact that there were discovered examples of communications between officers of the GHF Parties and Mr Naqvi in which Mr Naqvi had given instructions that were followed. But, they argued, this fact did not sustain the proposition that Mr Naqvi had authority to act on behalf of the GHF Parties as regards negotiations conducted with third parties. They submitted that when such authority was conferred by AGHF it was conferred expressly (e.g. pursuant to the AGHF IMA). They submitted that it was striking that, among the many documents relied on by Mr Jafar that were said to demonstrate Mr Naqvi's authority to make the Representations on behalf of the GHF Parties, there was not a single example of Mr Naqvi making representations, or having any other dealings with third parties as a purported agent or representative of the GHF Parties. The closest example relied on by Mr Jafar related to entry into the Air Arabia Loans ([32(4)(f)] of the RRASOC). The GHF Parties said that Mr Jafar relied on these loans, under which Air Arabia lent money to AGHF with Mr Naqvi acting as guarantor, as containing representations by Mr Naqvi that he had the power to control GHF's performance of its obligations, in reliance on the wording of Mr Naqvi's guarantee under which he guaranteed performance of GHF's obligations, rather than merely guaranteeing to make payment in the event that GHF defaulted on the loans. However, the GHF Parties argued, the Air Arabia

loan documents did not support Mr Jafar's argument. First, the First and Second Air Arabia Loans were signed by Mr Siddique and Mr Dave on behalf of AGHF GP underlining and confirming that Mr Naqvi did not have authority to commit AGHF GP to relationships with third parties (had Mr Naqvi had such authority it would have been simpler for him to have signed the relevant documents both in his personal capacity, and in his capacity as agent of AGHF - he did not do so because he did not have authority to act on behalf of AGHF). Secondly, the wording used in the guarantee ("*guarantees the due performance by AGHF GP...*") was ambiguous as to whether it meant that Mr Naqvi was, as Mr Jafar alleged, making a representation that he will procure performance from AGHF or whether he was saying simply that he will meet AGHF's obligations in the event that the AGHF did not perform. The latter was, in substance, the nature of a guarantee, and the far more likely interpretation of the ambiguous language. Thirdly, insofar as the wording used might be taken as containing a promise to ensure that AGHF performed its obligations, this was likely a reflection of an historic quirk as regards the law of guarantees. The classic definition of a guarantee was that the obligation of a guarantor is to "*see to it*" that the borrower performs. This, in truth, was something of a fiction, and the authorities indicated that it was more accurate to describe the guarantor's promise as a promise that the obligation will be performed, in the sense that the guarantor will be personally liable for the debt, default or miscarriage of the principal. Accordingly, even if the wording of Mr Naqvi's guarantee could literally be read as connoting a promise to "*see to it*" that AGHF performed its obligations, the proper contextual understanding of Mr Naqvi's undertaking was that he was merely promising that he would meet AGHF's liability personally if it failed to perform. Fourthly, even if Mr Jafar were right to say that Mr Naqvi was making, in his personal capacity, a representation as to his power over the GHF Parties, it was not, on any view, an instance of him making a representation to a third party on behalf of the GHF Parties. Even on Mr Jafar's interpretation, therefore, reliance on the relevant document did not improve his case. Fifthly, the relevant document was revealing as to matters of capacity. Even if it did support the suggestion that Mr Naqvi had authority to act on behalf of AGHF it undermined Mr Jafar's case as regards capacity because it arose in the context of AGHF being a party to the relevant contractual relationship. It therefore confirmed that if Mr Naqvi had been acting in the capacity of a representative of the GHF Parties in his communications with Mr Jafar the

GHF Parties would have been parties to the Loans and the fact that they are not was a decisive indicator that Mr Naqvi was not in fact conducting himself or speaking on their behalf even if he had a general authority to do so.

957. The GHF Parties also argued that Mr Jafar’s reliance on a cashflow projection spreadsheet was misplaced. Mr Jafar had argued that the spreadsheet evidenced the *de jure* directors authorising Mr Naqvi in the broadest possible terms, in which fund-raising activities were identified as “*actions managed and delivered by AMN.*” In fact, the GHF Parties said, that document pointed to a position contrary to Mr Jafar’s case. The relevant entry under the heading “*KE Proceeds*” contained US\$300 million of fund-raising labelled “*Bank of Sharjah – Loan to AMN.*” That was inconsistent with any suggestion that the GHF Parties granted Mr Naqvi any authority, let alone a broad authority, to act on their behalf in relation to fund-raising. The loans that were contemplated were loans “*to AMN*” and were matters “*managed and delivered by AMN.*” There was, the GHF Parties said, no trace of a suggestion that Mr Naqvi would, in the course of this cash-raising endeavour, be acting on behalf of the GHF Parties. As was clear from the context, the cash-raising efforts were undertaken by Mr Naqvi on behalf of AH.

Ostensible authority

958. The GHF Parties said that ostensible authority was founded on an estoppel by representation and required a communication to have been by and from the GHF Parties to Mr Jafar, representing that Mr Naqvi had authority to act on their behalf and reliance on that representation by Mr Jafar. The GHF Parties noted that permission to make a plea of ostensible authority was specifically only granted on condition that Mr Jafar relied on no facts other than those already pleaded. Those facts did not contain any evidence of the GHF Parties’ directors having represented to Mr Jafar that Mr Naqvi had, or held Mr Naqvi out to Mr Jafar as having, authority to make statements or representations on the GHF Parties’ behalf, and nor did Mr Jafar suggest that any such representation or holding out had occurred in Jafar 1 or in his oral evidence. Additionally, there was no evidence to suggest that Mr Jafar relied on any such representation or holding out in any relevant way. When asked in

cross-examination about the capacity in which he understood Mr Naqvi was acting, Mr Jafar did not suggest that he acted in reliance on any representation to him by the GHF Parties to the effect that Mr Naqvi had authority to make representations on behalf of the GHF Parties. The GHF Parties submitted that to the contrary, at the time, it seemed that Mr Jafar did not really give any consideration to the capacity in which Mr Naqvi acted, and now that it suited his interests to say that Mr Naqvi was acting on behalf of the GHF Parties, he had said that he thought Mr Naqvi was acting on behalf of every entity in the “*Abraaj Group*.” This, the GHF Parties submitted, was unsustainable.

Paragraph 32(4A) of the RRASOC

959. The GHF Parties noted that by an amendment to the RRASOC at [32(4A)] (quoted above) Mr Jafar had introduced a claim that the attribution of Mr Naqvi’s actions and knowledge to the GHF Parties was also achieved by reason of the alleged knowledge of Mr Lakhani, Mr Dave, Mr Siddique and Mr Abdel-Wadood (as directors of ADV 1) that Mr Naqvi had obtained the Loans by deceit. The GHF Parties submitted that this claim failed as there was no evidence to support it, namely that the directors of ADV 1 knew of Mr Naqvi’s alleged deceit. But it was also wrong in law since it appeared to be based on the proposition that mere knowledge of another’s misdeeds was alone sufficient to give rise to liability. This, the GHF Parties submitted, was not the law. The fact that one person (A) knows that another committed deceit on a third party is no reason to attribute the fraud to that person A, and thereby hold that A also committed the deceit. Such a principle would be a radical development in the law, not least because it would render the law of ratification otiose (a preliminary requirement for ratification being that the ratifying party must know of the conduct in question). The sole authority relied on by Mr Jafar in support of this submission was a stray comment from Jacob J in *Vald Nielsen* at [382] where the Judge said that the relevant persons “*had manifestly approved and adopted the representation*” (which in turn reflected a comment made by the Court of Appeal in *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205). The GHF Parties submitted that this appeared only to be a shorthand formulation of the test for ratification, akin to the requirement for unequivocal adoption of the relevant act. It was not, they argued, authority

for some entirely new, ‘*thought- crime*’ based notion of attribution, under which mere knowledge of another’s misdeeds was alone sufficient to give rise to liability for the same.

Ratification

960. The GHF Parties noted Mr Jafar’s pleaded claim of ratification at [33(30)] of the RRASOC based on the directors of AGHF GP and GP8 permitting the funds derived from the Loans to be paid to GHF’s and GP8’s accounts. The GHF Parties submitted that Mr Jafar had to show that (a) at the time of the (alleged) ratification, the GHF Parties had full knowledge of all the material circumstances (see Bowstead and Reynolds on Agency, at [2-071]) and (b) that the words and conduct relied on as the basis for the putative ratification were unequivocal evidence that the principal has adopted or recognised the relevant act (the words and conduct must not be such that they could be accounted for by other interpretations: Bowstead and Reynolds on Agency at [2-074] and [2-077]). The GHF Parties submitted that Mr Jafar’s case failed on both of these counts. First, as to the GHF Parties’ knowledge, there was no evidence that they had any knowledge of any of the relevant circumstances, still less full knowledge of all material circumstances, which would be necessary for there to have been a properly informed and therefore effective ratification by them of Mr Naqvi’s acts after the event. In particular, the facts pleaded did not suggest that the GHF Parties, whether through the directors of ADV 1 or otherwise, knew anything of the circumstances as regards the entry into the Loans and the negotiations pursuant to which they were concluded, let alone that Mr Naqvi had made the convoluted and vague representation alleged by Mr Jafar to have taken the form of the Overarching Message. Secondly, even if this hurdle could be surmounted, the mere fact of accepting money from AIML and AH did nothing to suggest that the GHF Parties were adopting or can be taken to have adopted any representations allegedly made by Mr Naqvi to Mr Jafar. The GHF Parties submitted that it was a *non-sequitur* to suggest that the mere receipt of money (representing the proceeds of a loan made to a third-party) necessarily entailed the adoption of the representations made in order to induce the making of that loan to the third party. The money was paid by Mr Jafar to AH and AIML, and part of the proceeds of the Loans, which had become the property of AH and AIML, was then transferred on to GHF. Furthermore, since it was AH and AIML who were

the borrowers under the Loans, the logical assumption would be that it was on their behalf that Mr Naqvi was acting when he made any representations. Therefore, the GHF Parties, even if it could credibly be said that they were acting through their “*directors*” and even if they had somehow known of the representations said to have been made by Mr Naqvi, they would more than likely have assumed that any representations made were made for and on behalf of AH and AIML (as the borrowers) and cannot have intended or be taken to have intended that by their receipt of the proceeds of the Loans they, as separate and different entities, were adopting any statements made by Mr Naqvi to Mr Jafar. This was particularly so when the GHF Parties had no direct relationship or engagement with Mr Jafar.

No pleaded basis on which Mr Jafar can establish that Mr Naqvi’s actions are attributable to AGHF GP

961. The GHF Parties submitted that there was no pleaded basis on which Mr Jafar could establish that Mr Naqvi’s actions were attributable to AGHF GP and therefore no pleaded basis upon which any liability of AGHF GP could be treated as a liability of the AGHF.

962. But they also argued, and the GHF Parties’ pleaded case was, that, in so far as AGHF GP caused loss or injury, or incurred obligations to Mr Jafar, AGHF GP was not acting in the ordinary course of the business of the Partnership or Parallel Fund B (i.e. the AGHF, being the “Healthcare Fund” as defined by Mr Jafar in the RRASOC), nor was it acting with the authority of the Fund IV limited partners. On this basis the GHF Parties had denied that the AGHF would be or was liable for any actions in relation to Mr Jafar taken by or attributed to AGHF GP. The GHF Parties said that Mr Jafar’s pleaded case failed properly to plead a basis on which the AGHF could be or was liable for the actions of or attributed to AGHF GP.

963. The GHF Parties noted that at [56] of Mr Jafar’s Reamended Reply it was stated that:

“56. As to paragraph 53 of GHF’s Re-Amended Defence:

(1) As to sub-paragraph 53(1), the Healthcare Fund is a defined term referring to two exempt limited partnerships [“GHF Fund LP and GHF Fund (B) LP which were operated collectively under the name “the

Healthcare Fund referring to two exempt limited partnerships]. Mr. Naqvi's actions and knowledge are to be attributed to each of those entities.

- (2) *As to sub-paragraph 53(2), it is denied that Mr. Jafar has not pleaded to which corporate or other entity the actions of Mr. Naqvi are to be attributed and/or why attribution of Mr. Naqvi's actions to that corporate or other entity results in attribution of the said actions to the Partnership and Parallel Fund B. Mr. Naqvi's actions are to be attributed to each of the exempt limited partnerships, and the general partner is responsible for those actions attributable to the exempt limited partnerships. Paragraph 1(3) of the Re-Amended Statement of Claim is repeated."*

964. [1(3)] of the RRASOC states that:

"The Second Defendant, GHF General Partner Limited ("the Healthcare GP"), is the general partner of two exempt limited partnerships, GHF Fund LP and GHF Fund (B) LP which were operated collectively under the name "the Healthcare Fund" ("the Healthcare Fund"). The Healthcare GP is sued because it is the current general partner of the Healthcare Fund. The Healthcare GP "shall (on an unlimited basis) be fully liable for such of the Partnership's debts, liabilities and obligations as exceed the Partnership Assets" irrespective of whether they were incurred before it became General Partner dated 18 August 2017, construed in the light of s.17 of the Exempted Limited Partnership Act (2021 Revision). The general partner of the Healthcare Fund at the times of the events pleaded herein was Abraaj Growth Markets Health Fund General Partner Limited ("the Former Healthcare GP").

965. [1(3)] of the RRASOC states that the AGHF comprises two partnerships (and ignores the third relevant partnership, being Parallel Fund C) and that GP8 is sued because it is liable for the AGHF's debts and liabilities. [56(1)] of the Reamended Reply states that Mr Naqvi's actions and knowledge are to be attributed to those entities, namely the two partnerships identified. [56(2)] confirms that it is the limited partnerships to whom Mr Naqvi's actions are to be attributed and asserts that the relevant general partner (now GP8) is liable for the resulting liabilities since it is responsible for the actions attributable to the exempt limited partnerships.

966. The GHF Parties noted that in *Singularis Holdings Ltd v Daiwa Capital Markets Ltd* [2002] AC 1189 (when dealing with Daiwa's argument that since Singularis was effectively a one-man company and Mr Al Sanea was its controlling mind and will, his fraud was to be

attributed to the company, with the consequence that its *Quincecare* claim against Daiwa is defeated, either by illegality, or for lack of causation, or because of an equal and opposite claim for the company's deceit) the UK Supreme Court had started with the principle established by the House of Lords in *Salomon v Salomon and Co Ltd* [1897] AC 22 that a properly incorporated company had an identity and legal personality separate from that of its subscribers, shareholders and directors. Attribution was predicated upon this separate legal personality (person A's conduct or knowledge was attributed to the company which was itself a separate legal person, person B). However, the GHF Parties submitted that in a partnership setting, an agent's knowledge or conduct will be attributed to the partner or partners on whose behalf the agent is acting, not to the partnership. In *Sandham (t/a Premier Metal Leeds) v Revenue and Customs Commissioners* [2020] UKUT 193 (TCC) at [34] Mr Justice Miles and Judge Richards held that (my underlining):

"At the hearing before us, the Appellants made a related submission namely that, because the Appellants entered into the transactions as part of a business carried on as a family partnership, the question of knowledge should appropriately be tested by reference to their own state of mind rather than the state of mind of an agent acting on their behalf. We reject that submission since, if correct, it would mean that persons acting in partnership could never be treated as possessing the knowledge of their agents. That would leave partnerships free to delegate all aspects of their business to potentially dishonest actors without being answerable for the consequences so long as they ensured that they were kept uninformed of what was going on. We do not need to decide how likely it is that partnerships would act in this way. It is sufficient to note that, for reasons we expand upon in the next section, such an interpretation would be contrary to the purpose and effect of the Kittel principle. "

967. The GHF Parties also noted that in the context of a Cayman Islands ELP, which had no separate legal personality, the general partner acts as agent of each of the limited partners. In *Neoma Manager (Mauritius) Limited v Abraaj ABOF IV SPV Limited & Ors* (Unreported, 10 March 2023) at [51] Justice Parker had said that (my underlining):

The entitlement is in reality to be put on 'a level playing field' with regard to information. It arises from the GP's position as agent and fiduciary of the Partnership and, since the exempted limited partnership has no separate legal personality, as agent of each of the limited partners. The GP also holds the assets of the Partnership on a statutory trust and is, as trustee, under an obligation to account to the limited partners. By s.14 of the ELPA, the limited partner is prevented from taking part in the conduct

of the business. By s.16 of the ELPA, all rights or property of the Partnership which is held on behalf of the GP or in the name of the Partnership is deemed to be held by the GP upon trust as an asset of the Partnership.”

968. The GHF Parties argued that Mr Jafar’s pleaded case, as articulated in the Reamended Reply was confused and misconceived. Mr Jafar had pleaded that Mr Naqvi had the authority to approach Mr Jafar on behalf of AGHF GP and GHF. He also pleaded that “*Mr Naqvi’s actions are to be attributed to each ELP making up the Healthcare Fund.*” But, the GHF Parties submitted, Mr Naqvi’s actions cannot be attributed to an ELP, which comprises one general partner, and one or more limited partners and which has no separate legal personality. At best, any knowledge or actions of Mr Naqvi could only be attributable to one or more of the general partners on whose behalf Mr Naqvi was purporting to act with authority. Mr Jafar also averred (at [1(3)] of the RRASOC) that the general partner was responsible for the actions attributable to the relevant ELPs. The GHF Parties said that they took this to be a reference to the allegation that AGHF GP “*shall (on an unlimited basis) be fully liable for such of the Partnership’s debts, liabilities and obligations as exceed the Partnership Assets*” in reliance on clause 10.1 of the Fund IV LPA (construed in light of s.17 of the ELP Act). However, the GHF Parties argued, the plea that AGHF GP was responsible for the actions attributable to the relevant ELPs ignored an essential step in the reasoning, namely how knowledge or actions are to be attributed to an ELP in the first place. In an ELP the general partner acted as agent of each of the limited partners who were not permitted to take part in the conduct of partnership business. Therefore, Mr Jafar’s case could not be that Mr Naqvi was authorised by the limited partners in any relevant sense, only that he was authorised by AGHF GP (and GHF) to act on their behalf. If Mr Naqvi was authorised to act on behalf of AGHF GP (and GHF) then Mr Naqvi’s actions would (at most and only then in principle) be attributable to AGHF GP (and GHF) but not to the Partnership or Parallel Fund B. But Mr Jafar had not pleaded that Mr Naqvi’s actions were attributable to AGHF GP, only that they are attributable to the Partnership and Parallel Fund B (the “*Healthcare Fund*” as defined by Mr Jafar).

969. The GHF Parties submitted that there was, therefore, no pleaded basis on which Mr Jafar could establish that Mr Naqvi's actions were to be attributed to or were attributable to the Partnership and Parallel Fund B.
970. The GHF Parties said that had Mr Jafar pleaded that Mr Naqvi's actions were attributable to AGHF GP, then their response would have been to the effect that section 16(2) of the ELP Act was silent on "*liabilities*" incurred by the general partner and that lacuna was filled by section 11 of the Partnership Act (2013 Revision) (the ***Partnership Act***) concerning the "Liability of the firm for wrongs". That would have raised the further question of whether Mr Naqvi, on AGHF GP's behalf, was "*acting in the ordinary course of the business of the firm [i.e., the Partnership and Parallel Fund B], or with the authority of his co-partners.*" Alternatively, if section 16(2) of the ELP Act applied, which was not part of Mr Jafar's pleaded case, that would have raised the question of whether AGHF GP was acting "in the conduct of the business" of the Partnership and Parallel Fund B (which was also not Mr Jafar's pleaded case).

Vicarious liability

Mr Jafar's pleading and submissions

971. As I have noted, at [33] of the RRASOC Mr Jafar pleaded his case in the alternative on the basis of vicarious liability. He asserted that AH, the AGHF and Fund IV were vicariously liable for the actions of Mr Naqvi because the Overarching Message was conveyed by Mr Naqvi for and on behalf of each of them; the actions of Mr Naqvi in conveying the Overarching Message were so closely connected with the role that Mr Naqvi performed on behalf of each of them, that each of them ought fairly to be held vicariously liable in respect of his actions (for the reasons pleaded in paragraphs 32(3)-(5) of the RRASOC) and because by virtue of their knowledge as pleaded in sub-paragraph 32(4A) of the RRASOC, the directors of general partners of the Funds, by permitting the monies derived from the Loans to be paid to GHF's and GP8's accounts ratified Mr Naqvi's acts and/or conferred

retrospective authority on him to act on behalf of each of the AGHF and Fund IV with respect to the procuring of the Jafar Loans.

972. Mr Jafar dealt with his case on vicarious liability in his Written Opening Submissions but not in his Written Closing Submissions or oral closing submissions.
973. Mr Jafar summarised the applicable law as follows. A principal cannot escape vicarious liability by asserting that their employee or agent committed a tort for their own personal gain: see *Lloyd v Grace, Smith & Co* [1912] AC 716, pages 735-736. The straightforward position was that, “*If the agent commits the fraud purporting to act in the course of business such as he was authorised, or held out as authorised, to transact on account of his principal, then the latter may be held liable for it*” (page 725 per Earl Loreburn). The English Court of Appeal has confirmed that a principal will be vicariously liable in deceit where his employee or agent was acting within the scope of his actual or ostensible authority in making the relevant statement to the claimant: *Hockley Mint Ltd v Ramsden (Hockley Mint)* [2019] 1 WLR 1617. It was there held, in particular, that:
- (a). If a principal confers on an agent actual authority to make deceitful representations, then the principal will be vicariously liable for the deceit ([38]).
 - (b). If a principal confers on an agent actual authority broad authority to negotiate and that authority permits the agent to make such representations as the agent sees fit, then the principal will be vicariously liable for the agent’s deceit ([38]).
 - (c). If a principal confers ostensible authority and the deceitful acts are committed pursuant to that ostensible authority, then the principal will be vicariously liable for the agent’s deceit ([50]-[63]).
 - (d). A principal may “*approve*” an agent’s act after the fact. This means ratification of the agent’s unauthorised act. That required knowledge on the part of the principal of all the essential facts. That would amount to actual authority ([77]).”

974. Mr Jafar argued that in this case AGHF GP and GP8 were vicariously liable for Mr Naqvi's torts. The torts were committed by Mr Naqvi acting in the course of his actual or ostensible authority. The evidence (discussed above) demonstrated that Mr Naqvi was on an objective analysis plainly acting in the course of his broad and unfettered authority when he procured the Loans by deceit.

The Fund Parties' submissions

975. GP8 noted that Mr Jafar claimed that GP8 was vicariously liable for any deceit involved in the representations said to have been made by Mr Naqvi and that the substance of this allegation was not that GP8 itself made the statements and representations alleged by Mr Jafar but that it was responsible for them due to its relationship with the alleged tortfeasor (Mr Naqvi).
976. GP8 acknowledged that there was in principle a clear conceptual distinction between the doctrine of attribution and the doctrine of vicarious liability which rested on the difference between primary liability (attribution) and secondary liability (vicarious liability). However, as had been explained by the House of Lords in *Armagas Ltd v Mundogas SA* [1986] A.C. 717 (*Armagas*) and the Court of Appeal in *Hockley Mint* in the context of reliance-based torts (such as the tort of deceit) there was little to distinguish between the operation of the two doctrines. This was because, in that context, the question of whether GP8 is directly (through attribution) or indirectly (vicariously) liable depends on the same issue, namely whether Mr Naqvi in making the alleged representations was acting in the capacity as an agent of GP8 and within the scope of any actual or ostensible authority to do so. Accordingly, the same grounds as GP8 relied on to defend itself against Mr Jafar's claim of attribution applied to his claim of vicarious liability and for that reason did not need separate treatment or repeating.
977. The GHF Parties said that vicarious liability normally involved a two-stage test. First, it was necessary to consider the relationship between the defendant and the tortfeasor to see whether it was one that was capable of giving rise to vicarious liability. Secondly, regard

must be had to the connection that linked the relationship between the defendant and the tortfeasor and the act or omission of the latter (*Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56 at [21]). However, where the tort alleged was a reliance-based tort, the question is whether the defendant is to be regarded as having authorised the wrongdoer to speak on their behalf in relation to the matter in hand, either by reason of actual or ostensible authority. In *Hockley Mint* at paragraph [48] it was said that:

“The Armagas case [Armagas Ltd v Mundogas SA [1986] AC 717] is binding authority of the House of Lords that, where a claimant has suffered loss in reliance on the deceit of an agent, the principal is vicariously liable if, but only if, the deceitful conduct of the agent was within his or her actual or ostensible authority.”

978. Mr Jafar’s case in vicarious liability therefore added little to his case on attribution. In any event, the GHF Parties submitted, it was flawed for all the same reasons as his case on attribution was flawed and failed.

979. The GHF Parties also submitted that there were two further problems with this aspect of Mr Jafar’s claim. First, Mr Jafar had failed again to grapple with the fact that the AGHF comprised a number of ELPs. No particulars are given of which entity (which ELP) was said to be vicariously liable and whether that liability arises under the ELPA or at common law. Secondly, the main thrust of Mr Jafar’s case was based upon Mr Naqvi’s alleged control over the AGHF. Mr Jafar did not disavow that case in support of his plea of vicarious liability (even in the alternative). Mr Jafar’s case therefore failed on the basis that it was not said, by Mr Jafar, that Mr Naqvi was in a relationship akin to employment with the AGHF, in fact Mr Jafar’s case was quite the opposite.

Attribution and vicarious liability – discussion and determination

Separate issues – what Mr Naqvi said and was understood to have said about who he was acting for versus who in fact Mr Naqvi was acting for and on whose behalf he was making the Representations

980. It is important to start by noting that the dispute regarding Mr Naqvi’s relationship with and whether he was acting for the Funds arises in two different contexts. The first, which I have

already considered, relates to what Mr Naqvi said and what a reasonable person in Mr Jafar's position would have understood Mr Naqvi to have said, as to which Abraaj entity he was speaking or acting for when he was negotiating the Loans. The second relates to whether, having regard to the powers and authority given to him and the role, considered objectively, which he played in running and making decisions on behalf of and relating to the Funds (including by making decisions for the Funds' general partners), Mr Naqvi, in fact, was authorised and empowered to act for the Funds (or those general partners) when negotiating the Loans and making the Representations.

981. I have already found that Mr Naqvi did not make a representation and that Mr Jafar did not understand, and indeed that a reasonable person in Mr Jafar's position would not (based on what Mr Naqvi said and the context) have understood, Mr Naqvi to be representing that he was acting on behalf of the Funds (or the Funds general partners or AIML as the Funds' manager). As can be seen from the extract from Lord Falconer's oral closing submissions quoted above, Mr Jafar accepted that this was so. His position that even though Mr Naqvi did not make it clear or say that he was acting for the Funds (whether directly or indirectly) and that neither Mr Naqvi nor Mr Jafar turned their minds to the question of the capacity in which Mr Naqvi was acting when negotiating the Loans (as I have found to have been the case) nonetheless he was, in fact and having regard to all the circumstances, doing so and therefore the general partners of the Funds (and therefore the Funds) are liable for Mr Naqvi's deceit.

Two main issues – did Mr Naqvi have the requisite authority to negotiate and borrow loans on behalf of the Funds and was Mr Naqvi exercising his powers to do so when negotiating the Loans?

982. Mr Jafar relies on the principle that a principal is liable for the fraudulent misrepresentations committed by his agent where they were made within the agent's actual or apparent authority (which was adopted by the House of Lords in *Armagas*). Mr Jafar argues (a) that Mr Naqvi was authorised by AIML and the Funds' general partners to obtain loans and borrow monies for and for the benefit of the Funds and (b) that when he was negotiating and arranging the Loans this is precisely what he was doing, namely exercising those powers and acting for the Funds (directly or indirectly). So there are two main sub-issues. First, was Mr Naqvi so

authorised? Secondly, was Mr Naqvi acting for the Funds and conducting the Funds' business when negotiating the Loans and making the Reinvestment Representation and giving the Overarching Message – in particular, was he acting in his capacity as a director of AIML exercising AIML's powers as manager of the Funds or as a *de facto* director of the Funds' general partners that what he was doing when he made the Representations?

983. There is a further sub-issue to be borne in mind. In the case of some of the grounds for attribution to the Funds' general partners relied on by Mr Jafar it is necessary for Mr Jafar to show not only that, from an internal perspective, Mr Naqvi was treated as a decision maker and his decisions were carried into effect by the *de jure* directors but also that third parties with whom Mr Naqvi dealt were aware of the attitude and actions of the *de jure* directors so that the *de jure* directors could be said expressly or implicitly to be representing to third parties in general or to the particular third party plaintiff that Mr Naqvi had authority to act on behalf of and to bind the general partners. This is the position with respect to a claim of attribution based on ostensible authority. Whether or not it is also the position in relation to a claim of attribution based on Mr Naqvi being a *de facto* director of the Funds' general partners is discussed further below.

984. Mr Jafar, as I have explained above, puts his case as to Mr Naqvi's authority on a variety of grounds. His pleaded case, as I have also noted, was that:

- (a). Mr Naqvi was authorised to *act for AIML*, which was authorised to borrow monies for the Funds. As a director (and CEO) of AIML Mr Naqvi had (and was held out as having) authority to exercise those powers of AIML (see [32(2) and (3)] of the RRASOC).
- (b). In addition and alternatively, Mr Naqvi had authority to *act for AGHF GP and GP8* (and GHF) by arranging and entering into agreements on their behalf for the purpose of raising monies to address cash shortfalls in the Funds (see [32(4)] of the RRASOC). AGHF GP and GP8, as general partners, had authority to act for and bind the Funds (that is to create obligations and liabilities binding on themselves as corporate entities

which were treated as limited partnership liabilities payable out of the assets of the Funds and to that extent binding on the limited partners). Mr Naqvi's authority to act for AGHF GP and GP8 (and GHF) arose:

- (i). Under and pursuant to the constitutional documents of AGHF GP and GP8 (and GHF).
- (ii). Because the *de jure* directors of AGHF GP and GP8 (and GHF) habitually sought instructions or directions from Mr Naqvi regarding the financial affairs and management operations of the Funds and Mr Naqvi gave such instructions and directions which were habitually followed (thereby, although this was not pleaded, making Mr Naqvi, even though not a *de jure* director of AGHF GP and GP8 - and GHF - a *de facto* director or shadow director of them).

985. As can be seen from the way I have summarised the basis of Mr Jafar's pleaded case, it seems to me that Mr Jafar has identified the correct parties (targets) for the purpose of attributing the asserted liability in deceit to the Funds. I do not accept the Fund Parties' submission that Mr Jafar had failed to plead a proper basis on which Mr Naqvi's actions could be and were attributable to the AGHF and Fund IV. Mr Jafar's case is that the Representations made by Mr Naqvi can be treated as having been made for, and therefore by, the Funds' investment manager (AIML) and/or by their general partners in connection with and for the purpose of the exercise by the investment manager and the general partners of their powers to conduct limited partnership business and negotiate and borrow loans for the Funds. AIML as investment manager and AGHF GP and GP8 (and GHF) as general partners were, Mr Naqvi said, authorised to negotiate and borrow loans for the Funds. Mr Naqvi was authorised to act for AIML and for AGHF GP and GP8 (and GHF) and to cause them to exercise those borrowing powers.

986. A liability of a Fund arises when the general partner incurs a liability in the course of conducting and managing the business of the limited partnership and that liability is payable by the general partner and is binding on the limited partners. The general partner can be

liable as a result of action taken by its agents and directors (*de jure* or *de facto*). It can also be liable as a result of action taken by the investment manager, AIML. The manager was given the authority and power to bind the general partner. This can be seen, for example, in clause 2.1 of the Fund IV IMA under which the general partner *delegates to* AIML certain powers, duties and discretions to manage the Fund IV's partnership and its business, affairs or assets, including the power and authority to execute agreements on behalf of Fund IV, subject at all times to the review of, and if applicable, subject to any directions from, GP8 as the general partner.

Did AIML have the authority to negotiate loans for the Funds?

987. The answer to this question is yes. The Fund Parties did not dispute that AIML did have the authority to negotiate loans for the Funds. It is clear that the Fund LPAs and the Fund IMAs gave AIML as manager wide management powers in relation to the conduct of the business of the AGHF and Fund IV including the power to borrow.

988. I have set out above the basis of Mr Jafar's claim, both as pleaded at [32(2)] of the RRASOC and as explained in oral submissions. Mr Jafar avers that AIML, as the management company, was empowered to raise monies for the Funds. Under clause 5.1(a) of the Fund IV LPA Fund IV's general partner (GP8) was given exclusive responsibility for the management and control of the business and affairs of Fund IV and the power to delegate its management authority. Clause 5.1(b) states and confirms that the general partner has agreed, pursuant to the Fund IV IMA with AIML, that AIML will carry out its (the general partner's) duties and powers with respect to the management of Fund IV 's business and affairs (and that AIML may itself delegate all management authority and power subject to certain conditions). The result is that by the Fund IV IMA, GP8 delegated, as it was permitted to do by the Fund IV LPA, management powers in respect of Fund IV to AIML. Under the AGHF LPA AIML (as the manager) was given the full power and authority on behalf of the AGHF (either acting itself or by directing the general partner, AGHF GP, to act) to do all things which AIML considered to be necessary or desirable in connection with the operation of the AGHF and its investment portfolio including the power to borrow.

Did AGHF GP and GP8 have the authority to negotiate loans for the Funds?

989. Mr Jafar's claim in relation to the general partners is set out at [32(4)] of the RRASOC. Mr Jafar asserted that Mr Naqvi had authority (express or implied) to act on behalf of both AGHF GP and GP8 when negotiating the Loans (and therefore that they were liable for Mr Naqvi's deceit). Mr Jafar did not specifically aver or spell out that the liability of the two general partners resulted in there being a liability of the limited partnerships. This is an issue, as I have noted, raised by the Fund Parties which I have already briefly discussed and shall discuss further below.
990. But there can be no serious dispute that the general partners of the Funds had, in that capacity, the authority and power to incur liabilities in relation to the Funds' operations and business affairs that would rank as exempted limited partnership liabilities (payable by the general partner and binding on the limited partners in the sense that they could not object to the general partner paying them as partnership liabilities out of partnership assets).
991. This, of course, is subject to the effect of the agreements between the general partners and AIML as manager. As I have noted, GP8 delegated management powers in respect of Fund IV to AIML. It might be said that by delegating its management powers GP8 had given up and disabled itself from exercising those powers itself but the point was not run by the Fund Parties that only AIML and not the general partners had the power to borrow on behalf of the Funds and it seems to me that in the absence of argument to that effect it would not be right to conclude that this was the effect of the delegation of powers to AIML. Whether the delegation was exclusive and displaced the powers of the general partner is a matter of construction of the relevant LPAs and IMAs and it is not self-evident that the delegation was to be treated as exclusive. Similarly, under the AGHF LPA AIML (as the manager) was given the *full* power and authority to act on behalf of the AGHF. But the AGHF LPA did state, as I have noted, that AIML act by giving directions to the AGHF GP as general partner, so the general partner at least retained powers to act in relation to partnership matters to that extent.

Was any liability of AGHF GP and GP8 in respect of or arising out of the negotiations for the Loans binding on the Funds?

992. The Fund Parties argued, as I have noted, that in so far as Mr Naqvi was acting for AGHF GP or GP8 and if and to the extent that Mr Naqvi's fraudulent misrepresentations were to be attributed to them so that they were liable for the loss flowing from his deceit, nonetheless the liability incurred by them would not be a partnership liability of the AGHF or Fund IV because it could not be said that either AGHF GP or GP8 was acting in the ordinary course of the business of the AGHF (the Partnership or Parallel Fund B) or that GP8 was acting in the ordinary course of the business of Fund IV (or with the authority of the Fund IV limited partners).

993. This was not an argument that was fully developed by the Fund Parties. The GHF Parties argued that they did not need to rely on it because of Mr Jafar's inadequate pleading (his failure properly to plead that Mr Naqvi's actions and fraudulent misrepresentations gave rise to a partnership liability because he was acting for the Funds' general partners). But, as I have already explained, I reject that challenge and criticism and agree with Mr Jafar's submissions that his pleaded case is properly formulated to assert a case against the general partners on the basis that Mr Naqvi's deceit is to be attributed to them and the resulting liabilities are partnership liabilities on the basis that all liabilities of the general partners incurred in acting for the purpose of conducting the partnerships' businesses in the ordinary course are partnership liabilities, and that Mr Naqvi's actions in negotiating the Loans were done for that purpose.

994. The Fund Parties relied on section 11 of the Partnership Act (2025 Revision) and section 3 of the ELPA. Section 11 is in the following terms:

"Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of that partner's co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

995. Section 3 of the ELPA states that “*The rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2025 Revision) but excluding sections 31, 45 to 54 and 56 to 57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Act.*”
996. It seems to me that Mr Jafar is right that *if* he is able to prove that Mr Naqvi, when negotiating the Loans and making the Representations to Mr Jafar, was acting for the general partners in the conduct of limited partnership business to raise loans to be made to them for the benefit of and as part of the businesses the Funds, then Mr Naqvi and the general partners would properly be said to have been conducting and acting in the ordinary course of the partnerships’ business so that the requirements of section 11 of the Partnership Act would have been satisfied.
997. The Fund Parties did not explore in depth or cite authorities as to the meaning to be given to the statutory phrase “*acting in the ordinary course of the business of the firm*” (that is a wrongful act of the Funds’ general partners so acting) but it seems to me that the wide meaning given to the term in the authorities dealing with vicarious liability (albeit not vicarious liability based on deceit, as I discuss below) are at least helpful and confirm that there is no proper basis for concluding that, if Mr Naqvi was in fact acting for the general partners and conducting limited partnership business on their behalf by negotiating loans to be made to the general partners, the liability for Mr Naqvi’s deceit would not be treated as a liability of the general partners arising from a wrongful act done by them in the ordinary course of the limited partnerships’ businesses. The meaning of ordinary course of business in the context of a claim based on vicarious liability was discussed in the speech of Lord Nicholls in *Dubai Aluminium v Salaam* [2003] 2 A.C. 366 as follows (my underlining):

“21 Whether an act or omission was done in the ordinary course of a firm’s business cannot be decided simply by considering whether the partner was authorised by his co-partners to do the very act he did. The reason for this lies in the legal policy underlying vicarious liability. The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on.

When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.

- 22 *This policy reason dictates that liability for agents should not be strictly confined to acts done with the employer's authority.* Negligence can be expected to occur from time to time. Everyone makes mistakes at times. Additionally, it is a fact of life, and therefore to be expected by those who carry on businesses, that sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong. To this end, the law has given the concept of "ordinary course of employment" an extended scope.
- 23 *If, then, authority is not the touchstone, what is? Lord Denning MR once said that on this question the cases are baffling: see Morris v C W Martin & Sons Ltd [1966] 1 QB 716, 724. Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. Lord Millett said as much in Lister v Hesley Hall Ltd [2002] 1 AC 215, 245. So did Lord Steyn, at pp 223D224 and 230. McLachlin J said, in Bazley v Curry (1999) 174 DLR (4th) 45, 62: "the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimisation)...*
- 24 *In these formulations the phrases "may fairly and properly be regarded", "can be said" and "can fairly be regarded" betoken a value judgment by the court. The conclusion is a conclusion of law, based on primary facts, rather than a simple question of fact.*
- 25 *This "close connection" test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged. It provides no clear assistance on when ... an incident is to be regarded as sufficiently work-related, as distinct from personal...*
- 26 *This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negating vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having*

regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions. In this filed the latter form of assistance is particularly valuable.”

Was Mr Naqvi authorised to act for AIML and exercise its powers as the investment manager of the Funds so as to negotiate and borrow loans on their behalf?

998. As I understood the Fund Parties’ submissions, they did not contest the propositions that AIML was empowered to raise monies for the AGHF and Fund IV, that Mr Naqvi was a director of AIML at the relevant time and in that capacity (pursuant to AIML’s memorandum and articles) Mr Naqvi had at least ostensible authority to exercise the powers delegated or given to AIML to conduct and take steps in the management of the businesses of the limited partnerships (the AGHF and Fund IV) including the power to borrow money to be used in those businesses (Mr Atherton challenged the correctness of the designation of Mr Naqvi as AIML’s CEO during his cross-examination of Mr Conway but this did not affect the significance of Mr Naqvi’s position and role as a director of AIML).

999. I also did not take the Fund Parties to challenge Mr Jafar’s claim that Mr Naqvi was to be treated as “*a responsible officer*” of AIML for the purpose of clause 6.6 of the AGHF LPA. “*Responsible officer*” was not a defined term in the AGHF LPA and there is no reason to think that it was intended to have a special meaning. It connotes any senior officer of AIML with the power to undertake on behalf of AIML the relevant tasks involved in acting as manager and relating to the management of AIML. It does not appear that it was envisaged that it was necessary for AIML to make a formal appointment of or specifically to designate a person as a responsible officer, so that anyone fulfilling the criteria for being a responsible officer of AIML could act in exercise of its powers as manager. By contrast a delegation (covered by the adjacent wording in clause 6.6) did appear to require an act to designate particular person or body of person as a delegate (“*the Manager may also delegate (by power of attorney or otherwise) to any person or persons or fluctuating body of persons all or any of the rights, powers or obligations accorded to the Manager by this Agreement and such delegation may be made upon such terms and conditions (including power to sub-delegate) as the Manager may think fit.*”)

1000. During 2017 Mr Naqvi was one of three directors of AIML (with Mr Abdel-Wadood and Mr Siddique). I accept Mr Jafar's case that there is sufficient evidence to conclude that both Mr Abdel-Wadood and Mr Siddique acted as directed and instructed by Mr Naqvi on important matters and with respect to important decisions relating to AIML. Mr Jafar referred to Mr Abdel-Wadood's statement to the US authorities when pleading guilty to criminal charges that "...too often we [senior Abraaj executives] capitulated to [Mr Naqvi's] demands." Although only hearsay evidence with limited weight it seems to me that this is useful corroboration of other evidence, in particular Mr Conway's and Mr Cleary's evidence, as to the relationship between Mr Naqvi and the de jure directors of AIML.

1001. I also note that the DFSA were clearly of the view that Mr Naqvi had (too) extensive management powers in respect of AIML (as well as AH) and that the requirements of good governance and the protection of investors required that AIML and its asset management businesses be independently managed in future. Mr Naqvi via AH and AIML had been in charge of all fund management matters, which I take to include decisions relating to the raising of funds and borrowings for the Funds.

1002. So, there can be no real dispute that the answer to this question (was Mr Naqvi authorised to act for AIML and exercise its powers as the investment manager of the Funds so as to negotiate and borrow loans on their behalf?) was yes. What the Fund Parties vigorously disputed was Mr Jafar's claim that when Mr Naqvi was negotiating the Loans in December 2017 he was actually exercising the money raising powers that had been delegated or given to AIML by the AGHF and Fund IV, an issue to which I shall return shortly.

Was Mr Naqvi authorised to act for AGHF GP and GP8 and exercise their powers as the general partners of the Funds so as to negotiate and borrow loans on their behalf?

1003. In summary, Mr Jafar claimed that:

- (a). Mr Naqvi held positions and performed certain roles within the corporate governance structure of the Funds such that his actions, when involving acts of or relating to the

management of the Funds, should be treated as having been taken on behalf of the Funds' general partners. These positions and roles were his role as chairman of the GIC, Fund Head of the AGHF, a Key Person and Key Investment Executive of the Funds and a signatory on the AGHF's bank accounts.

- (b). Mr Naqvi gave instructions and thereby took decisions with respect to the businesses (and the management of the businesses) of and on behalf of the Funds. He was the nerve centre from which the activities of each Fund radiated and he took major decisions in the name of the Funds. His Inner Circle, who held key *de jure* management positions at the Funds' general partners, sought, carried out and followed his instructions and decisions. These tasks could not have been performed by a manager below board level. A manager below board level of the AGHF could not have taken the decision to pledge to the AGHF's limited partners on 8 December 2017 to return unused and uncommitted funds (which was a massive financial commitment on the part of the AGHF). Nor could a manager below board level in Fund IV have taken the decision to alter the financial year end for Fund IV. Nor could a manager have secured the extensive funding needed for the audit for year end 31 December 2017 (indeed the CEO, CFO and COO did not even have access to the AGHF's bank statements). Mr Jafar claimed that Mr Naqvi in acting in this way had performed the tasks undertaken by and the functions of a director, and was therefore a *de facto* director, of AGHF GP and GP8. Since he had given instructions to the *de jure* directors of the general partners he was also a shadow director.
- (c). Mr Naqvi was held out by the Funds (limited partnerships) as being a senior officer and decision maker and as having authority (and therefore that he had ostensible authority) to act and make decisions on behalf of the Funds by way of their general partners and Mr Jafar was aware of and relied on this holding out when making the Loans.

- (d). Mr Naqvi was authorised by the de jure directors of AGHF GP and GP8 to act and take decisions on behalf of the general partners of the Funds in relation to the management of the Funds.

1004. The starting point is Mr Conway's evidence. His *opinions* are obviously not definitive or binding on me but his evidence, derived from his work as a JOL, as to the corporate governance structures of the Funds, how the management of the Funds was conducted and who took decisions on behalf of the Funds is important (particularly in a case where none of the directors or those who were involved in the management of the Funds gave evidence). When he gave his evidence Mr Conway was an interested party in the litigation both because AH initially was a defendant to these proceedings and because AH and the JOLs were plaintiffs against the Funds in related litigation in which the JOLs' case was based on and was assisted by claims that Mr Naqvi was the ultimate decision maker and controller of all the Abraaj entities. Nonetheless, none of the parties sought to challenge Mr Conway's professionalism and integrity and Mr Conway stood by his evidence during his cross-examination and it seems to me that it should be given considerable weight.

1005. Mr Conway's evidence as to the role of Mr Naqvi as the key and ultimate decision maker on behalf of the Funds was clear. It is worth repeating what he said at [38]-[42] of Conway 1 (my underlining):

"38. ...Mr Naqvi was the founder and Group CEO of the Abraaj Group. He was held out to third parties as representing the Abraaj Group and exercised ultimate decision-making authority. It appears from our investigations that Mr Naqvi exercised top-down control over the Abraaj Group (including each of its underlying Funds) and Mr Naqvi was able to, and did, personally instruct and direct the actions and activities of the Abraaj Group (along with each of its underlying funds).

39. At all material times, Mr Naqvi was:

- (a) an executive director and the CEO of AH;
- (b) the sole shareholder of [AE2L], the majority shareholder in AH;
- (c) an executive director and the CEO of AIML;

- (d) *an authorised signatory for all bank accounts held by AIML for all transfers in excess of US\$25 million or US\$75 million depending on the account; and*
 - (e) *the Chairman of the Global Investment Committee.*
40. *As set out in the AH Articles ... Mr Naqvi had the right to: (a) appoint and remove the CEO of AH (Article 152); (b) approve investment decisions for Abraaj Funds up to the maximum limit permitted under the respective Funds' mandates (Article 153.1); (c) appoint an Executive Committee of AH (Article 157); (d) appoint an advisory board, with the membership and powers that he deemed appropriate (Article 155); and (e) appoint an Investors' Council consisting of various important shareholders and stakeholders, and define its charter and powers (Article 156).*
41. *Article 151 of the AH Articles also granted Mr Naqvi "full power and authority in operating [AH] and [he] shall have full authority to take all day-to-day decisions for the running and operation of [AH]."*
42. *Based on our investigations into the events leading up to the payments which form the subject matter of the JOLs' transaction avoidance claims, it is clear that Mr Naqvi exercised control over all major commercial and financial decisions within the Abraaj Group...*

1006. Mr Conway was cross-examined by Mr Atherton regarding Mr Naqvi's role. Various points that emerged during the cross-examination are worth noting.

The role of the MexCom

1007. Mr Conway accepted that Mr Naqvi's role in relation to MexCom was not of great significance (Day 9 pages 22-24) (my underlining):

"A. In theory, I believe it was almost intended to act as a bit of an oversight and a sense check for the CEO, for Arif. In practice, from what we can tell based on the correspondence, it appeared to operate more – certainly he was always present and he would take people to task if they raised points that he didn't like within it. When we see decisions being taken on new investments or drawdowns or what to do with new projects, the MexCom always seemed to be after the fact, if at all...It didn't have any teeth, I would say. It was more - maybe not entirely just a facade but it certainly seemed to us to be more of a facade than something that had substance.

Q. I think you agree that Mr Naqvi wasn't a member of this committee, was he?

A. *No. That was the intention - the intention was for it to be an oversight-type role. Him being the person who kind of ran the group, it was more of an oversight for him.*

...

Q. *You said it was a facade, you said that it didn't really have, in your words, teeth. Then why would any reference to MexCom be indicative of anybody having any degree of control over any particular operation of Abraaj Holdings?*

A. *I don't think it would be particularly useful in terms of figuring out who has control.*

...

Q. *Would it therefore be fair to say that we can ignore MexCom as being indicative of Mr Naqvi exercising control over anything for these purposes?*

A. *Well, I think - I think it would be fair to say that we should not attribute too much kind of substance to MexCom in terms of anyone's exercise of control.*

Q. *If that is right, why is it that you refer to MexCom relatively extensively in your witness statement in paragraph 35?*

A. *I think because MexCom is part of the official kind of governance structure of the group and therefore not to be ignored.*

Q. *But I think, as you have accepted during the course of this discussion, in reality it didn't really fulfil a substantive function, so it wouldn't be fair in fact to - albeit notionally it may sit within the governance structure, it actually played no genuine part; is that fair, where we have got to now?*

A. *Well, I mean, I would kind of go back to my point that I think we shouldn't attribute too much substance to it."*

1008. Accordingly, Mr Conway accepted that MexCom itself was not a decision-making body and while a part of the governance structure its role was marginal and of little significance for determining who controlled decision making on behalf of the Funds.

Mr Naqvi exercising top-down control

1009. After reviewing the approach to how the Funds were treated in the consolidated financial statements for the Abraaj group Mr Atherton asked Mr Conway about his statement at [38] of Conway 1 that Mr Naqvi exercised top-down control over the Abraaj Group (Day 9 pages 35-36) (my underlining):

“Q Presumably on the basis that Mr Naqvi is at the top, Abraaj Holdings is at the top and that's how control was exercised, you say?”

A. Well, I mean, you put it as through the entities. I suppose I thought of it more through the people that he worked with and kind of did his bidding.

Q. Is top-down control, on your explanation, completely divorced from the corporate structure?

A. No. I mean, obviously there was a corporate structure and when he was making decisions they were captured for the relevant companies.

Q. But top-down control means, doesn't it, from the top to the bottom? Leaving aside where the bottom may be, Mr Naqvi is, I think, the main shareholder in Abraaj Holdings and Abraaj Holdings is the TopCo? That's what you mean therefore by top-down control over the Abraaj Group, isn't it?

A. I suppose one way of looking at it is as the corporate structure and that fits nicely. I was just saying I thought about it more as control over the individuals.

Q. That gloss that you sought to put on your statement, there doesn't appear in your witness statement, does it?

A. Well, probably through the references to when he was exerting control over the individuals and getting them to do what he asked them to do, that's probably where it appears.”

1010. Mr Conway's point, from which he did not resile, was that from his review of the documents and his understanding of the decision-making process Mr Naqvi was able to control the Inner Circle who followed his decisions in relation to the management of the Funds.

The significance of the references to Mr Naqvi as the Fund Head

1011. Mr Atherton also asked Mr Conway about his statement in Conway 1 at [77] that “*Although not a director of ADV I, our investigations indicate that Mr Naqvi exercised control and oversight over the affairs of AGHF*” (Day 9, pages 70-72) (my underlining):

“Q. ... here you are setting out your evidence in relation to Mr Naqvi and his alleged control and oversight, is the phrase you use, over the AGHF. I think you accept that Mr Naqvi is not a director of ADVI; that's correct, isn't it?

A. Yes.

Q. And ADVI being the corporate director of the general partner?

A. Yes.

Q. And AHG, what is now GHF, as an entity?

A. Yes.

Q. You say there that your: “... investigations indicate that Mr Naqvi exercised control and oversight over the affairs of AGHF.” Not AHG; correct?

A. We don't say AHG there. I don't know that that means that we say he didn't exercise control over AHG.

Q. You are not limiting your comment in paragraph 77 to the fund?

A. Well, that comment - that is limited to the fund there.

Q. Then at (a) you say: “Mr Naqvi was held out to investors in the [PPM] as being the head of the Fund and responsible for its inception and strategic direction.” Correct?

A. Correct

Q. Again, not a reference to AHG? It's a reference to the fund?

A. It is.

Q. And the phrase is “inception and strategic direction”, which I'm going to suggest is not the same as having control over the affairs of the fund?

A. I'm not sure. I think strategic direction is fairly significant.

Q. It says "inception and strategic direction". That doesn't equate, does it, to, for example, plenary control over the fund, does it?

A. I see your point, yes.

Q. Would you agree with it?

A. Well, I would read "'Head of the Fund' and responsible for its inception and strategic direction" as basically being in control.

Q. Inception is it's his idea at the beginning?

A. Yes.

Q. So that in itself doesn't intimate control, would it, to be fair?

A. No, true.

Q. Then one can have the notion of strategic direction, this is the type of thing the fund can do or should do, that doesn't in and of itself equate with having control over the fund, would it?

A. Well, I suppose your point being it would imply someone who doesn't go into the minutiae?

Q. It would imply that that person does not have control over the fund? They might have an involvement or influence as regards strategic direction but not control over the fund; for example, its day-to-day operations?

A. I don't read that, "... Head of the Fund and responsible for inception and strategic direction" as saying he doesn't have control of the fund but I do take your point that maybe strategic direction is a bit more woolly than day-to-day.

Q. It may fall short of having control; would you agree?

A. I think taken with "head of the fund", I read that as control, personally. But I understand your point."

1012. Mr Atherton asked Mr Conway about the references to Mr Naqvi in the AGHF PPM and the AGHF LPA (Day 9, pages 77-70). Mr Conway accepted that the PPM was primarily aimed at prospective investors and he resisted and rejected Mr Atherton's suggestion that the reference to Mr Naqvi as the "Fund Head" in the AGHF's LPA did not indicate or imply that Mr Naqvi was actively in control of the AGHF's management:

“Q. But the PPM is essentially a prospectus?”

A. Yes.

Q. You are trying to attract investors. And by referring to Mr Naqvi in that sense would suggest that it is intended to attract them into the fund; would you agree?

A. Yes. A really important part of fund investment is knowing who is going to be handling your cash. So if someone has a good reputation, that's part of the PPM.

...

Q. [Mr Atherton referred to the definition of Fund Head in the AGHF LPA which just identified Mr Naqvi as holding that position]

A. Are you prepared to take it from me that fund head doesn't then feature really as a substantive definition within the LPA?

A. I am prepared to take that from you.

Q. That title, if you like, doesn't implicitly or expressly indicate any degree of control in and of itself, does it, by Mr Naqvi in respect of the fund?

A. Well, I would probably disagree. I would read "Fund Head" to imply quite a lot of control.

Q. Not simply the figurehead for the purposes of attracting investors, would that be more why likely what one would read into the term "fund head" in that context?

A. No, I wouldn't read "figurehead" for it, I would read someone who is actually controlling it.

Q. It wouldn't invoke the notion or imply the notion of oversight, would it, either?

A. It kind of feels like an executive type.

Q. Nothing from that phrase really - let me put it this way, slightly differently - the use of the phrase "Fund Head" doesn't - cannot bear the weight of any suggestion, as it appears in the LPA, of Mr Naqvi exercising complete control over the [AGHF] can it?

A. Well, it kind of feels like it does a bit, to me, to be honest. You know, just the plain reading of it. Obviously I don't know what the legal connotations are, but I'm just reading the words.

Q. I'm not asking you about that. Equally, it could simply mean the titular head of the fund, without carrying with it the baggage or the weights of having absolute control over the fund?

A. That wouldn't be a very - you know, in promoting a fund, you don't want to imply that you have got a figurehead who's not really involved. So if - I certainly think they would want to convey that.

Q. But it is equally consistent with the notion that this gentleman has inceptioned this fund, come up with the idea, and is its head and for investors that may be attractive. It doesn't say anything about his actual involvement in the operation of the fund, does it?

A. Well, "Fund Head" kind of implies you are pretty involved and in control, to me, once again."

1013. In my view, the description of Mr Naqvi as “*Fund Head*” in the LPAs and the AGHF PPM does not of itself establish his role as the sole controller and decision maker for the Funds (which Mr Jafar does not need to show in order to succeed on this point) nor indicate that he held, nor delineate with precision, a specific set of powers to act on behalf of the AGHF but the terms does clearly suggest, and support the conclusion that Mr Naqvi was held out to those parties to prospective and actual investors in the AGHF and Fund IV, to whom the AGHF PPM was addressed and who would be subject to the terms of the Fund LPAs, that Mr Naqvi was given and held a senior management position with the power and authority to make decisions on behalf of and for the Funds on at least a number of important matters (consistently with Mr Jafar’s case).

1014. As can be seen from the exchanges between Mr Atherton and Mr Conway, and from the summary of the relevant documents I have set out above, the term “*Fund Head*” was a term without a defined meaning in the AGHF LPA. But there was some elaboration in the AGHF PPM (dated April 2016) which provided a structure chart detailing the manner in which the Fund was to be operated with Mr Naqvi at the top of the chart described as the “*Fund Head*.” The AGHF Team was described and stated that the “*activities of the Fund are being led by three senior members of Abraaj, namely Arif Naqvi (Founder & Group CEO), Sev Vettivetpillai (Head of Thematic Businesses) and Khawar Mann (COO of the Fund).* As Head of the Fund, Mr. Naqvi has led the design of the AGHF concept and the strategy and business

plan. Both Mr. Naqvi and Mr. Vettivetpillai are involved in overseeing the Fund's activities. The day-to-day operations are being managed by Khawar Mann who brings over 20 years of healthcare investing and operating experience to the Fund. Mr. Mann joined Abraaj in 2014 and was recruited specifically to be COO of the Fund." In the Fund IV PPM once again Mr Naqvi is placed on top of the structure chart of the management team and is described as "Founder and Group CEO." The Fund IV PPM goes on to state that the eleven executive directors report to Mr Naqvi.

1015. These documents do not say that Mr Naqvi took all major decisions relating to the management of the Funds or that his approval was required for such decisions but they do indicate that he was a key decision maker and the most senior decision maker, so that it was to be inferred that he had the ultimate say. While "Head of Fund" was a term without a defined content it speaks for itself and Mr Naqvi's position as the most senior decision maker is clear from the descriptions of his role and his position on the top of the management team tree.

The significance of Mr Naqvi as a Key Person

1016. Mr Atherton asked Mr Conway about the significance of the proposal discussed by the AGHF LPAC in March 2017 for an amendment to the Key Person clause in the AGHF LPA. This was in the investor protection provisions in the AGHF LPA. Clause 7.7 stated that if a Key Person Event occurred at any time prior to the end of the Investment Period "*the Partnership shall automatically enter into a Suspension Period.*" A Key Person Event was defined as any of (my underlining):

- "(a) 50 per cent of the Senior Abraaj Executives or Arif M. Naqvi and one additional Senior Abraaj Executive ceasing to devote substantially all of their respective business time (assessed over a rolling six month period) to the business of the General Partner Group; or*
- (b) two or more of the Fund Executives: in the case of (x) Fund Executives other than Arif M. Naqvi and Sev Vettivetpillai, ceasing to devote substantially all of their business time (assessed over a rolling six month period) to the affairs of the Partnership, any Parallel Funds, any Alternative Investment Vehicles, any*

co-investment top-up or similar vehicles which may be established to co-invest in certain investments alongside the Partnership, excluding for these purposes business time spent by Shakir Merali on the affairs of the Predecessor Fund and (y) in the case of Arif M. Naqvi and Sev Vettivetpillai only, ceasing to oversee the Fund's strategy, investments and divestments, (assessed over a rolling six-month period and subject to their respective General Partner Group-related general management duties from time to time), or

- (c) *there ceasing to be at least four Operating Executives dedicated to the Fund and/or to one or more of the Portfolio Companies*

provided that an individual shall be deemed immediately to have ceased to devote substantially all of their business time for the purposes of determining a Key Person Event in the event of such individual's death, permanent incapacity or cessation of membership, employment or equivalent engagement within the General Partner Group."

1017. The proposal discussed by the AGHF LPAC involved an amendment to the definition of Key Person Event to exclude Mr Naqvi and Mr Vettivetpillai (SV) from (b) of the definition. The minutes of the AGHF LPAC meeting on 17 March 2017 recorded that "*SV clarified that it was important for Arif and Sev to be fund executives in the initial years of the fund to be involved in the operations of the Fund, oversee strategy implementation, and provide investors with comfort around the new strategy. Today, the Fund is moving forward swiftly, the strategy is in place, and therefore the manager suggests they be removed as fund executives but remain as part of the IC trigger (Trigger A). In their place, more executives have been added to Trigger B.*" Mr Atherton suggested to Mr Conway that this proposal and the explanation given as to why it was appropriate showed that there had been a change in Mr Naqvi's role and that while Mr Naqvi might want and need to be involved in the operations of the AGHF and the implementation of strategy at the beginning, and there were emails recognising that role, the time for his active involvement was by this point past. Mr Conway did not think so. The following exchange took place (Day 9, pages 81-83) (my underlining):

- "A. *It seems to be saying that they would be retained, Mr Naqvi and Sev would be retained as a trigger under the IC, so it's almost like they are perhaps stepping a bit away from the detail, that's the impression I got from that.*

- Q. *I agree. But what it is showing is there has been a transition as regards Mr Naqvi's role, inception and strategy at the beginning, as we have seen, but that function has passed. Therefore being involved in the inception and the direction of strategy is, if you like, front loaded as regards the activities of the fund and that stage in that phase has passed; would you agree?*
- A. *Not entirely. I mean, I suppose because obviously this is the investor facing piece. But what obviously we saw from everything else in the witness statement is just how involved he was on investment decisions, the use of cash and so forth. So I don't - I didn't get the sense that he had stepped away over time from [the AGHF].*
- Q. *What I'm suggesting is that rather indicates the fact that there had been a change in Mr Naqvi's role from what it was originally; would you agree?*
- A. *I hadn't observed that change, other than this paragraph you bring me to."*

1018. These provisions make it clear that in the documents governing the constitutions of the Funds Mr Naqvi was described and presented as having committed to devote substantially all his business time to the business of "*the General Partner Group*." This was not affected by Mr Vettivetpillai proposed amendments. The General Partner Group is defined as "[AH] and the subsidiaries from time to time of [AH]" but it seems to me that in the context of the Fund LPAs this should be understood as a reference including the activities of the Funds. AIML after all 100% owner of the Funds' general partners and so the Funds were in this way part of what was understood to be the Abraaj group.

1019. Those proposed amendments do suggest that at least some of the senior management regarded Mr Naqvi as having a less hands-on role so that it was appropriate to remove the trigger based on Mr Naqvi and Mr Vettivetpillai "*ceasing to oversee the Fund's strategy, investments and divestments, (assessed over a rolling six-month period and subject to their respective General Partner Group-related general management duties from time to time)*." But, as Mr Conway said, even if Mr Vettivetpillai's proposals were agreed by the AGHF LPAC and can be treated as evidence of a general view that Mr Naqvi was not at that time expected to oversee the AGHF's (and Fund IV's) strategy, investments and divestments, the amendment was made on the basis that Mr Naqvi's commitment to devote substantially all his business time to the business of the Abraaj entities and that he retained his role as the

most senior member of the management team. I also consider that this one document and piece of evidence is insufficient to demonstrate that there had been a major change in Mr Naqvi's management and decision-making role. More evidence would be required to establish this.

The investment approval process, the GIC's role and the issue of whether Mr Naqvi controlled the GIC

1020. Mr Atherton also reviewed with Mr Conway the AGHF investment approval process and the GIC's role within it and suggested to him that the GIC was in fact not often involved. He referred Mr Conway to the Abraaj Investment Approval Process memorandum dated September 2015 and the Investment Process Flowchart. This stated that (my underlining):

"The Abraaj Group follows a systematic approach for evaluating potential transactions. The respective regional, country and thematic Investment Teams are responsible for managing the day-to-day activities of the Fund including Investment Identification, evaluation, execution, ParCo [partner companies]..... Investment Teams work with APAG, CXT colleagues in other Investment Teams with relevant knowledge/expertise (sector or functional) as appropriate and colleagues across a number of other functions including RCA, Global Markets and AFSS, during the process.... The Investment Process is designed to facilitate collaboration across the Group and entails interfacing with a number of functions within the organization, including the regional/thematic Investment Teams, the Abraaj Performance Acceleration Group (APAG), the Operations and Central Execution Team (CXT) which includes IT, Legal and HR, the Investment Committee (IC), the ParCo Review Committee (PRC), Risk, Compliance and Audit (RCA), Legal, Global Markets and Abraaj Finance & Support Services (AFSS) which includes Finance, Tax, Fund Administration and Corporate Affairs. The Investment Teams are responsible for steering and implementing the Investment Process, including coordinating with the relevant functions at the appropriate time throughout the Investment Process."

1021. Mr Atherton noted that the memorandum stated that *"each investment is evaluated against the established investment criteria and passes through the following stages: Identification; Screening; Due Diligence; Legal Documentation; Disbursement; Post-acquisition value acceleration and governance, including reporting to investors and Exit."* The memorandum also stated that *"Prior to being brought to [the GIC] an investment should be presented to [the] [Initial Screening Team]."* Mr Atherton noted that Mr Naqvi was not a member of the Initial Screening Team. Thereafter the Central Execution team became involved and Mr

Naqvi was not a member of that team either. Next, the APAG is involved. This was said to be “*at the heart of Abraaj’s value creation thesis, and its involvement is an embedded part of the Investment Process. APAG is formally involved in the Investment Process from the moment the transaction is identified to the point of eventual exit, with specific sector-related areas of value add assisted by the application of tools, processes, benchmarks and people ...*” Mr Atherton noted that Mr Naqvi was also not involved as part of APAG. The next part of the process was the AFSS which supported the investment approval process and provided “*a variety of support services to the Group and [facilitated] its smooth and orderly functioning. These services [included] Finance and Accounting, Taxation, Fund Administration and Corporate Affairs. In the specific context of the Investment Process and post-acquisition ParCo management.*” Mr Atherton noted that Mr Naqvi was not involved in the AFSS. Mr Atherton said that this made it clear that a good deal was done before the GIC became involved, with which activity Mr Naqvi had no involvement.

1022. Mr Atherton noted that the due diligence stage was described as having eleven aspects and there were various references to engagement with the GIC. The memorandum stated that the Investment Team was responsible for managing the advisors appointed to conduct the due diligence process on a day-to-day basis to ensure that they were covering the stated scope of work within the agreed budget and for keeping CXT and RCA informed about material aspects that develop during DD process. The Investment Team (my underlining) was “*encouraged to engage frequently with [GIC] on any early red flags [and any] deviation from the approved [GIC] DD budget [needed] to be approved by the [GIC].*” “*To ensure the expertise across the Group is leveraged, Investment Teams [were] encouraged to require the target company’s management to organize a presentation on the business for Investment Teams, APAG and member(s) of the [GIC]. As part of this engagement, two [GIC] members [were] required to visit the potential company and Investment Teams should organize interactions between the [GIC] and the counter parties including the target company’s senior management.*”

1023. Following completion of the due diligence the Investment Team was required to complete the [GIC] Due Diligence ESG Checklist and then the legal process is completed. Then a

memorandum with details of and relevant information relating to the proposed investment has to be prepared for the GIC. This was referred to as the IC Final Memorandum. The Investment Approval Process memorandum stated that “[s]igning and fund disbursement will not commence until IC has provided approval post their review of the Final IC Memorandum...” and that “[t]he minutes of the IC are taken by CXT and are expected to be finalized within the same week of the IC meeting. The minutes explicitly state the final approvals from the IC meeting...”

1024. Mr Atherton put it to Mr Conway that a review of the Investment Approval Process memorandum and the process it described showed that the GIC only had a limited involvement in that process. Mr Conway noted that the GIC was involved at an early stage since its approval was required even during the screening stage to the execution of a non-binding letter of intent. Mr Conway’s evidence in response to Mr Atherton’s questions on this issue was as follows (Day 9, pages 108-110) (my underlining):

“Q. I accept that along those stages there are either requirements to consult with the GIC or suggestions that those involved in the structure of the investments can consult with the GIC, but really it's at the end of the process, perhaps taking the [letter of intent] as an exception, that the GIC really performs its function, which is to formally either approve or decline the investment?

A. Well, like I say, I feel that earlier gate is actually quite an important function of an investment committee.

Q. I don't disagree with that. I have tried to take you through the stages and I recognise, and you recognise, that there are within those stages either mandatory requirements to go to the GIC or suggested situations where you might want to go to the GIC but ultimately it's about the approval or non-approval of the investments. It may not get there because of the [letter of intent]?

A. They are almost equally important stages, I would say.

Q. ...We do see that because a number of investments go a number of times to the GIC for approval at various stages ...for example, where one requires approval of funding for the due diligence process?

A. Yes.

...

Q. ultimately the point is [that] there is a lot involved outside the GIC in preparing or compiling an investment for submission to the GIC at any of the mandatory stages or indeed any of the voluntary stages; would you agree?

A. Yes.

Q. In relation to that, Mr Naqvi doesn't appear to be involved in any of that?

A. I couldn't say that for sure.... I have seen - you see emails to him, apparently in early stages, saying, "Is this any good, should we take this forward?" I have seen a few emails like that, so I can't say for sure he wasn't involved. Certainly I doubt whether he would be involved in things like due diligence, but initial screening, seeing if he has contacts of the targets or things like that, I suspect would have had some involvement."

1025. Mr Atherton referred Mr Conway to minutes of meetings of the GIC which recorded discussions about proposed investments and a decision made by the whole IC concluding with a GIC "Recommendations to the Board of the Manager [AIML]." The following exchange then took place (Day 9, pages 112-113):

Q. Importantly, I'm going to suggest, there is nothing particularly outstanding in terms of this being evidence of Mr Naqvi's control of the fund; would you agree?

A. To me, this is evidence of the investment committee's control over the Fund.

Q. Entirely consistent with the structure that is in place for the process of investment approval?

A. Yes.

Q. But it is not representative of Mr Naqvi exercising control himself, is it? He is part of and indeed chair of the committee, but it is a committee process and it's a process where the information and the investment is the product of other people's work, to come to a conclusion as to the recommendation that we have seen, for example, at the bottom of the page.

A. Well, I mean, it seems like a fairly thorough interrogation of an investment proposition by the investment committee that is chaired by Arif Naqvi. To the extent there is control over the investment decision, it seems to be - it certainly says the investment committee has a strong level of control and Arif as chairman of that committee, presumably, also has.

...

Q. There is nothing in [all] the documents that I have taken you to .. which would suggest that Mr Naqvi was in control of the investment committee, is there? He is the chair, he participates, but nothing is indicated from those papers that he is controlling it in any way?

A. As you say, he is the chair. I think most of the minutes, I think they were just referencing questions from the IC, so it is hard to tell from that who is raising the questions.

Q. Adopting your very fair assessment, it is likely that the observations made by the investment committee members could well have included Mr Naqvi, but the other members as well?

A. Yes, yes.”

1026. It seems to me that the documents and evidence relating to the AGHF investment approval process and the GIC’s role within it show a multilayered process with input from multiple sources but with the GIC having the key decision-making role. Mr Naqvi’s position as chair of the GIC clearly gave him substantial (and potentially decisive) influence on its decisions but the description and operation of the investment approval process and the functioning of the GIC do not show that Mr Naqvi controlled the GIC’s decision making.

1027. Being a signatory on the bank account mandates is by itself some but not decisive evidence that Mr Naqvi was given and exercised authority to deal with the Funds’ assets. It is not decisive because the signatory on an account mandate may be required before giving instructions to the bank to have obtained internal approvals from others (being a signatory would, for example, be consistent with payments out of the Funds’ accounts needing the prior approval of the GIC or board of the Funds’ general partners).

Did Mr Naqvi give instructions and take decisions for the Funds generally and with respect to the borrowing of loans – did the de jure directors of the Funds’ general partners defer to him and act on his instructions with respect to fund raising for the Funds?

1028. In the RRASOC Mr Jafar, as I have noted, relied on thirteen examples to establish that Mr Naqvi gave instructions and thereby took decisions with respect to the businesses (and the management of the businesses) of the Funds. Mr Jafar also relied on the evidence adduced at trial (including Mr Cleary’s and Mr Conway’s evidence) to support his claims. I have

already noted Mr Conway's view, albeit not based on direct observation of the conduct of Mr Naqvi and the *de jure* directors, that Mr Naqvi exercised control of all matters relating to the Funds by directing and giving instructions to them. Mr Jafar argued that Mr Conway's and Mr Cleary's evidence as to Mr Naqvi's role was corroborated by the contemporary documents to which he referred and on which he relied.

1029. It seems to me that Mr Jafar is right about this. It is not an entirely straightforward fact-finding exercise in the absence of evidence from Mr Naqvi or the *de jure* directors. But Mr Cleary was an eye witness who had direct and close-up (an insider's) experience of how Mr Naqvi and the *de jure* directors operated over many years (albeit, as he admitted and explained, from the perspective of the AH board and committees and therefore with only limited direct exposure to the day to day operations of the Funds). He had worked closely with the *de jure* directors and had direct experience of their working relationship with Mr Naqvi. I found Mr Cleary to be a well informed and credible witness who was highly experienced in corporate management and governance issues and gave honest and helpful answers during his cross-examination (although on occasions he was inclined to go beyond the question he was asked and give overly elaborate responses, albeit in the spirit of wishing to assist the Court).

1030. Mr Farnum also had direct experience of the functioning and management in particular of the AGHF. I also found him to be a well-informed and credible witness who had extensive experience in relation to funds and fund management and who also gave clear, honest and helpful answers during his cross-examination. But his viewpoint was far more limited and restricted than Mr Cleary's. He was also an outsider. For that reason, where their evidence conflicts, I prefer the evidence of Mr Cleary.

1031. I accept that the witness evidence and the documentary record show that Mr Naqvi was the dominating and domineering leader of the Funds' management team (see Cleary 1 at [37]). Mr Cleary's written evidence was clear as to Mr Naqvi's domination of the inner circle and the fact they did his bidding on all matters. He noted (in Cleary 1 at [25]) that Mr Siddique, Mr Naqvi's brother-in-law (together with all other executive AH board members) deferred

to Mr Naqvi and would routinely act upon his instructions and that (at [41] of Cleary 1) (my underlining):

- (a) Throughout, in my roles in the Abraaj Group, I interacted frequently with executive directors on the board of directors, including Mr Naqvi and Mr Siddique.
- (b) In my experience, Mr Naqvi was a dominant CEO who, having founded the Abraaj group, felt the need to determine its course. He was the public face of, and the dominant personality in, Abraaj throughout my experience of the Abraaj group. He also determined the agendas and content of the presentations at AH board meetings until and including the board meeting of 8 February 2018 and at all investors' conferences at which I was present before that time.
- (c) I note that discussions at these board meetings were by no means confined to issues that related exclusively to AH as the holding company of the group. Rather, Mr Naqvi would ordinarily provide an update to the board (and instruct other Executive Directors to do so, including, Mustafa Abdel-Wadood, Sev Vettivetpillai and the incumbent Chief Financial Officer) in relation to matters concerning the wider business of the Abraaj group, including in relation to investment activity at the individual fund levels.

...

- (e) Although, as set out above, discussions at the board level did sometimes address events happening at the individual fund levels, I had no direct experience of those matters and was rarely able to comment or otherwise express an informed opinion in relation to them. Responsibility for such matters lay with management. Other non-Executive Directors with investments in funds, expressed their opinions. My area of focus (like other 'independent' non-executive members of the Board - those without investments in the funds) was governance at the Abraaj Holdings level (although I was also concerned with matters relating to compliance and risk across the Abraaj group). For that reason, my involvement in these 'fund level' discussions was limited (as is reflected in the board minutes).

...

- (g) Until 8 February 2018, in my experience, all members of the Abraaj executive team, including executive board members, deferred to Mr Naqvi and would routinely act upon his instructions. My impression of the way in which Mr Naqvi dominated other management functions is elaborated upon, to a certain degree, by email correspondence that was addressed to me by various other board members and senior management after February 2018, including most notably Mr Sev Vettivetpillai, and also Mr Humayun Shahryar, Mr Hamid and Mr Bourgeois.

1032. It seems to me that the evidence does establish that Mr Naqvi operated, and was held out and treated internally as, the nerve centre for important management decisions affecting all the Abraaj entities including the Funds. Mr Naqvi was held out and acted as Mr Abraaj (the face of Abraaj) and its senior and key decision maker. I also accept Mr Jafar's submission that the Funds and all the Abraaj entities were operated as a single unit with a centralised albeit structured decision-making process and common decision makers. Furthermore, the evidence showed that monies were generally treated as available to any entity that needed funds with commingling of cash an ever-present feature of the Abraaj entities' operations. The loans from Air Arabia that Mr Jafar had referred to in the RRASOC (and were set out in the particulars relied on to show Mr Naqvi's authority to act for the Funds) were evidence that lenders were told that funds were being borrowed by one entity but then the recipients of the loans were other entities.

1033. The evidence supports Mr Jafar's claim that Mr Naqvi dominated his Inner Circle, who acted as he directed, and insisted on his Inner Circle maintaining complete secrecy about his and their activities. As I have found, and Mr Jafar accepted (see for example [112] of his Written Closing Submissions) Mr Naqvi kept the non-executive directors of AH in the dark (although I have found that Badr and Mr Jafar were aware that the Loans would not be disclosed to the AH non-executive directors). Mr Jafar referred to an email dated 1 April 2016 from Mr Naqvi which sent to the Inner Circle a payment schedule for USD\$ 224 million to be paid to limited partners in which he said that the information be shared with "*nobody outside the loop knowing what [was] going on.*" There were also other emails dated 30 November 2017, 9 December 2017 and 14 December 2017 to the like effect.

1034. Mr Jafar said that the evidence showed that money coming in and going out of the Funds was all under the control of Mr Naqvi and the AFSS. He argued that the AGHF was not, as the GHF parties contended, autonomous with respect to its own investments. Mr Naqvi was constitutionally integral to the operation of the investment business of the Funds. Mr Cleary had given uncontradicted evidence that "*... no investment decision and to the best of my knowledge disinvestment decision was ever taken without Mr Naqvi's initiative*" (Day 11, page 37). Mr Jafar also submitted that Mr Naqvi also maintained considerable power over

Fund drawdowns as was shown in Mr Naqvi's Finance Function Email dated 23 April 2017. In that email Mr Naqvi had confirmed that a centralised finance function was still required and the evidence demonstrated that it was Mr Vettivetpillai and Mr Siddique (two members of the Inner Circle) and not Mr Mann or Mr Hilal, who were responsible for the issuing of drawdown notices. Mr Mann deferred to Mr Vettivetpillai and asked him what to do in relation to important decisions (Mr Farnum's evidence as to this was of limited weight in view of his position as an outsider and should not be relied on) and Mr Naqvi exercised powers to give directions with respect to drawdown notices. All three drawdown notices were issued either as a result of Mr Naqvi's decision or approval.

1035. I accept these submissions on the basis that Mr Abdel-Wadood, Mr Siddique, Mr Lakhani, Mr Dave and Mr Zikar followed Mr Naqvi's directions and instructions and permitted and agreed to him acting as the final and ultimate decision maker on important issues.

1036. The documentary evidence is however limited and there are few if any examples of Mr Naqvi directly acting on behalf of the Funds' general partners and therefore the Funds. Mr Jafar's pleaded particulars did include cases of Mr Naqvi allegedly making decisions with respect to the borrowing of loans for use by and to fund the activities of the Funds. Mr Naqvi's role in arranging the 2016 Air Arabia Loans was relied on. It certainly appears that Mr Naqvi arranged the loans but not that he acted directly for GP8 when documenting the borrowing. At [12A] of the RRASOC it was averred that the decision to borrow from Air Arabia had been made by Mr Naqvi. Mr Lakhani, acting in his capacity as director of GP8, had gone to Mr Naqvi and informed him of the Fund IV funding need (that it was necessary to find US\$195 million to cover a cash shortfall in the accounts of Fund IV). Mr Naqvi had responded by an email dated 6 June 2015 indicating that the funds should be borrowed from Air Arabia. Steps were then taken to arrange the financing. But, as I have noted, GP8 pointed out that even though the loans were ultimately needed by GP8 (for the purposes of Fund IV) the borrower ended up being Menasa Capital Management Holdings Limited, a company controlled by Mr Naqvi. Even though GP8 was made a party to the financing agreement this was only for the limited purpose of regulating payment of the loan proceeds to GP8's accounts and Mr Lakhani and not Mr Naqvi signed on behalf of GP8. So, as GP8 submitted,

this was not a case of Mr Naqvi having acted *for GP8* and being treated as having the *authority to bind GP8* in relation to the borrowing of loans to be used in the business and activities of Fund IV. This rather was a case of Mr Naqvi having made the decision as to who should be asked to lend loans borrowed to generate funds to be used in the business and activities of Fund IV and had arranged for GP8 to be a party to the funding documentation (albeit not as a borrower) and to be the direct recipient of the loans advanced.

1037. It seems to me that it is right to say that the proper conclusion is that the evidence demonstrated that Mr Naqvi was, indirectly by way of his control of the *de jure* directors of the Funds' general partners, the central decision-maker for the Funds including in relation to fund raising (even though he was not involved in each and every day-to-day decision). He was kept informed and his approval sought as a matter of standard practice in respect of any significant investment decision to be made or taken by the Funds. Mr Jafar summarised the key evidence he relied on at [156] of his Written Closing Submissions.

1038. Mr Jafar argued that the handful of documents relied on by the Fund Parties did not undermine these conclusions. I agree.

1039. I do accept the Fund Parties' submission that Mr Jafar has been unable to produce substantial evidence of Mr Naqvi openly acting directly on behalf of the Funds' general partners (for example by signing documents on behalf of the Funds' general partners or the Funds). But he did not need to, and his *modus operandi*, no doubt because it was convenient to have others sign the relevant paperwork and to give the impression that the elaborate governance structures set out in the LPAs and PPMs were being followed, was to operate through and to have his decisions implemented by others.

1040. I have considered and taken into accounts the Fund Parties' critique of the examples given by Mr Jafar in [32(e)-(h)] of the RRASOC and I have accepted some of the points they make. But I do not accept that these examples and the evidence adduced at trial as a whole only showed at most isolated instances of Mr Naqvi giving instructions to GP8's *de jure* directors. Nor do I accept that it was implausible or that the evidence failed to show that in

circumstances where the Abraaj entities had a properly and well-defined contractual governance structures and constitutions and Mr Naqvi had no formal role in relation to the GHF Parties, Mr Naqvi was nonetheless able to and did generally exercise a key and centrally controlled decision making role. The fact that he had not been appointed as a director of for example ADV 1 did not undermine this conclusion.

1041. It seems to me that GP8 underestimated the significance of the cashflow spreadsheet referred to at [32(h)(v)] of the RRASOC. GP8 argued that the spreadsheet simply showed how funds being raised by Mr Naqvi on behalf of other Abraaj entities (such as AH) would be distributed between those entities to meet GP8's funding requirements and that Mr Naqvi did not need, and was not seeking, any authority from GP8 to raise funds on behalf of other Abraaj entities. But the spreadsheet and the context in which it was being distributed and shared by Mr Naqvi was evidence of his central role in decision making regarding the raising and moving/distribution of cash, including for and by the Funds. I also agree that it was evidence of Mr Lakhani's, Mr Siddique's and Mr Dave's knowledge of Mr Naqvi's plans to raise from third parties the money needed to deal with the cash shortfalls in the Funds.

1042. Mr Jafar had placed considerable weight, and in my view was right to place such weight, in particular on the evidence that Mr Naqvi took the decision and instructed management to move Fund IV's year end to 31 December 2017 and took the decision to repay the Healthcare Investors their Uninvested Capital as headline examples of how Mr Naqvi took critical decisions on behalf of the Funds.

Was Mr Naqvi a de facto director of AGHF GP, GHF and GP8?

1043. Two issues arise. The first is a pleading point arising out of the Fund Parties' challenge to the adequacy of Mr Jafar's pleaded case. The second is a point of substance, namely whether Mr Jafar has established sufficient facts to justify Mr Naqvi being characterised as a *de facto* director *for the purpose* of showing that Mr Naqvi's actions and statements in negotiating the Loans, if it is also established that he was acting as a *de facto* director of AGHF GP, GHF and GP8 in connection with the businesses of the limited partnerships (the AGHF and Fund

IV), could be attributed to the Funds' general partners so that the general partners were liable in deceit and the resulting liability was a limited partnership liability.

1044. I have set out above, when summarising the parties' submissions on this issue, the main authorities on what needs to be established in order to justify a person being treated as a *de facto* director. Before dealing with the two issues I have just identified I would add the following further comments as to the applicable law.

1045. The distinction between a *de facto* director and a shadow director is often said to be as follows. A *de facto* director is a person who assumes to act as a director and who may be held out by the company as a director although he has not been validly appointed as such. The main question is whether the individual concerned has assumed the status and functions of a company director so as to make himself responsible as if he were a *de jure* director. A shadow director does not claim or purport to act as director and is not held out by the company as a director. Rather such a person shelters behind the directors of the company but becomes liable for certain purposes in accordance with the relevant statutory rules because of the directions or instructions which he or she is accustomed to give to the directors and which they are accustomed to follow.

1046. I have said in this summary that a *de facto* director may be held out as a director by the company (or relevant corporate entity) because the authorities make it clear that at least for some purposes a person can be a *de facto* director even though there is no holding out. In *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch) Mr Justice Etherton (as he then was) referred to Mr Justice Millett's judgment in *Re Hydrodan (Corby) Ltd (in liq.)* [1994] B.C.C. 161 (to which I have already referred) in which he said (at page 163) that: "*A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in*

relation to its business which can properly be performed by a manager below board level.”

Mr Justice Etherton commented on this passage from Millett J’s judgment and said this (my underlining):

“66. There are two difficulties with that description of a de facto director. First, it seems wrong in principle that it is a necessary characteristic of a de facto director that he or she “is held out as a director by the company”. Such “holding out” may be important evidence in support of the conclusion that a person has in fact acted a director, but it would appear to be far too narrow a test to embrace all those who have discharged functions normally and most appropriately carried out by a director: see Jacob J. in Secretary of State for Trade and Industry v Tjolle [1998] B.C.C. 282, at p.291 to the same effect. Secondly, Millett J.’s statements that the functions or actions of a de facto director must be those which can properly be discharged only by a director and must not merely be those which can properly be performed by a manager below board level do not help identify what such functions or actions may be.

67. *In Re Richborough Furniture Ltd [1996] B.C.C. 155, which were disqualification proceedings under s.6 of the 1986 Act, Mr Timothy Lloyd Q.C., sitting as a deputy High Court judge, said (at p.168) that like Warner J. in Re Moorgate Metals Ltd [1995] B.C.C. 143 he did not believe that the statement of Millett J. in Hydrodan was intended to be an exhaustive statement of the test. Mr Lloyd expressed the test in the following way at p.170:*

“It seems to me that for someone to be made liable to disqualification under s. 6 as a de facto director, the court would have to have clear evidence that he had been either the sole person directing the affairs of the company (or acting with others all equally lacking in valid appointment, as in Morris v Kanssen) or, if there were others who were true directors, that he was acting on equal footing with the others in directing affairs of the company. It also seems to me that, if it is unclear whether the acts of the person in question are referable to an assumed directorship, or to some other capacity such as a shareholder or, as here, consultant, the person in question must be entitled to the benefit of the doubt.”

68. I respectfully agree with the emphasis in that passage on the necessity for the de facto director to participate in directing the affairs of the company.”

1047. These dicta were approved and followed by Jonathan Gaunt QC (sitting as a Deputy High Court Judge) in *Gemma Ltd v Davis* [2008] EWHC 546 (Ch) where he said as follows (my underlining):

“40. From those cases I derive the following propositions material to the facts of this case:

- (1) *To establish that a person was a de facto director of a company, it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director (per Millett J. in Re Hydrodan (Corby) Ltd (in liq.) [1994] B.C.C. 161 at 163.*
- (2) *It is not a necessary characteristic of a de facto director that he is held out as a director; such “holding out” may, however, be important evidence in support of the conclusion that a person acted as a director in fact (per Etherton J. in Secretary of State for Trade and Industry v Hollier [2006] EWHC 1804 (Ch); [2007] B.C.C. 11 at [66]).*
- (3) *Holding out is not a sufficient condition either. What matters is not what he called himself but what he did (per Lewison J. in Re Mea Corp Ltd [2006] EWHC 1846 (Ch); [2007] B.C.C. 288).*
- (4) *It is necessary for the person alleged to be a de facto director to have participated in directing the affairs of the company (Hollier (above) at [68]) on an equal footing with the other director(s) and not in a subordinate role (above at [68] and [69] explaining dicta of Timothy Lloyd Q.C. in Re Richborough Furniture Ltd [1996] B.C.C. 155 at 169–170).*
- (5) *The person in question must be shown to have assumed the status and functions of a company director and to have exercised “real influence” in the corporate governance of the company (per Robert Walker L.J. in Re Kaytech International Plc [1999] B.C.C. 390).*
- (6) *If it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity, the person in question is entitled to the benefit of the doubt (per Timothy Lloyd Q.C. in Re Richborough Furniture Ltd (above)), but the court must be careful not to strain the facts in deference to this observation (per Robert Walker L.J. in Kaytech at 401).”*

1048. These cases and dicta show, I think, that it is important to bear in mind the purpose for which the characterisation of an individual as a *de facto* director is sought. In some cases, a plaintiff wishes to show that the defendant was a director within the meaning of a relevant legislation which defines a director. So for example, section 22(4) of the UK’s Directors Disqualification Act 1986 provides that for the purpose of disqualification proceedings the expression “director” includes “any person occupying the position of director, by

whatsoever name called” and section 250 of the UK Companies Act 1986 contains the same definition of a director, and it is well established that for these purposes “*director*” includes a person who acts as a director even though never validly appointed as such (and such a person is commonly referred to as a “*de facto*” director). There is no similar statutory definition in the Companies Act in this jurisdiction (although as I have noted section 89 contains a definition of a shadow director). But it is also well established that a person who satisfies the criteria of being a *de facto* director (in particular covering, to use Mr Justice Etherton’s words, all those who have discharged functions normally and most appropriately carried out by a director) will be treated as if he were a *de jure* director for various purposes. These will include being subject to the duties of (that he would have had if he had been appointed as) a *de jure* director and having the authority and power to act for and bind the company (or other corporate entity). As the *dicta* from the judgment of Etherton J and Mr Gaunt QC make plain, though, a person can be treated as a *de facto* director for these purposes and with these consequences even if they have not been held out to third parties as holding the position of and having the authority of a director.

1049. In this case Mr Jafar is seeking to establish that Mr Naqvi was a *de facto* director for the purpose of attributing his deceit to the Funds’ general partners. In order to do this he needs to show that the grounds for attribution of Mr Naqvi’s acts and representations have been pleaded and established. Mr Jafar needs to show that even if Mr Naqvi was not formally appointed as a *de jure* director of the Funds’ general partners (including ADV 1) he (a) nonetheless had actual authority to act for the general partners in relation to the limited partnerships’ business because the *de jure* directors of those general partners had authorised him to do so and take decisions and act on behalf of the general partners or (b) that his decisions relating to the limited partnerships’ business were followed and implemented by the *de jure* directors internally and the *de jure* directors by their words or conduct represented to third parties generally or Mr Jafar in particular that Mr Naqvi’s decisions on these matters would be implemented and given effect.

1050. Mr Jafar’s case was, in my view, primarily based on the first basis. Even though Mr Naqvi was not formally appointed a *de jure* director of the Funds’ general partners, nevertheless

the conduct of the *de jure* directors of the general partners in permitting him to take important decisions in respect of the limited partnerships businesses and affairs resulted in them granting him actual but implied authority to act on behalf of the general partners. No separate holding out was therefore required or needed to be shown.

1051. I take it to be in relation to the case formulated in this way that Mr Jafar submitted that the law was that where an individual is the nerve centre of an entity their knowledge and acts are those of the entity. He cited, as I have noted Lord Denning MR in *H.L. Bolton (Engineering) Co. Ltd v T.J. Graham & Sons* at page 171 and *Jafari-Fini v Skillglass Ltd* at [98]. I would, though, note that it does not seem to me that the dicta in those cases is very helpful. They do not deal directly with the position of *de facto* directors. For example, in *H.L. Bolton* Lord Denning had said that “*A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such.*”

1052. Turning and dealing now with the first issue, namely the pleading point. In my view, Mr Jafar was right to say that the facts upon which his claim that Mr Naqvi was a *de facto* director of the Funds’ general partners was based were adequately pleaded and that it was not necessary for him also to plead that as a result of these facts Mr Naqvi was to be treated as a *de facto* director.

1053. As I have noted [9A] of the RRASOC contained the averments regarding Mr Naqvi’s relationship with the Funds’ general partners (AGHF GP, GHF and GP8) and [32(4)] of the RRASOC contained the averment that Mr Naqvi was authorised to act and did act for the AGHF and Fund IV, in particular because he held express or implied authority to act on behalf of the Funds’ general partners. [32(4)] (h)(iii)] also stated that the “*directors of the*

AGHF” knew when Mr Naqvi sent his email dated 27 September 2017 he was speaking on behalf of the AGHF as its de facto director.

1054. While not being at all points as precise and clear as the pleading could have been it seems to me that the pleading made clear that Mr Jafar was claiming, and asserted that, Mr Naqvi was taking decisions when acting, and acted, on behalf of the Funds and did so by acting through and on behalf of the Funds’ general partners. It is true that the averment in [32(4)] does not spell out that Mr Naqvi’s decision making with respect to the business and assets of the Funds resulted in him being treated as a *de facto* director of the Funds’ general partners and that [9A] is framed in terms of and focusses on the attitude and actions of the *de jure* directors of AGHF GP, GHF and GP8, who are said to have regarded Mr Naqvi as holding the highest form of power to control these entities and to have delegated their powers to him. But this is just another way of saying that Mr Naqvi was the decision maker in relation to the operations and affairs of the Funds that fell to be decided and his power and authority to make decisions on behalf of the general partners, and through them on behalf of the Funds, was recognised and given effect by the de jure directors.

1055. It is also true of course that ADV 1 was the corporate director of AGHF GP so the question arises as to whether Mr Jafar needed to say and was saying that Mr Naqvi was a *de facto* director of ADV 1 in order to fit in with the corporate governance structure for GHF and to establish that Mr Naqvi was able to act for AGHF GP. But I do not think that this was necessary. Mr Jafar’s claim, somewhat loosely formulated but clear enough, was that Mr Naqvi took key decisions with respect to the business and affairs of the Funds and that those individuals who were de jure directors of the relevant entities (including the *de jure* directors of the corporate director of one of the general partners) that could create partnership liabilities and deal with the assets of the Funds (namely the Funds’ general partners) treated his decisions as binding and put his decisions into effect (and permitted Mr Naqvi to make such decisions). In this way, Mr Jafar’s claim covered the *de jure* directors of ADV 1, the sole director of AGHF GP, namely Mr Lakhani, Mr Dave, Mr Siddique and Mr Zikar.

1056. There was no need for Mr Jafar to plead that Mr Naqvi was to be treated as a *de facto* director of the general partners. The designation of a person as a *de facto* director involves a legal characterisation derived from the established facts. It involves a point of law and the application of a legal principle, namely that someone who on the facts is shown in substance to have assumed to act as a director or exercised the powers and functions of a director, having regard to the relevant factors identified by HHJ Pelling in *Energetics Holdings* and Judge Hodge in *Re MSD Cash and Carry*. If a person is, as a matter of law, treated as a *de facto* director certainly legal effects and consequences follow. It seems to me that in these circumstances, GCR O.18, r.11 applies so that while Mr Jafar was permitted to raise the issue of Mr Naqvi's characterisation as a matter of law as a *de facto* director he was not required to do so.

1057. Dealing with the second and substantive issue, the key issues are, put in summary form whether (a) Mr Naqvi undertook functions in relation to the business and affairs of the AGHF and Fund IV which could properly only be discharged by a director of the Funds' general partners and participated in directing the business and affairs of the limited partnerships on behalf of and for the general partners on an equal footing with the *de jure* directors, so as to have exercised real influence and (b) was authorised and permitted to do so by the *de jure* directors of the Funds' general partners so as to constitute an implied actual authority so to act.

1058. Having carefully considered the pleaded examples and the evidence adduced, which I have summarised and reviewed in some detail above, I am satisfied that these requirements are met. Looking at what the evidence shows Mr Naqvi did, and the cumulative effect of his activities, in the months leading up and at the time that the Loans were advanced, it is clear that he took important decisions in relation to the business, affairs and assets of the Funds which were of a kind that, subject to the caveat mentioned below, only a director of the general partners could take over a wide area of the Funds' business and financial affairs and that the *de jure* directors of AGHF GP and GP8 (and GFH) sought out his instructions and decisions, consented to his acting as decision maker and implemented, put into effect and followed his decisions and instructions such that they are to be taken as having authorised

and assented to him being the senior decision maker (such that he not only took the decisions but his approval was required) for important decisions relating in particular to fund raising from investors, including the issuing of drawdown notices to investors (for both the AGHF and Fund IV); the management and disbursement of the Funds' cash held in the general partners limited partnership bank accounts including the making of payments from these accounts to other Abraaj entities and in relation to payments to investors (in both the AGHF and Fund IV); and the distribution of important reports to investors and to the preparation of financial statements including in relation to the accounting year end for Fund IV.

1059. There is also evidence of Mr Naqvi's decision making (made in the same circumstances and on the same basis as I have just described) extending to important fund raising for the Funds including the borrowing of loans:

- (a). In some cases, the borrower was one of the Funds' general partners. Thus the loan from Air Arabia documented in a short two page agreement dated 21 June 2017 was made to and borrowed by AGHF GP (with a personal guarantee from Mr Naqvi). The same arrangement was followed for the loan from Air Arabia dated 4 December 2017. Both of these loans are described in [13] of the RRASOC and then referred to and relied on at [32(f)] of the RRASOC as being loans arranged by Mr Naqvi. No specific documents are referred to which show Mr Naqvi giving instructions in relation to these loans but Mr Jafar asserted and I accept that it can be inferred from the other evidence as to Mr Naqvi's decision making in relation to fund raising (in particular for the purpose of covering the Funds' cash shortfalls) that he would have been the key or one of the key decision makers that arranged and authorised this borrowing.
- (b). In other cases, the Funds' general partners were not the direct borrowers. In these cases, Mr Naqvi was making decisions as to how and from whom the monies would be obtained but the funds were being raised and borrowed from the third party lenders by other Abraaj entities. The decisions taken on behalf of and by the Funds' general partners were in relation to their receiving funds from those other, or different, Abraaj entities. The decision making on behalf of the Funds related to their agreement to

borrow, if funds were received as loans, from other Abraaj entities. While the borrowing from and loans made by the independent third parties could be said in a broad commercial sense to involve raising loans for the ultimate benefit of and use by the Funds' general partners for limited partnership purposes, formally and as a matter of law the involvement of the general partners was as a counterparty to a loan or other funding arrangement with another Abraaj entity. This was the position in relation to the 2016 Air Arabia Loan (where Menasa Capital was the borrower), as the Fund Parties submitted. There has been no suggestion that the borrowers used should be regarded as nominees for the general partners or that the interposition of another Abraaj entity as a borrower was a sham. In some cases, including the 2016 Air Arabia Loan, the proceeds of the loans were paid, and stated in the loan documents to be payable, directly to the accounts of the general partners. This would involve the general partner appearing on the face of the documents to which the third party lenders were signatories and to that extent having a direct relationship with those third parties but where the other Abraaj entity was clearly identified as the only obligor and only party liable to repay the loan, I do not see that this would change the legal structure and legal analysis. In the case of the 2016 Air Arabia Loan, for example, it was made clear that the loan proceeds were being transferred to AGHF GP from Menasa Capital by way of an "*onward transfer*" on the instructions of Menasa Capital, thereby making it clear that the borrowing from Air Arabia was only by Menasa Capital.

1060. The caveat I have just mentioned arises because the important decisions taken and instructions given by Mr Naqvi (insofar as the instructions were given to the *de jure* directors of AIML) could be treated and characterised as having been taken by Mr Naqvi as a director of AIML with the approval of the other AIML directors, on behalf of AIML as manager of the Funds. Ultimately, the characterisation of Mr Naqvi's actions will depend on the facts of each transaction and the surrounding context and circumstances. But where there is no clear indication in a particular case which indicates whether Mr Naqvi was purporting to take decisions for the general partners by acting as a director of AIML or as a *de facto* director of the general partners, he could have been acting in either or indeed both capacities. Ultimately, it does not much matter for the purpose of Mr Jafar's claim whether Mr Naqvi's

deceit is attributed to the Funds' general partners via AIML or directly by Mr Naqvi being treated as acting on behalf of the general partners. I can see that since AIML was given the main management role with respect to the Funds' financial and business activities in a case where there is no sufficient basis to decide which of the two capacities he was acting in it would make sense to conclude that he was acting on behalf of AIML. But, as I say, this seems to be a distinction without any consequences for the outcome of Mr Jafar's attribution claim.

Was Mr Naqvi a shadow director of the Funds' general partners?

1061. In view of the findings and decision I have already made, it is unnecessary for me to consider whether Mr Naqvi was also a shadow director. I would just say this. I agree with the Fund Parties that the designation of a person as a shadow director is only relevant where there is a claim which is applied by statute to shadow directors. The term is a statutory term which results, where the Companies Act says so, in certain consequences as set out in that Act. The mere fact that someone is designated and characterised as a shadow director does not of itself have legal consequences beyond those provided for by statute. This is subject to an important qualification. Someone who acts in a manner that satisfied the statutory definition of a shadow director may still be treated as a director for some purposes. Where a person gives specific directions and instructions to the de jure directors of an entity and they are accustomed to acting in accordance with them, he may be and be treated as a decision maker himself with respect to particular actions and transactions. In these circumstances, assuming that the decisions relate to board level matters and are of a kind that only directors may take, the person concerned is exercising the decision making powers of a director and is to be treated also as a de facto director, and subject to the duties and treated as having the same powers as a de jure director (in relation to the matters in relation to which he acts). He will be an agent of the relevant company or corporate entity. If such a person truly acts in the shadows out of sight of third parties he will be a de facto director who is not held out to third parties as having the authority to act for and bind the company or corporate entity. Such a shadow director is then a case of a de facto director without any holding out. But not every shadow director will do so since some may exercise influence more generally without

reference to particular actions or transactions so that they cannot be treated as having taken decisions on particular action points so as to be exercising the decision-making powers of a director.

Was Mr Naqvi the controlling or directing mind and will of the Funds' general partners?

1062. Since I have held that Mr Naqvi was as a director of AIML with the assent of the other AIML directors, and also *de facto* director of the general partners of the Funds acting and authorised by the general partners' *de jure* directors to act on behalf of the general partners in relation to limited partnership business, so that his representations and deceit, *if* he was acting in either capacity when negotiating the Loans, would be capable of being attributed to the general partners and give rise to a partnership liability owing by the general partners, it is also unnecessary to analyse in detail the alternative claim made by Mr Jafar that Mr Naqvi was also the directing mind and will of the general partners of the Funds. But I will address the parties' submissions on this issue briefly.

1063. I am mindful of the fact that Lord Hoffmann downplayed the importance of the directing mind and will test in *Meridian* explaining it (at [1995] 2 AC 500 at 511) simply as a special rule of attribution fashioned for the particular statute in *Lennard's Carrying Co* so that, as a matter of principle, it should not be regarded as establishing a separate and distinct basis for attribution. I also note that the judgment of Justice Clifford in *Weaverling*, relied on by Mr Jafar in his submissions on the controlling mind and will ground, makes clear that in a case such as the present case where the *de jure* directors allow another person to take decisions and act on behalf of a company (in *Weaverling* the *de jure* directors had allowed Mr Peterson to act on behalf of the company in relation to redemption payments, such that they had in substance delegated to him the power to make such payments to Mr Peterson) there is a substantial overlap between the concepts of *de facto* director, delegation and actual authority.

1064. Having said that, cases after *Meridian* have continued to use the directing mind and will terminology. The Court of Appeal in *AHAB CICA* applied the concept of the directing mind and will or, using Lord Walker's term, the relevant responsible director, and held that it had

to be considered in relation to the particular activities relied on. As Lord Sumption said in *Bilta (UK) Ltd (in liquidation) v Nazir* [2016] AC 1 (in a passage from his judgment quoted in *AHAB CICA*) (my underlining):

“67. *The question what persons are to be so far identified with a company that their state of mind will be attributed to it does not admit of a single answer ... The primary rule of attribution is that a company must necessarily have attributed to it the state of mind of its directing organ under its constitution, i.e. the board of directors acting as such or for some purposes the general body of shareholders. Lord Hoffmann, delivering the advice of the Privy Council, observed that the primary rule of attribution together with the principles of agency and vicarious liability would ordinarily suffice to determine the company’s rights and obligations. However, they would not suffice where the relevant rule of law required that some state of mind should be that of the company itself...*

68. *A modern illustration of the attribution of knowledge to a company on the basis that its agent was its directing mind and will for all purposes is Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, where the Privy Council was concerned with the knowledge required to make a company liable as constructive trustee on the footing of knowing assistance in a dishonest breach of trust. The defendants were a one-man company, BLT, and the one man, Mr Tan. At pp392–393, Lord Nicholls of Birkenhead, delivering the advice of the Board, observed that Mr Tan had known the relevant facts and was therefore liable. ‘By the same token, and for good measure, BLT also acted dishonestly. [Mr Tan] was the company, and his state of mind is to be imputed to the company.’ On the other hand, El Ajou v Dollar Land Holdings plc... did not concern a one-man company. The issue was whether knowledge of the origin of funds received for investment by Dollar Land Holdings, a public company, could be imputed to it so as to found a liability to account as a constructive trustee on the footing of knowing receipt. Lord Hoffmann, delivering the leading judgment of the Court of Appeal and applying the principles which he would later explain in Meridian Global, held that the company was fixed with the knowledge of one Mr. Ferdman, its part-time chairman and a non-executive director, because he had acted as its directing mind and will for the particular purpose of arranging its receipt of the tainted funds.*”

1065. The question is whether Mr Naqvi acted as the directing mind and will of the general partners for the particular purpose of arranging loans from third parties for the purpose of the Funds’ business and activities. Did he act as the key decision maker for the general partners and the Funds for this purpose? Did he manage and control the actions of the general partners in relation to the raising of loans and other monies for the Funds? It seems to me that it follows

from the findings that I have already made concerning Mr Naqvi's control of decision making in respect of the business and operations of the Funds and of *de jure* directors of the general partners of AGHF GP, GP8 and GHF, and that those *de jure* directors sought his approval for and followed his instructions on important issues relating to the Funds, including with respect to the borrowing of loans and fund raising, that the answers to these questions is yes. Mr Naqvi is also to be treated as the directing mind and will of the Funds' general partners in relation to such fund raising and the conduct of their businesses and affairs.

Did Mr Naqvi have ostensible authority to act for and bind the Funds' general partners in relation to borrowing loans for the Funds' business?

1066. As I have noted, ostensible authority arises where a principal holds out a person as their authorised agent and then in reliance on that holding out by the principal third parties treat the putative agent as authorised to act on behalf of the principal. To establish that Mr Naqvi had ostensible authority to act on behalf of the Funds' general partners (and the Funds) to negotiate and borrow loans for the Funds' business Mr Jafar needed to show a communication by and from (made on behalf of) those general partners representing that Mr Naqvi had authority to act on their behalf and reliance on that representation by Mr Jafar.

1067. I regard Mr Jafar's case based on ostensible authority as a makeweight and an afterthought, that is inadequately pleaded. As the GHF Parties noted, it was only introduced by amendment and permission to make the plea was only granted on condition that Mr Jafar relied on no facts other than those already pleaded. As a result, Mr Jafar's case faced the challenge of having to be based on and fitted into the facts already pleaded in relation to the other grounds relied on by Mr Jafar, in particular actual and implied authority.

1068. The plea of ostensible authority is set out in [32(4)] of the RRASOC where it was averred that Mr Naqvi was *expressly, impliedly or ostensibly* authorised on behalf of each of the AGHF and Fund IV to make the representations contained in the Overarching Message and that such authority arose (a) under the Funds' constitutional arrangements as particularised

in [32] and (b) because the directors and/or other officers or employees or agents of AGHF GP, GHF and GP8 habitually sought instructions or directions from Mr Naqvi and Mr Naqvi gave instructions and directions as to the financial affairs and management operations of the Funds. The constitutional arrangements particularised in [32] of the RRASOC included in the particulars set out in [32(4)] a reference to Mr Naqvi as the Fund Head in the AGHF PPM (and the AGHF LPA) and the reference to Mr Naqvi as a key person in the AGHF LPA and the Fund IV LPA (as well as Mr Naqvi's position as chair of the GIC with a right of veto).

1069. In his written and oral submissions Mr Jafar relied primarily on the PPMs and LPAs as containing and constituting the holding out and representation as to Mr Naqvi's authority to act for the Funds. As I have noted, the case was mainly put on the basis that the PPMs and other documentation relating to the Funds referred to Mr Naqvi as the key manager and decision maker and this constituted a holding out and representation to the whole world as to Mr Naqvi's role. Mr Jafar also submitted, as Lord Falconer put it during his oral closing submissions, that this representation had "*percolated through*" to Mr Jafar who like everyone else regarded Mr Naqvi as authorised to speak on behalf of the Funds and every other Abraaj entity.

1070. The Fund Parties argued that the pleaded facts did not include a holding out by the Funds' general partners or by the Funds. While the pleading could be clearer I consider this criticism to be unfounded. As I have noted, [32(4)] of the RRASOC does aver that Mr Naqvi had ostensible authority to act for each of the AGHF and Fund IV (and as I have already held this is to be treated as include the Funds' general partners acting with respect to the business and assets of the limited partnerships) by reason of what is said about his role and position in the AGHF PPM and the Fund LPAs and because of how he was treated and held out by the directors of the Funds' general partners.

1071. What the RRASOC does not plead explicitly and clearly is that Mr Jafar read or was aware of and relied on these constitutional arrangements. [36]-[38] of the RRASOC aver that Mr Jafar relied on the Overarching Message but there is no averment that Mr Jafar relied on the

holding out said to have been constituted and the representation as to Mr Jafar's authority said to have been by the documents referred to. This seems to me to be a serious deficiency and omission, such that a critical element of the case based on ostensible authority arising from the constitutional arrangements (documents) has not been pleaded, so that case fails.

1072. Even if that is wrong, I agree with the Fund Parties that Mr Jafar has failed to make out a case of ostensible authority based on the pleaded constitutional arrangements. As the GHF Parties submitted the AGHF PPM and the LPAs are documents internal to the Funds and their investors and in some cases were confidential (for example the terms of the relevant LPAs). There was no evidence as to the extent to and manner in which the AGHF PPM or the Funds' LPAs was made public or publicly available and so it is wholly unclear and not established how they would have been generally available. Mr Jafar may well have seen these documents in his capacity as an investor in AH or as a director of AH but this is not pleaded and there is no direct evidence to this effect. So there was no evidence establishing the communication of the contents of these documents to the public or to Mr Jafar so as to establish the required holding out of Mr Naqvi as a person with authority to act for the Funds' general partners and the Funds themselves.

1073. As regards Mr Jafar's case of ostensible authority based on representations (statements) made expressly or impliedly or by words or conduct (constituting a holding out) as to Mr Naqvi's authority to act for the Funds' general partners (and to create liabilities that were limited partnership liabilities) in relation to borrowing loans, made by the *de jure* directors of the Funds' general partners, it seems to me that it fails because of particulars and specifics. Mr Jafar does not plead facts establishing precisely what and when statements (representations) were made to him (or a class of representees of which he was part) or how and when he came to be aware of and rely on them. [32(4)] of the RRASOC does not particularise the statements or conduct (acts) of those *de jure* directors which constituted or from which could be implied representations as to Mr Naqvi's authority *which Mr Jafar says he was aware of or were directed to him* nor does that sub-paragraph contain an averment that Mr Jafar relied on the particular statements or conduct constituting the holding said to have been constituted by those representations or that conduct. The case is based on a wide

range of facts that are said to show (and I have found that the facts do show) that the *de jure* directors treated Mr Naqvi as having, and impliedly gave Mr Naqvi, authority to act as a director of the Funds' general partners and to take decisions in respect of the business but Mr Jafar has not linked with sufficient particularity those actions of (or statements made by) the *de jure* directors (from which representations as to Mr Naqvi's authority to take decisions on limited partnership matters) to him so as to establish a holding out to him by those directors or reliance by him on such statements or conduct. It seems to me that this linking of Mr Jafar to and showing how and when reliance was placed by him on at least some specific statements and acts/conduct of the *de jure* directors is required. It is one thing to say that by appointing a person as a *de jure* director a company held him out as having authority to act for the company and bind it or by stating in public documents that a person has such authority but where the holding out is, as in this case, based on representations as to authority derived from the statements made or conduct of *de jure* directors the plaintiff must show that that these statements were or conduct was sufficiently directed to them and relied on by them. It is not sufficient, as Mr Jafar does, to say in a general way that the *de jure* directors acted in their conduct of the business of the partnerships and in relation to other third parties on the basis that Mr Naqvi was authorised to take decisions and act on limited partnership business.

Ratification

1074. As I have noted, at [33(3)] of the RRASOC Mr Jafar pleaded that “*the Fund Directors, by permitting the monies derived from the [Loans] to be paid to [GHF] and GP8's accounts..., ratified Mr Naqvi's acts and/or conferred retrospective authority on him to act on behalf of the [AGHF] and [Fund IV] with respect to the procuring of the [Loans].*”

1075. This plea was also introduced by a pleading amendment.

1076. It is common ground that Mr Jafar must show (a) that at the time of the alleged ratification, the general partners of the Funds (through their directors including the directors of ADV 1) had full knowledge of all the material circumstances and (b) that the words and conduct

relied on as the basis for the putative ratification are unequivocal evidence that the general partners adopted or recognised the relevant act as authorised or binding. The words and conduct must not be such that they could be accounted for by other interpretations.

1077. As regards the first requirement, Mr Jafar, as I have already noted, submitted that the evidence showed, or that it could be inferred from the evidence, that the *de jure* directors (of GP8/ADV 1 and AGHF GP/GHF) knew that when Mr Naqvi approached third parties like Mr Jafar to procure funding for the AGHF and Fund IV he was likely to deceive them into advancing the loans. Mr Jafar argued that the contemporaneous documents showed that Mr Naqvi carefully discussed his plans with the Inner Circle. He said that in light of the urgent need for funds to be raised, and given that deception had been deployed in the period immediately preceding Mr Naqvi's approach to Mr Jafar, including to procure the Indorama SPA and the Schmidheiny SPA it was to be inferred that each of Mr Lakhani, Mr Siddique, Mr Dave and Mr Abdel-Wadood knew that Mr Naqvi would use deceit to procure monies from Mr Jafar. The Inner Circle knew that the AH audited financial statements (which were false and misleading) were habitually presented to banks to obtain funding and Mr Naqvi had discussed in detail how to deal with the December 2017 crisis with his Inner Circle. They were, he said, in regular communication throughout December 2017 including, for example, the huddle on 24 December 2017. Mr Jafar submitted that given the clear pattern of evidence showing that Mr Naqvi and the Inner Circle discussed plans, including plans to procure funding by deceit it was clear that he must have discussed with them his plan to get monies from Mr Jafar (this was he said rendered inescapable by an email from Mr Naqvi dated 23 December 2017 in which he provided Mr Siddique, Mr Dave and Mr Lakhani with the updated cashflow spreadsheet showing US\$100 million coming in from BOS). There was, Mr Jafar said, clear evidence of the Inner Circle being involved in or otherwise having knowledge of the relevant events (which I have referred to above). Mr Jafar also said that it could be inferred from the evidence that when the Loans were paid over to AH and AIML these individuals must have known that such substantial sums of money could only have been obtained by way of loans on the basis of deceit as to the financial soundness of Abraaj entities. There was no reason for them to believe he had departed from what had become standard operating procedure. As I have said, Mr Jafar argued that since none of the relevant

de jure directors had given witness evidence, there was no evidence to contradict his case based on these documents and inferences.

1078. As I have also noted, the Fund Parties argued that Mr Jafar's evidential basis for his assertion that the *de jure* directors of the Funds' general partners (including the directors of ADV 1) were fully informed as to the deceit or the circumstances giving rise to the deceit committed by Mr Naqvi on Mr Jafar was insufficient. They argued that there was no evidence that these directors had any knowledge of any of the relevant circumstances, still less full knowledge of all material circumstances, which was necessary for there to have been a properly informed and therefore effective ratification by them of Mr Naqvi's acts after the event. In particular the facts pleaded were insufficient to show that the *de jure* directors of the Funds' general partners, whether through the directors of ADV 1 or otherwise, knew anything of the circumstances as regards the entering into of the Loans and the negotiations pursuant to which they were concluded, let alone that Mr Naqvi had made the Representations.

1079. It seems to me that Mr Jafar is right to say that there is sufficient evidence to justify the inference that the *de jure* directors of the general partners of the Funds, including ADV 1, were aware that Mr Naqvi was engaged in (and perhaps thought that he had been forced by desperate circumstances into) a process of fundraising based on deliberate misrepresentations and that the approach to Mr Jafar was another step in that process which was likely to have involved Mr Naqvi being prepared to misrepresent and fail to disclose to Mr Jafar relevant and important facts and matters. But the absence of evidence from the *de jure* directors is not really of assistance to Mr Jafar, who bears the burden of proof on this issue and who must establish that these *de jure* directors had sufficient information as to the circumstances giving rise to the (alleged) deception of Mr Jafar so that when they dealt with the funds received from AIML and AH they knew that the Loans had been procured by fraud and had decided to take the benefit of and authorise Mr Naqvi's actions. Of course I have already held that Mr Jafar was not in fact deceived but if I am wrong on that and assuming that Mr Naqvi had made the Reinvestment Representation and the Overarching Message and that Mr Jafar relied on them and was induced to make the Loans and that (a point I deal with shortly) Mr Naqvi can be treated as having negotiated the Loans in his capacity as a party

acting for and authorised by the Funds' general partners, I am prepared to accept that an inference can properly be made from the evidence that these *de jure* directors, even though Mr Naqvi may not have kept them fully in the loop, knew enough of the related and relevant circumstances surrounding the negotiations with Mr Jafar to make them aware that the Loans had been, or were probably, obtained improperly and as a result of some kind of deception of Mr Jafar, related to and adopting elements of the process that Mr Naqvi had used before.

1080. If these assumptions are made, it seems to me that the second requirement would be satisfied.

By accepting money from AIML and AH, which on this basis was obtained as a result of Mr Naqvi's actions (including his fraudulent misrepresentations) as an agent for or as a party acting on behalf of and so as to bind the Funds' general partners, being aware of the fact that the Loans were or were probably improperly procured and were or were probably the result of deliberate misrepresentations, the *de jure* directors would be adopting the Loan transactions and Mr Naqvi's actions on their behalf to procure the Loans since the Funds' general partners (and the limited partnerships) were acting on the basis that they were entitled to the Loan advances funds as assets of Funds' general partners (and assets of the limited partnerships).

1081. However, I agree with the Fund Parties that if and to the extent that the Loans are treated, as in my view they are to be treated, as Loans to AIML and AH negotiated by Mr Naqvi in his capacity as a director of AIML and AH for their purposes (albeit that the Loan proceeds would subsequently and rapidly be paid on to other Abraaj entities) the mere receipt by the Funds' general partners of payments from AIML and AH which are related to the Loan advances would not constitute the adoption of the Loans and Mr Naqvi's representations made on behalf of AIML and AH. As the GHF Parties said it is a *non-sequitur* to suggest that the mere receipt of money necessarily entails the adoption of representations made in order to induce a loan being made to a third party.

Vicarious liability

1082. At [33(2)] of the RRASOC Mr Jafar averred that “*the actions of Mr Naqvi in conveying the Overarching Message were so closely connected with the role that Mr Naqvi performed on behalf of each of [the AGHF] and [Fund IV] that each of them ought fairly to be held vicariously liable in respect of his actions for the reasons pleaded in paragraphs [32(3)-(5)] above.*”

1083. Accordingly, the factual basis for the plea of vicarious liability was the same as that relied on in support of Mr Jafar’s claim that Mr Naqvi had authority and was exercising that authority, to act on behalf of AIML and the Funds’ general partners when negotiating and arranging the Loans.

1084. Mr Jafar argued, as I have noted, that in this case AGHF GP and GP8 were vicariously liable for Mr Naqvi’s torts. The torts were committed by Mr Naqvi acting in the course of his actual or ostensible authority. The evidence demonstrated that Mr Naqvi was on an objective analysis plainly acting in the course of his broad and unfettered authority when he procured the Loans by deceit.

1085. As has been noted above, vicarious liability is to be distinguished from attribution. In cases of vicarious liability, the principal or employer will be held liable for the completed wrong of its agent/employee. There is no need to show that the principal or employer did anything wrong. There is no need to attribute to the principal or employer the actions or state of mind of the agent/employee. It is a form of strict liability without fault and it arises by operation of a series of rules which determine when (as a matter of policy) it is right that the principal or employer should be held liable for its agent’s or employee’s wrong (see *Civil Fraud, Law, Practice and Procedure*, 2018, at [17-006] and the speech of Lord Nicholls in *Dubai Aluminium* quoted above - although I note, but do not need to discuss here, the review of the development of the doctrine of vicarious liability as applied to tort cases by Rachel Leow in chapter 4 of *Corporate Attribution in Private Law* (Hart, 2022) in which she argues that the

vicarious liability doctrine in tort law has always involved and included rules attributing acts and that the approach to the application of the doctrine changed in 1956).

1086. There was no material dispute as to the applicable law but it is worth noting the following extracts from the judgment of the English Court of Appeal (Sir Terence Etherton MR, Flaux LJ and Carr J) in *Hockley Mint* which set out and confirm the basic principles. I set out below the relevant passages from the judgment (underlining added). The Court of Appeal determined that the *Armagas* principle had not been replaced or supplemented by the law as laid down in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 and *Dubai Aluminium*. The trial judge had taken the view that the relevant tests for determining whether a principal was vicariously liable for his agent's deceit was whether it was just and fair for liability to be imposed on the principal and whether there was a sufficiently close connection between the agent's wrongdoing and the class of acts which the agent was employed to perform. But the Court of Appeal observed that *Armagas* was authority binding on the court and that the judge accordingly had applied the wrong legal test:

- “48. The *Armagas* case is binding authority of the House of Lords that, where a claimant has suffered loss in reliance on the deceit of an agent, the principal is vicariously liable if, but only if, the deceitful conduct of the agent was within his or her actual or ostensible authority.
53. Lord Keith held (at p 783C) that Mr Magelssen was not authorised to enter into the three-year charterparty, to do so was not within the usual authority of an employee holding his position, and *Armagas* knew it, and *Mundogas* had done nothing to represent that he was authorised to do so. Accordingly, Lord Keith concluded (at p 783E) that *Mundogas* was not vicariously liable for Mr Magelssen's deceit.
54. The judge appears to have extracted from the *Armagas* case a much wider principle based upon Lord Keith's statement (at p 782H) quoted above that “At the end of the day the question is whether the circumstances under which a servant has made the fraudulent misrepresentation which has caused loss to an innocent party contracting with him are such as to make it just for the employer to bear the loss.”
55. Adopting that approach, the judge said (at para 43) that it was just and fair for liability to be imposed upon Mr Ramsden's principal, Mr Winter, in all the circumstances of the case since Mr Winter, by authorising Mr Ramsden to enter

into BNP 1, BNP 2 and BNP 3 and to finalise arrangements for cash discounts, had put Mr Ramsden in a position where he could commit the wrong.

63. The analysis of the judge did not identify or address the essential ingredients of vicarious liability of a principal for the deceit of his agent as required by the Armagas case: a holding out or representation by the principal to the claimant, intended to be and in fact acted upon by the claimant, that the agent had authority to do what he or she did, including acts falling within the usual scope of the agent's ostensible authority. Instead, he applied a broad principle of fairness and a test of "sufficiently close connection" derived from the Lister case [2002] 1 AC 215 and the Dubai Aluminium case [2003] 2 AC 366. Those cases, however, did not concern a reliance-based tort, and were not about the ostensible authority of an agent or employee as a result of a holding out by the principal or employer. They concerned the ordinary course of employment (in the Lister case) and the ordinary course of a firm's business (in the Dubai Aluminium case). That is why the Armagas case was not mentioned in any of the speeches in either case, and why Lord Nicholls in the Dubai Aluminium case said (at para 30) that in that case and in the other cases he cited there was no question of reliance or holding out and (at para 28) that he left aside cases where the wronged party was defrauded by an employee acting within the scope of his apparent authority. In short, the first ground of appeal is correct in stating that the judge applied the wrong test.
64. Mr Zaman sought to add a gloss to the Armagas test to the effect that a principal will always be liable for the dishonesty of his or her agent where the agent has acted with the intention of benefiting the principal. In that connection, Mr Zaman emphasised that Mr Winter was intended to benefit and did benefit from BNP 1, BNP 2 and especially BNP 3. He relied on a statement of Lord Keith in the Armagas case, and a statement of Willes J in Barwick v English Joint Stock Bank LR 2 Ex 259 mentioned by Lord Macnaghten in the Lloyd case [1912] AC 716 and by Lord Millett in the Lister case, as well as on a further statement by Lord Macnaghten in the Lloyd case about a principal's inability to approbate and reprobate.
65. We do not accept Mr Zaman's gloss. He relied on the following statement of Lord Keith in the Armagas case (at p 780B–C) introducing Lord Keith's analysis of the relevant principles: "Dishonest conduct perpetrated with no intention of benefiting the employer but solely with that of procuring a personal gain or advantage to the employee is governed, in the field of vicarious liability, by a set of principles and a line of authority of peculiar application."
66. The principle or test laid down in the Armagas case [1986] AC 717 is to be found at pp 782E and 782H–783B at the end of Lord Keith's analysis, as we have said and set out above. Mr Zaman's gloss does not form part of it. It is in any event clear from the facts of the Armagas case that the gloss cannot be correct since Mr Magelssen's deceit in that case was for the purpose of securing a sale of his

principal's ship in a transaction that potentially would give a substantial profit to his principal but it was nevertheless held that there was no vicarious liability. It seems probable that Lord Keith's words—"Dishonest conduct perpetrated with no intention of benefiting the employer but solely with that of procuring a personal gain or advantage to the employee"—in the passage relied upon by Mr Zaman were intended to reflect the facts of the Armagas case itself since the three-year charterparty (rather than a one-year charterparty) was not to Mundogas's advantage but was procured by Mr Magelssen with deceit in return for the bribe offered to him by Mr Johannesen.

69. *We do not accept that either Lord Macnaghten or Lord Millett was laying down a definitive statement of law that a principal will always be vicariously liable for the wrongdoing of his or her agent where the wrongdoing was committed for the benefit of the principal, regardless of the circumstances and even in cases of deceit. Those were not the facts of either the Lloyd or the Lister cases. Furthermore, as we have said, the Lloyd case was decided at an early stage in the development of the principles of the vicarious liability of a principal for an agent; and in any event the test for the liability of a principal for the deceit of an agent is authoritatively laid down in the Armagas case, which was decided after the Lloyd case and was not cited in the speeches or even in argument in the Lister case.*

1087. Accordingly, the critical requirement to establish the vicarious liability of a principal for the deceit of his agent is that the deceitful conduct of the agent was within his or her actual or ostensible authority. Lord Millett's dictum in *Dubai Aluminium* (at [122]) remains applicable, I think, even in the context of a claim for vicarious liability of a principal for deceit. An act can be within the usual scope of the agent's actual or ostensible authority if the agent was authorised to do acts of the kind, even if not the specific act, in question (my underlining):

"The vicarious liability of an employer does not depend upon the employee's authority to do the particular act which constitutes the wrong. It is sufficient if the employee is authorised to do acts of the kind in question: see Navarro v Moregrand Ltd [1951] 2 TLR 674, 680, per Denning LJ. This is equally true of partners, though it is perhaps less obvious in their case, since the relation between partners is essentially one of agency. An employer may authorise his employee to drive, but he does not authorise him to drive negligently. A firm of solicitors may authorise a partner to draft agreements for a client, but it does not authorise him to draft sham agreements."

1088. It is also well established that an act of an agent within the scope of the agent's actual or ostensible (or apparent) authority does not cease to bind the principal merely because the

agent was acting fraudulently (see Bowstead and Reynolds on Agency, 23 ed., 2024, at [8-062] and 98-063]).

1089. It seems to me that since I have already accepted Mr Jafar's case that Mr Naqvi had actual authority to act on behalf of the Funds' general partners in relation to fund raising for the general partners in relation to the Funds' businesses and activities, it follows that the general partners could be vicariously liable for the liabilities flowing from Mr Naqvi's deceit *if* Mr Naqvi was acting for and on behalf of the general partners when negotiating and arranging the Loans. Mr Naqvi was authorised to do acts of the relevant kind, namely the borrowing of loans by the general partners for the purpose of the Funds' limited partnership activities and businesses. When acting as a director of AIML with the assent and consent of the other AIML directors Mr Naqvi would be AIML's responsible officer for the purpose of the Funds LPAs with authority to cause AIML to exercise its powers as manager to borrow loans needed for the limited partnership activities of the Funds which would be repayable by and binding on the general partners. Alternatively, when acting for the general partners directly, Mr Naqvi had actual implied authority to borrow loans for the general partners which would also make them liable to repay the loans.

1090. On the basis that Mr Naqvi had actual authority to arrange and borrow loans for the Funds' general partners there is no need for there also to be a holding out of Mr Naqvi to third parties of whom Mr Jafar was one and (proof of) reliance by Mr Jafar on that holding out. Accordingly, the difficulties that I have identified with Mr Jafar's case based on ostensible authority do not invalidate his case based on vicarious liability

The hat wearing questions: was Mr Naqvi exercising the powers of AIML, AGHF GP and GP8 (and GHF) when negotiating the Loans? Should the Representations and his deceit be attributed to the Funds' general partners in this case?

1091. I have already discussed and set out my conclusions on this issue in relation to other aspects of this case, in particular in relation to what Mr Jafar, or a reasonable representee in his position would have, understood as to the capacity in which Mr Naqvi was acting, during his negotiations with Mr Jafar in December 2017. But I now need to return to and consider this

issue further in a different context, namely in what capacity in fact was Mr Naqvi acting when negotiating and agreeing to borrow the Loans (although I have already touched on this aspect in my earlier discussion).

1092.[34] of the RRASOC avers that “*In the premises, the Overarching Message and [the Reinvestment Representation] were conveyed by Mr Naqvi for and on behalf of himself and each Defendant [AH, GHF GP, GHF and GP8] ...*”

1093.Mr Jafar submitted, and I accept (I do not think that there was any dispute on this point) that the question of capacity is a question of fact and that the Court is entitled to take into account all of the circumstances of the case when determining whether a person acted in a particular capacity. It was also accepted by all parties, rightly in my view, that it is important for the Court to consider and take into account the context in which the acts or statements to be attributed were made and the purpose for which the attribution is relevant. As Lord Walker said when sitting in the Hong Kong Court of Final Appeal in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* [2104] HKCFA 22 (at [41]) “... *one of the fundamental points to be taken from Meridian is the importance of context ... in any problem of attribution.*” In *Bilta (UK) Ltd (in liquidation) v Nazir* [2016] AC 1 at [41] Lord Mance said that “... *as Lord Hoffmann made clear in Meridian Global the key to any question of attribution is ultimately always to be found in considerations of context and purpose.*” In this case, the applicable rules relating to when corporate entities (AIML and the general partners acting in relation to the limited partnerships’ activities and assets) are to be made liable for acts taken by a person who has assumed or been given decision making powers, and where these powers have been assumed or given in relation to multiple such entities, which entity is the individual to be treated as acting for. The rules to be applied in this case are the primary rules of attribution identified by Lord Hoffmann in *Meridian*, being the corporate constitutions of AIML and the Funds’ general partners (understood and applied in light of the terms of the Funds’ LPAs) and the general rules of attribution arising under the law of agency. It is necessary to connect the act with the individual and corporate entity and where there are multiple corporates, to the appropriate corporate.

1094. Mr Jafar's case as explained by Lord Falconer is that, on the facts of this case Mr Naqvi when speaking to Mr Jafar at the First 20 December 2017 Meeting (and generally in the negotiations leading up to the making of the Loans) made the Representations on behalf of all the Abraaj entities including and in particular on behalf of the Funds.

1095. I took Lord Falconer when referring to (a) all the Abraaj entities, to mean all the entities and partnerships using the Abraaj name and partnerships managed by AIML, and entities which were subsidiaries of or controlled by AH or AIML or their directors or otherwise associated with AH and AIML including those entities treated for the purpose of the consolidated financial statements or otherwise as members of the Abraaj group and (b) when referring to the Funds, to mean the Funds' general partners.

1096. Clearly the key question in this case is whether when Mr Naqvi was negotiating with Mr Jafar for the advance of the Loans, and when he made (assuming he did make) the Reinvestment Representation and the Representations from which the Overarching Message is derived, he was doing so on behalf of the Funds. It seems to me that this means, in light of the findings I have made as to the capacities and basis on which Mr Naqvi was authorised and able to act on behalf of the Funds' general partners, that the question is whether when Mr Naqvi was negotiating with Mr Jafar and when he made the alleged misrepresentations he was conducting limited partnership activities/business and acting in his capacity as a director (or responsible officer) of AIML or *de facto* director of or an agent with actual implied authority to act on behalf of AGHF GP and GP8 for the purpose of borrowing loans to be made to the general partners and used by them in conducting the business and activities of the Funds.

1097. There is, I think, a tension between Mr Jafar's claims that on the one hand Mr Naqvi was acting on behalf of all the Abraaj entities and on the other the Funds (general partners) when making the misrepresentations. This is because there appears to be a different basis for the former claim from the latter claim. Mr Jafar's case that Mr Naqvi made the misrepresentations on behalf of all Abraaj entities is based on the claim that during the First 20 December 2017 Meeting Mr Naqvi referred to the liquidity problems of the Abraaj Group and of seeking the Loans to deal with those problems and for the benefit of the Abraaj Group.

Those for whom Mr Jafar is said to have been acting was not limited to those entities who would be indirect recipient of the Loan advances. But Mr Jafar's case that Mr Naqvi made the misrepresentations on behalf of the Funds was based on the claim that he was in substance acting for the Funds (their general partners) because they needed and were to receive almost immediately and benefit from a substantial part of the sums advanced by Mr Jafar as indirect recipients. It might be said that these cases are incompatible and that the first ground undermines the force and cogency of the second.

1098. But I shall focus on the specific basis on which Mr Jafar based his case that Mr Naqvi was acting for the Funds (their general partners) when negotiating the Loans and making the misrepresentations. Mr Jafar argued that the context and surrounding circumstances, as established by the evidence and inherent probabilities, showed that Mr Naqvi approached Mr Jafar to obtain funds primarily (but he admits not exclusively) to fill the holes in the Funds' balance sheets and needed the loan proceeds to reach and be paid to the Funds' general partners very rapidly after they were advanced. Mr Naqvi when negotiating and having discussions with Mr Jafar was engaged in fundraising and was doing so primarily for the benefit of the Funds. To the extent that he made representations (and committed deceit to obtain the Loans) he did so primarily for the benefit of the Funds. His actions and those misrepresentations must therefore be treated as having been made for the benefit of the general partners of the Funds. The interposition of the Abraaj entities (AIML and possibly AH) who were selected to be the borrowers did not affect this assessment. They were used simply as conduits and as a means to circulate the funds borrowed to the Abraaj entities that needed them. When asking the question what was Mr Naqvi doing and on whose behalf was he was doing it, the Court should conclude that he was fundraising on behalf of the Abraaj entities who would benefit from the fundraising by receiving the loan advances directly and indirectly and attribute his actions and state of mind to all of them and treat all of them at a minimum as liable for Mr Naqvi's deceit. This would result in a number of Abraaj entities (including AIML and AH) as being joint tortfeasors, but this was consistent with the manner in which Mr Naqvi had acted and his multiple roles.

1099. Mr Jafar argued that when making this assessment the Court should not simply focus on what Mr Jafar believed that Mr Naqvi was doing or as to the capacity in which Mr Naqvi was acting. As Lord Falconer said, "*This would allow the fraudster to have his way with the fraud.*" Lord Falconer, as I have mentioned, gave the following example in his oral closing submissions (which I have modified by substituting letters for the names of counsel). If A says to B "*I'm authorised to act on behalf of C, would you (B) lend C US\$1 million*" and B says, "*Of course I would*" but in fact A is acting with D to defraud B and A wants the US\$1 million for D, the fact that B thought that A was acting on behalf of C would not make C liable. Lord Falconer argued that the Court needed to consider all the circumstances and see on whose behalf the representor (fraudster) was really acting. He submitted that it could not be right, as the Fund Parties contended, to treat the misrepresentations as having been made and the fraud as having been committed by the immediate borrowers in a case where those borrowers immediately passed on (and it was always intended by the fraudster that they should pass on) a substantial part (in this case two thirds) of the loan advances to the entities who needed the monies and for whose benefit the loans were really borrowed.

1100. Lord Falconer argued, as I understood his argument, that the availability of other remedies against the indirect recipients of the loan advances was not a good reason for denying the claim in deceit (fraud) against them, and in this case, it appeared that relief based on a claim for knowing receipt was not available under UAE law.

1101. The Fund Parties, as I have noted, rejected this approach. The nature of the negotiations and transactions entered into as a result of those negotiations and the context showed that Mr Naqvi was not exercising and not purporting to exercise any authority (or such authority as he had) to act on behalf of the Funds' general partners when he was negotiating with Mr Jafar in December 2017. He was acting on his own behalf and in his capacity as agent for AIML and AH, the prospective loan counterparties. GP8 and AGHF GP were not seeking to borrow any money from Mr Jafar in December 2017 and were not, and never intended to be, the counterparties to any loans obtained from Mr Jafar. GP8 and Fund IV had not even been mentioned in the relevant December 2017 communications and there was no case or even suggestion that Mr Jafar thought he was negotiating with GP8 (or that Mr Naqvi indicated

that he was acting for GP8). The AGHF was mentioned as needing some (admittedly a significant part) of the loan advances but there was once again no suggestion that Mr Jafar was negotiating with AGHF GP or that Mr Naqvi was acting for AGHF GP. There was no need when having discussions with Mr Jafar for Mr Naqvi to act for, or indicate that he was acting for, AGHF GP or GP8 because the discussions never were about or envisaged and did not result in loans to AGHF GP or GP8. The simple point was that Mr Jafar was not negotiating with AGHF GP or Fund IV in December 2017.

1102. As will be clear from what I have said above on this issue, I agree with the Fund Parties and accept their submissions on this issue. The issue which arises for decision on Mr Jafar's case in deceit is a relatively narrow one. Mr Jafar seeks to attribute Mr Naqvi's fraudulent misrepresentations (assuming that he made the Reinvestment Representation and gave the Overarching Message) to the Funds' general partners. To do so he must establish that Mr Naqvi was acting in his capacity as a representative, and on behalf, of these general partners when he made the fraudulent misrepresentations. The negotiations in which the fraudulent misrepresentations were made were for the purpose of and in relation to the borrowing of loans. There was a complete failure by both Mr Naqvi and Mr Jafar to focus on details and specifics including who the loans being sought were to be made to. But as I have found the Loans were made to AIML, which signed some documents to record its position as a borrower and obligor in respect of the sums advanced (and it was accepted by all parties that the borrowers and obligors in respect of the Loans was either AIML or AIML and AH). The loan advances were paid with Mr Jafar's consent and authority only to AIML and AH. There has been no suggestion from Mr Jafar that the Loans were to be treated as borrowed by the Funds' general partners so that Mr Jafar did not contend that Mr Naqvi was acting in his capacity as a representative, and on behalf, of these Funds' general partners when agreeing who would be liable to repay the Loans. None of the (admittedly very limited) documents in which the terms of the Loans were recorded referred to the Loan advances being paid to the Funds' general partners (the Funds' general partners were not mentioned on the face of the loan documents as they were in relation to some of the Air Arabia loan documents) nor was the manner in which the Loan advances would be routed to the general partners discussed

by Mr Naqvi or articulated. In addition, a substantial part of the Loan advances (33%) were in any event not paid to the Funds' general partners.

1103. In these circumstances it seems to me that Mr Naqvi must be understood as having been conducting the negotiations and seeking the Loans for the Abraaj entities that became the borrowers and entered into a binding legal (contractual) relationship with Mr Jafar. He was negotiating in order to obtain loans and the loans were made only to AIML (and possibly AH). He had to be acting on behalf of AIML (and possibly AH) in order for it (them) to borrow and become liable to repay the Loans. Formal legal relations and liabilities were only intended and needed to be between Mr Jafar and AIML (and AH) and the representations made to obtain and induce the making of the Loans should also be treated as being made on behalf of and by AIML (and AH). Had Mr Naqvi been acting as a representative of and in his capacity (wearing his hat) as a director of AIML for the purpose of exercising its powers to borrow on behalf of the general partners, or as a *de facto* director or agent of the general partners, the Loans would have been made to and the resulting liability would have been an obligation of the general partners. But they were not.

1104. It could be said that Mr Naqvi should be treated as having been simultaneously acting at least for all the Abraaj entities who he intended at the time would or ultimately did receive payments that could be said to have come out of and been made from the Loan Advances, even though only some of them (AIML/AH) would incur any liability to Mr Jafar (there was no suggestion in the discussions with Mr Jafar or from Mr Jafar that anyone else was to incur or assume any liability to him). But I do not consider that such an approach fits with or fairly and properly represents what Mr Naqvi was really doing when negotiating with Mr Jafar. The only Abraaj entities that Mr Naqvi needed to act for were the borrowers. Insofar as legal relations are concerned the only Abraaj entities that needed to enter into legal relations with, and assume obligations to, Mr Jafar were those borrowers. As I have said, the other Abraaj entities who were to receive sums out of the Loan advances only needed to engage and have legal relations with AIML or AH, or the other Abraaj entities to and through whom funds were transferred for further onward payment. There was therefore no need for Mr Naqvi to be acting as the representative of the Funds' general partners. In the context of

representations made to Mr Jafar, in the absence of any oral or written statement addressed to Mr Jafar to the effect that Mr Naqvi was acting as the representative and on behalf of the Funds' general partners, I see no justification or proper basis for concluding that Mr Naqvi was acting otherwise than in his capacity as a representative of (a director with authority to act for) AIML (and AH to the extent that it was agreed to be a borrower).

1105. I appreciate that Mr Jafar's claim is based on fraud and that it is important not to adopt an unduly technical or narrow approach in the face of fraudulent conduct which will assist the fraudster to avoid liability. But equally, in a fraud case it is for Mr Jafar to prove his case, and it is not enough when seeking to characterise what Mr Naqvi was doing and the capacity in which he was acting for Mr Jafar to ignore the core legal relationships that were involved and created by the negotiations for the Loans. In my view it is not sufficient to base the case for attribution on a broad and generalised commercial understanding of what Mr Naqvi was doing when he was negotiating with Mr Jafar. Thus, it is insufficient to say that Mr Naqvi is to be treated as wearing his hat as an AIML director exercising AIML's power as manager or as a de facto director or agent of the general partners merely because commercially the general partners would benefit from the advance of the Loans by being indirect recipients. Lending to treasury companies in large corporate groups is a common practice in circumstances where it is known and understood by the lender that the loan advances are needed by and will be immediately on-lent to other group companies (usually the asset owning and operating companies). But the mere fact that these other group companies will benefit from and rapidly receive payments out of the loan advances does not justify ignoring the separate corporate identity of the borrowers or collapsing the legal structure adopted.

1106. This is illustrated in my view by cases such as *Re Polly Peck International plc* [1996] BCC 486. In that case bonds were issued by PPIF, a Cayman Islands specially incorporated wholly owned subsidiary of PPI, the Polly Peck group holding company. PPIF's obligations in respect of the bonds were guaranteed by PPI. PPIF and PPI had common directors. The proceeds of the bond issues received by PPIF were on-loaned to PPI to enable PPI to use the funds for the group's business activities. PPI went into administration in England and PPIF went into creditors voluntary liquidation in this jurisdiction. When a scheme of arrangement

was proposed in relation to both companies the question arose as to whether PPIF had a claim against PPI for repayment of the on-lending. The bondholders claimed against both PPIF as primary obligor and PPI as guarantor (and were double dipping as a result). The scheme administrators argued that PPIF's claim against PPI should not be admitted since in reality there was only one liability in respect of the bond debt. PPIF when entering into the bonds and incurring a liability to the bondholders was in substance acting only as a nominee or agent for PPI, the ultimate parent company for whose benefit the bond debt had been issued and who would receive the full bond proceeds indirectly by way of the on-lending. Alternatively, the group companies should be regarded as one economic unity with one liability to the bondholders, being owed by PPI. Mr Justice Robert Walker (as he then was) rejected the scheme administrators' claims and refused to ignore the separate corporate identity of the PPIF or treat PPI as the principal and only borrower because the lending was for its commercial benefit. While the main issues in *Polly Peck* were whether PPIF was a nominee or agent for PPI and whether PPIF was a mere façade, and there were no issues of attribution or allegations that the bonds were procured fraudulently, the decision does show that in cases of loans to separate (even specially incorporated single purpose) corporate entities fulfilling a treasury function where the parties understand that the loans will be immediately on-lent to the group holding company or other operating companies the mere fact that of commercial benefit by those indirect recipients does not justify ignoring the separate identity of the borrower or collapsing the corporate structure adopted so as to impose liabilities on those indirect recipients.

1107. Mr Jafar argued that the assessment of attribution in this case, and in particular the determination of which of the different Abraaj entities for whom Mr Naqvi had acted and had authority to act was to be treated as the party he was acting for when speaking to Mr Jafar, should not be influenced by the fact that Mr Jafar might have recourse against the indirect recipients of his Loans pursuant to other causes of action. I accept that the existence of other causes of action against the indirect recipients do not affect the key decision as to who Mr Naqvi is to be treated as having been acting for when negotiating with Mr Jafar and the fact that Mr Jafar has, or could have had, claims against the indirect recipients does not prevent the Court from deciding that Mr Naqvi was in fact acting on their behalf. But it is

worth noting that the way in which Mr Jafar has ended up formulating his claims against the general partners of the Funds has created additional difficulties for him. I say ended up formulating his claim because, as I have mentioned, Mr Jafar's statement of claim has gone through a series of major transformations, in particular with regard to the basis of his claims against the Funds and their general partners. At one point, Mr Jafar based his claims against them on conspiracy. But this was dropped. He also decided (or at least acted so as) not to rescind the agreements to lend the Loans and thereby, at least as a matter of Cayman Islands law, gave up a claim against the indirect recipients on the basis of knowing receipt. As a result, he has been forced to formulate his deceit claim, made in the context of loans made to AIML and possibly AH, on an expanded basis so as to extend to non-parties to the Loans. I accept that in view of the failure by Mr Jafar and Mr Naqvi to focus on the detail gave rise to some uncertainty as to precisely who Mr Naqvi was acting for and therefore, in light of AIML's and AH's insolvent liquidation, a claim based against the solvent Funds on the basis that Mr Naqvi was also acting for the Funds' general partners became necessary and was considered to be viable. But the manner in which Mr Jafar has chosen to bring his claims against the Funds' general partners has, in my view, made him face an uphill struggle and made it more difficult for him to succeed. Of course, it should be said that Mr Jafar's failure to focus on precisely who was to be liable to repay the Loans and to consider whether he wanted anyone other the entities than those selected to be the borrowers to assume responsibility for what he said he was told and the Loans, and his failure to take steps at the time to ensure that all the entities he wanted to be liable including if this was the case the indirect recipients of his Loan advances, has been a major contributing factor to his difficulties (as I have noted above, in my view there were particular reasons for this failure by Mr Jafar, namely his assumption that he could rely on Mr Naqvi's wealth and position to see him right and get him repaid).

1108. I would note one further and final point. There is a difference, but one that I have found to be irrelevant, between the position of the AGHF and Fund IV. Mr Jafar says, and I have found, that Mr Naqvi mentioned that a substantial amount of the funding he needed was required to repay the Uninvested Capital of the AGHF's Healthcare Investors, and this is what two-thirds of the Loans were used for. Mr Jafar accepted, and I have found, that Mr

Naqvi made no mention of GP8 or Fund IV. Accordingly, the case that Mr Naqvi was acting as a representative of the AGHF (in his capacity as an AIML director exercising AIML's powers as a manager of the AGHF or as a *de facto* director (or agent) of AGHF GP) is stronger than the case that he was acting as a representative of Fund IV. There is a direct basis in what Mr Naqvi said to tie what he was doing to the AGHF. On different facts, if Mr Naqvi had agreed that AGHF GP was to guarantee the Loans or give collateral warranties assuming responsibility for any representations made on behalf of the borrowers or acted in a way that showed that he was speaking and assuming responsibility for the indirect recipients of the Loans, so as to bring them into and to establish the need for a legal relationship with Mr Jafar, the position might have been different and I can see that in such a case the claim against AGHF GP (in relation to the AGHF) would have been stronger than the claim against GP8 (in relation to Fund IV).

The UAE law claims

The need to satisfy the UAE law governing attribution - double actionability

1109. The parties are agreed that since the statements on which Mr Jafar's claim was based were made in the UAE the double actionability rule applies to his claim in deceit, subject to a dispute as to whether an exception to the rule applies with respect to the discrete issues of attribution and vicarious liability.

1110. Accordingly, it is common ground that Mr Jafar must establish liability for deceit both under the law of the Cayman Islands and of the UAE, save to the extent that a proper exception to rule applies. It is therefore necessary to consider the applicable UAE law. I discuss the expert evidence as to this below.

1111. The double actionability rule was explained and summarised by Lord Wilberforce in his speech in *Boys v Chaplin* [1971] AC 356 at 384 by reference to the statement of the rule in the then current edition of Dicey and Morris:

“...as stated in Dicey and Morris, Conflict of Laws, 8th ed. (1967), Rule 158, adopting with minor verbal adaptations the “general rule” laid down by the Court of Exchequer Chamber in Phillips v. Eyre, L.R. 6 Q.B. 1. This is as follows:

“An act done in a foreign country is a tort and actionable as such in England, only if it is both

- (1) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and*
- (2) not justifiable, according to the law of the foreign country where it was done.”*

1112. As Lord Justice Longmore said in *Sophocleous v The Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 2167, [2019] QB 549 at [13] (***Sophocleous***) Lord Wilberforce’s speech in *Boys v Chaplin* is regarded as being the authoritative statement of the law: *“It has been recognised that, in spite of the varying ways in which the other Law Lords expressed themselves in Boys v Chaplin, it is the speech of Lord Wilberforce that is to be treated as authoritative: see Armagas Ltd v Mundogas SA (The Ocean Frost) [1986] AC 717, 740 G, per Robert Goff LJ.”*

1113. Mr Jafar submitted that where the double actionability rule applied *“the lex fori is applied to the extent that it is congruent with the rights available under the lex loci delicti”* (*IM Skaugen SE v Man Diesel & Turbo SE* [2016] SGHCR 6, at [93]).

1114. Mr Jafar relied on the exception to double actionability rule. He submitted that there was a flexible exception which should be applied so that questions of attribution and vicarious liability are to be decided solely under Cayman Islands law. The basis for applying the exception was pleaded as follows at [53] of the RRASOC:

*“For the purposes of tortious claims in deceit, the applicable law is Cayman law subject to the same cause of action being established as a matter of UAE law (pursuant to the doctrine of double actionability). Accordingly, Mr. Jafar acknowledges that it is incumbent on him to establish that the claims that he is pursuing in tort under Cayman law would also be actionable under UAE law, and Mr. Jafar contends that the claims that he is pursuing in tort would be actionable under each law by reason of the same facts and matters. As a matter of mandatory Cayman Islands law, and/or by operation of the exception identified in (inter alia) *Chaplin v Boys* [1971] AC 356 and *Red Sea**

Insurance Co Ltd Bouygues [1995] 1 A.C. 190, Cayman Islands law alone applies to the question whether attribution or vicarious liability arises as against each of the Defendants, since the specific issue of attribution or vicarious liability is most closely connected with the Cayman Islands. In particular:

- (a) *Each of the Defendants is incorporated or established in the Cayman Islands and pursuant to the laws of the Cayman Islands. Accordingly, pursuant to Dicey's Rule 175(2), which provides that "all matters concerning the constitution of a corporation are governed by the law of the place of incorporation", the law of the Cayman Islands applies to matter concerning the constitution of each Defendant.*
- (b) *The articles of association of each Defendant are moreover governed by Cayman Islands law.*
- (c) *Ordinarily, questions of liability arising from company law are to be determined by reference to the lex societatis, in this case the law of the Cayman Islands.*
- (d) *As a matter of Cayman Islands law, the primary rules of (corporate) attribution are derived from a corporate entity's constitution and from company law. Accordingly, in light of the principles referred to in sub-paragraphs (a) – (c) above, the primary rules are to be derived from the law of the Cayman Islands."*

1115. Mr Jafar relied on the formulation of the exception set out once again in Lord Wilberforce's speech in *Boys v Chaplin* at 392. Lord Wilberforce said this at 391-392 (my underlining):

"Given the general rule, as stated above, as one which will normally apply to foreign torts, I think that the necessary flexibility can be obtained from that principle which represents at least a common denominator of the United States decisions, namely, through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy or as Westlake said of science, to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet. This technique appears well adapted to meet cases where the lex delicti either limits or excludes damages for personal injury: it appears even necessary and inevitable. No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems. It will not be invoked in every case or even, probably, in many cases. The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred. If one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice. Even within these limits this procedure may in some instances require a more searching analysis than is needed under the

general rule. But unless this is done, or at least possible, we must come back to a system which is purely and simply mechanical.”

1116. Mr Jafar said that the exception may be applied to a discrete issue in a claim and was not limited to the claim as a whole. For example, in *Church of Scientology of California v Commissioner of Metropolitan Police* (1976) 120 S.J. 690 the English Court of Appeal recognised that it was arguable that English law alone applied to the discrete question whether the English-domiciled police commissioner was vicariously liable for the acts (in the form of publication) of four English police officers who had published an allegedly defamatory report in Germany; there being no dispute that the double actionability rule applied to the primary question of liability. Mr Jafar argued that the test for deciding whether the exception applied was whether a discrete issue (or issues) in a claim were significantly more closely connected with a particular jurisdiction such that it was appropriate for the double actionability rule to be disapplied with respect to that discrete issue.

1117. Mr Jafar said that it was well established that authority was an integral element of attribution. A corporate entity's constitution provides the primary rules of attribution. Dicey's Rule 175(2) provided that "*all matters concerning the constitution of a corporation are governed by the law of the place of incorporation.*" The issues in dispute relating to the interpretation and effect of the constitutions of the AGHF and Fund IV were therefore more closely connected (indeed uniquely connected) with Cayman Islands law. A Cayman Islands exempted limited partnership was not simply an entity that existed under Cayman Islands law but it was a unique creature of Cayman Islands law. There was no evidence to suggest that it has an equivalent under UAE law and the very fact that the Abraaj private equity funds were established as exempted limited partnerships in the Cayman Islands, notwithstanding that the main base of Abraaj's operations was the UAE, suggested that there were unique features of Cayman Islands law thought to be desirable or at least appropriate for the operation of the Funds. Any party that entered into the exempted limited partnership and any party that contracted with the partnership (via the general partner) would expect that Cayman Islands law (alone) would govern questions of attribution vis-à-vis such an entity. The governing law of the AGHF and Fund IV was Cayman Islands law (see clause 28.8 of the AGHF's LPA and 88-90} and clause 13.9(a) of the Fund IV LPA).

1118. Mr Jafar submitted that it would be perverse and contrary to legitimate expectations and legal certainty if a Cayman Islands-domiciled corporate entity, whose constitution was necessarily governed by Cayman Islands law, were to have questions of corporate attribution or vicarious liability resolved by reference to any law other than that of the Cayman Islands. Further, on a practical level, it was logical that the question of whether a Cayman Islands entity was liable for the acts or omissions of another party should be judged by reference to Cayman Islands law. There would be a serious artificiality in seeking to adjudicate upon this question by reference to (here) UAE law given that the entity in question may not even be a type of entity recognised by UAE law.

1119. The Fund Parties submitted that there was no exception to the double actionability rule that applied in the present case. They noted that the authorities made it clear that the general rule was not to be lightly departed from. There was only a limited exception. GP8 cited Lord Wilberforce's speech in *Boys v Chaplin* at 391-392 which I have already extracted above (the general rule ought only to be departed from "*on clear and satisfactory grounds*") and Lord Justice Longmore's judgment in *Sophocleous* that the exception "*is not to be lightly applied and there is no mechanical rule determining when to apply it.*" GP8 argued that Mr Jafar had failed to establish the necessary "*clear and satisfactory grounds.*"

1120. Mr Jafar had not identified the mandatory Cayman Islands law that required or justified ignoring and disapplying the UAE law governing attribution.

1121. The Fund Parties argued that Mr Jafar's reliance on the fact that questions concerning the constitution of a corporation were governed by the law of incorporation was of no real assistance in this case where the Court was not dealing with particular questions of the Fund Parties' constitution but the wider issues of whether the Fund Parties were to be attributed with Mr Naqvi's conduct and knowledge and/or vicarious liability. As a matter of Cayman Islands law this issue turned on general principles of agency law. As a matter of UAE law, it turned on various doctrines, none of which concerned the constitution of GP8 or the AGHF GP. While the Fund Parties accepted that as a matter of Cayman Islands private international law all matters concerning the constitution of a corporate were governed by the law of the

place of incorporation, that would only be a reason for ignoring the applicable UAE law if the issue before this Court was properly one relating to, or requiring the giving effect to or enforcement of, the constitution of a corporate entity. However, the issue here was whether a UAE court would determine that GP8 and the AGHF GP were responsible for Mr Naqvi's alleged wrongdoing which did not involve, or not merely involve, the determination of questions relating to their constitutions. For the same reason, the fact that the Fund Parties' articles of association were governed by the law of the Cayman Islands was irrelevant and could not itself justify an exception to the double actionability rule. The Fund Parties also argued that the fact that ordinarily questions of liability arising from company law were to be determined by reference to the *lex societatis* did not justify the application of the exception. Attribution was not an issue arising from company law *per se*. Albeit as a matter of Cayman Islands law, the approach taken to reliance-based torts was to consider the matters in terms of authority. In addition, the issue of vicarious liability was independent of company law and had a separate legal basis.

1122. The Fund Parties submitted that application of the exception to disapply and ignore the UAE law of attribution and agency was also not justified on the ground that a Cayman Islands exempted limited partnership was unique. It was not or at least not so different from other entities that it required its own exemption from the double actionability rule.

Discussion and decision

1123. A number of authorities discuss the scope of the flexible exception. None of them address a claim that the exception applies on grounds similar to those relied on by Mr Jafar, but they are worth mentioning in so far as they show how applications to rely on the exception have been addressed.

1124. In *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 Lord Slynn, in delivering the advice of the Privy Council, emphasised that the exception could be invoked in cases where the *lex loci delicti* was more significantly related to the case as a whole or to a particular issue than was the *lex fori*.

1125. In *Sophocleous* the English Court of Appeal held that the judge at first instance had erred in deciding that English law alone governed personal injury proceedings brought by 34 individuals seeking damages following alleged assaults by British and Cypriot security forces in Cyprus during the Cyprus Emergency from 1956-58. The flexible exception to the double actionability rule was held not to apply. Both the law of Cyprus and the law of England and Wales applied for the purpose of determining liability. The judgment of Lord Justice Longmore is instructive as to how the flexible exception is applied.

1126. Lord Justice Longmore said (at [13]) that the formulation of the exception had proved elusive and went on as follows (my underlining):

“14 The exception was applied in *Boys v Chaplin* ... itself in which a traffic accident occurred in Malta between two British citizens temporarily stationed there as part of Her Majesty’s Armed Forces. Maltese law provided that damages could not be recovered for pain and suffering but only for losses actually incurred: English law, of course, has long awarded damages for pain and suffering and the majority of the House saw no reason why the local law (which would be applicable as between two Maltese residents) should apply to persons ordinarily resident in England. They therefore segregated the issue of pain and suffering from the general rule of double actionability and applied English law to that issue. Lord Wilberforce described this segregation (and consideration of what law should be applied to the segregated issue) as “a development from English seed”, citing Westlake, *Private International Law*, 7th ed (1925), p 281. Professor Westlake was seeking to refute the suggestion that a defendant who committed a tort in a foreign country automatically submitted himself to the law of that country and said, at p 281: “The truth is that by entering a country or acting in it you submit yourself to its special terms only as far as science selects them as the rule of decision in each case.”

...

30 The width of the flexible exception has never been defined. But it seems that, despite the formulation in Dicey & Morris, *The Conflict of Laws*, 12th ed, it can apply to a whole claim rather than just a particular issue, with the result that the entire claim is governed solely by either the *lex fori* or the *lex loci delicti*. In *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 the Privy Council held that it was in principle possible for a counterclaim, brought by an insurer by virtue of its rights of subrogation against some of the... to be governed only by the law of Saudi Arabia and not (also) by the law of Hong Kong, where proceedings had been brought...

- 31 *This case is hardly an authoritative example of the flexible exception as it decided merely that an application for leave to amend should proceed but it does show that the judge's decision that only English law applies to the claims in their entirety cannot be criticised on the basis that the flexible exception only applies to particular issues rather than whole claims...*
- 32 *Nevertheless, some caution must be exercised. It is one thing to say that an otherwise valid claim should not be entirely defeated by a technical rule of the forum, if the forum has no close connection with the subject matter of that claim; it is quite another to say that the law of the place of the tort should be completely disregarded. No case has gone as far as that.*
- 33 *There is, moreover, high authority that the flexible exception should not be too readily available.... In the House of Lords in Kuwait Airways Corp'n v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883, 1115, para 164, Lord Hope of Craighead said:*

"Unless a rigorous approach to this question is adopted, the application of the exception is at risk of giving rise to much uncertainty and the criticism alluded to in the Australian cases that it has become instinctive and arbitrary."

The exception was nevertheless applied in that case in which Iraqi Airways were held to be unable to rely on a confiscatory law of the Iraqi Government to excuse its conversion (or more crudely, theft) of Kuwait's aircraft."

1127. The judge had given six reasons as to why he had applied the exception. The six reasons included that: it was fair to judge the appellants by reference to the "superior" law of England and Wales which had made the Cyprus law rather than by reference to the "inferior" local law of Cyprus; Cyprus had no interest in the application of its law to the issues in the case (fifth reason); and English law was well suited to determine the issues because it had refined and sophisticated reasoning techniques (sixth reason). One only needs to summarise these reasons to see why the Court of Appeal concluded that there was no sufficient justification for applying the exception. When considering the fifth reason Lord Justice Longmore said this (at [52]) (my underlining):

"The rationale of the double actionability rule is partly that persons conducting themselves in a particular country should not be liable if by the law of that country there is no liability for such acts or if they are excused or released from liability for such acts: see Boys v Chaplin [1971] AC 356, 398 E, per Lord Pearson. Another way

of putting the same concept is to say that comity of nations ordinarily requires that a person who is given protection by the law of one country in respect of acts done in that country should be protected against legal proceedings in other countries in respect of those acts, at any rate if they cause damage in that country: see Metall & Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391, 445 H—446 A, per Slade LJ. This rationale must be borne in mind when determining whether it is in that country's interest to apply its own laws. To my mind, it would not be right to impose liability on the Secretaries of State if there would be no such liability if they were sued in Cyprus. The fact that the law of post-independence Cyprus might also excuse them on the grounds of sovereign immunity (see per Kerr J [2018] EWHC 19 at [139]) does not militate against that consideration, rather the opposite."

1128. The main issue for consideration is the proper basis and scope of the flexible exception.

1129. The first point to note is that obviously we are not here considering what I would label ordinary private international choice of law rules for determining the law governing particular issues in dispute or characterisation of issues for that purpose. In a claim governed by Cayman Islands law the choice of law rules will determine what law governs an issue of attribution depending on the nature and characterisation of the basis on which attribution is claimed. The double actionability rule is different. It does not seek to decide what law governs an issue in domestic proceedings with a foreign element. It imposes an additional requirement in cases of civil wrongs based on acts done in a foreign jurisdiction that the plaintiff must satisfy, namely to show that he could maintain his tort claim in the foreign jurisdiction.

1130. There are two limbs to the double actionability rule, derived from the judgment of Willes J in *Phillips v Eyre* LR 6 QB 1. The rule is that an act done in a foreign country is a tort and actionable as such in this jurisdiction only if it is both (a) actionable as a tort according to Cayman Islands law (that is, is an act which if done in the Cayman Islands would be a tort) and (b) not justifiable according to the law of the foreign country where it was done. There is a useful discussion of the origin and nature of the two limbs in a chapter on *Phillips v Eyre* written by Ugljesa Grusic and Professor Alex Mills in *Landmark Cases in Private International Law* (Hart, 2023, chapter 5, page 109). They point out that several explanations have been given for the first limb. First, that in the early period of English private international law, the English courts could not assume jurisdiction over a transitory action

concerning an act abroad unless the plaintiff pleaded by way of fiction that the act had taken place in England. Second, that tort law is a private system of deterrence, punishment and moral condemnation involving important domestic public policy goals so that foreign tort laws imposing liability for behaviour considered to be innocent in England should not be enforced. Third, the colonial context in which *Phillips v Eyre* was decided. They argue that the second limb was founded on two ideas. First, that private rights had a territorial origin which meant that the *lex loci delicti* governed the issue of the basis of liability. Second, is comity. An act committed abroad should not be questioned elsewhere if valid and unquestionable by the law of the place where the act was committed.

1131. It is also helpful to note what Grusic and Mills say about the discussion of the flexible exception in *Red Sea* (at pages 127-128) (my underlining):

“In previous cases ... the exception had led to the application of the law of the forum and so could be interpreted as allowing the Court to disapply the requirement of actionability under the law of the place of the tort. ... [In Red Sea] the Court disapplied the double actionability rule ... in its entirety replacing it with the exclusive application of the law of the tort... However, some further uncertainty was perhaps introduced in the explanation offered as to how the exception should operate. The Court suggested at certain points that it should be based on whether the law of the place of the tort had the “most significant relationship to the claim. Although the justification for this rule was meeting the “interests of justice” this account of the rule appears to require evaluation of objective connecting factors rather than the more justice-based test which had been proposed in Boys v Chaplin.”

1132. In *Red Sea* at page 206 Lord Slynn summarised the Board’s views as follows (my underlining):

“Their Lordships, having considered all of these opinions, recognise the conflict which exists between, on the one hand, the desirability of a rule which is certain and clear on the basis of which people can act and lawyers advise and, on the other, the desirability of the courts having the power to avoid injustice by introducing an element of flexibility into the rule. They do not consider that the rejection of the doctrine of the proper law of the tort as part of English law is inconsistent with a measure of flexibility being introduced into the rules. They consider that the majority in Boys v. Chaplin [1971] A.C. 356 recognised the need for such flexibility. They accept that the law of England recognises that a particular issue between the parties to litigation may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and with the parties. They agree with the

statement of Lord Wilberforce, at pp. 391-392, which has been set out above as to the extent and application of the exception. They accept, as he did, that the exception will not be successfully invoked in every case or even, probably, in many cases and, at p. 391H, that 'The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred.'"

1133. This seems to me to be an accurate (albeit not binding) summary of the law and of the approach to be followed by this Court in considering whether to apply the flexible exception. The Court has the power to adjust the double actionability rule (by for example dispensing with the need for the plaintiff to show that the relevant conduct was not justifiable according to the law of the foreign country where it was done) to avoid injustice. A particular issue between the parties to litigation may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and with the parties. However, the exception will not always or frequently be successfully invoked, and the general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred.

1134. So, I accept that it is open to me to follow the approach advocated for by Mr Jafar. The real question is whether I should do so in the circumstances. This seems to me to require an assessment as to whether it is necessary to avoid injustice to Mr Jafar that he be permitted to succeed in his Cayman Islands deceit claim by showing that his claim would be actionable in the UAE assuming that the rules governing attribution of Mr Naqvi's conduct are the rules under Cayman Islands and not UAE law.

1135. Mr Jafar relied, as I have noted, on the argument that applying UAE law to determine whether Mr Naqvi's conduct, knowledge and intentions should be attributed to the Cayman Islands' general partners of the Funds (so as to result in the incurring of liabilities on behalf of the Cayman Islands exempt limited partnerships) or AIML as manager of the Funds would be (a) contrary to legitimate expectations and legal certainty. Parties dealing with these entities and limited partnerships (particularly limited partnerships with characteristics peculiar to this jurisdiction) would reasonably expect all questions concerning their constitutions and internal governance and the powers and authority of their officers to be

governed by Cayman Islands law and (b) as a matter of law and characterisation these questions were to be treated as so closely connected with the law of incorporation of the corporate entities or constitution of the limited partnerships as to justify, and perhaps evidence a local policy, that in a tort claim brought in these proceedings they should be exclusively governed by local Cayman Islands law (particularly in a case where the entity in question may not even be a type of entity recognised by UAE law).

1136. I can see the force of Mr Jafar's argument, particularly as it relates to questions directly and exclusively concerning the interpretation and operation of the constitutions and internal management and the powers and authority of directors or other officers of Cayman Islands incorporated or constituted entities. But I am not satisfied that Mr Jafar should succeed in this case. This is for a number of reasons. First, I do not regard the legitimate expectations argument to the effect that third parties (and Mr Jafar in particular) would reasonably have expected that issues of attribution of foreign conduct of the directors and officers of a Cayman Islands entity would be *exclusively* governed by Cayman Islands law where those acts, giving rise to the deceit claim, all took place in the UAE and where the management of the Cayman Islands entities was exclusively or substantially conducted or at any rate was closely connected with the UAE. Secondly, Mr Jafar's argument really only supports his case (or at least is strongest) as regards claims to attribution that depend on the constitutional documents of the Funds' general partners, AIML and the LPAs but the claims to attribution are based on a wider range of grounds. So, if Mr Jafar were right it would be necessary to decide which were subject and which were not subject to the double actionability rule. Thirdly, even as regards the claims to attribute based on Mr Naqvi's position as a corporate director or *de facto* director it seems to me that (as the Fund Parties' submitted) the better view is that these arise under and to be treated as involving the general law of agency so that the fact that questions concerning the authority and powers arise is not of itself sufficient to establish that a special and peculiarly local area of law is involved. The position is well and in view convincingly explained by Professor Peter Watts (the editor of *Bowstead on Agency*) in his chapter *Are Directors Agents Through and Through?* in *Agency Law in Commercial Practice* (OUP, 2016, chapter 7 at page 97) where he says this (page 101 – 105):

“It is respectfully suggested that it is a serious mistake to read Lord Hoffmann’s judgment [in Meridian] as a tablet. There is not a hint that Lord Hoffmann would want to disown the view expressed in the long line of cases [to which Professor Watts had already referred] that directors ordinarily act as agents even when acting as the board. Certainly, he provides no reasons for concluding that that his primary rules of attribution are not, let alone cannot be agency rules. It is plain that Lord Hoffmann’s primary rules are in fact compatible with the law of agency; they merely describe the ways in which the law provides for the conferral of actual authority on the company’s agents. Diplock LJ in his classic description in [Freeman & Lockyer] of the way in which the rules of agency law apply to companies explained that “actual authority may be conferred by the constitution of the corporations itself as, for example in the case of a company upon the board of directors.” The judge had already posited that “a corporation cannot do any act, and that includes making a representation, except through its agent.” Lord Hoffman says nothing to contradict this.....The conclusion is that in the operation of the common law directors are agents and board simply a group of co-agents....”

1137. Accordingly, I am not satisfied that Mr Jafar has shown that in this case it is necessary to avoid injustice to permit him to succeed in his Cayman Islands deceit claim (assuming that all other elements of the claim were satisfied) by showing that his claim would be actionable in the UAE assuming that the rules governing attribution of Mr Naqvi’s conduct are the rules under Cayman Islands and not UAE law.

Mr Jafar’s claim that the AGHF and Fund IV are liable for Mr Naqvi’s deceit under UAE law

1138. Mr Jafar argued that he was able to satisfy the requirements of the double actionability rule because the expert evidence as to UAE law showed that the AGHF and Fund IV would be held liable as a matter of UAE law for Mr Naqvi’s deceit on the basis of his pleaded case.

1139. Mr Jafar relied on the facts as pleaded in the RRASOC and the propositions of UAE law as set out in the Schedule of UAE law annexed to the RRASOC (the ***UAE Law Schedule***). Those propositions relating to his claim in deceit were as follows (my underlining):

“Deceit

1. *The essential elements of deceit under UAE law are:*

- a. The wrongdoer says or implies something which he knows to be untrue or omits a fact; with the intention to deceive or with the intention of using those statements or implication(s) or silence(s) to induce the victim to do something.
 - b. The victim believes what the wrongdoer says is true;
 - c. The victim's belief in the truth of what the wrongdoer says is a material causative factor in the victim doing something he would not have done otherwise;
 - d. As a result of having [done] something he would not have done otherwise, the victim is caused loss. (Articles 185-186; Article 285 of the UAE Civil Code).
2. When several persons are responsible for a harmful act, each one of them is responsible for their own share in it and the judge may decide to allot the liability equally between them or consider them jointly and severally responsible (UAE Civil Code, Articles 283, 287 and 291).
 3. Where a party who is deceived into entering into a contract; the persons who were party to the deceit may be liable to the first party in deceit, regardless of what remedies the first party may seek to pursue against the other contracting party. (Articles 285 282, 292 and 293 of the UAE Civil Code).

By operation of the foregoing principles, as a matter of UAE Law, if the Court finds that a third party participated in a deceit, including by dealing with the proceeds of a deceit, then that third party is directly liable in respect of the deceit: see the report of Dr. Faraj Ahnish, at paragraph 5.39. Accordingly, each of the [AGHF GP, [GHF] and/or GP8 is liable in respect of deceit because (i) via their Directors they participated in the deceit by providing Mr. Naqvi with the cash updates pleaded in paragraph 12F, 12G and 17B above; and (ii) dealt with the proceeds of the Jafar Loans knowing that they were derived from the deceit: the relevant knowledge on the part of each entity arises from the knowledge of their Directors (the Fund Directors) as pleaded in paragraphs 30A, 32(4A) and 44A above.

The circumstances in which one legal personality may be responsible for the acts of another

4. The connection between, on the one hand, the wrongdoer and the acts done, and on the other hand, the party who is potentially liable, is such that it is just to attribute the acts to the latter. It is a multifactorial test, in which the Court is required to consider the circumstances of the act, including but not limited to the objects of the actor, and the outcome(s) achieved. This principle includes but is not limited to the liability of an employer/principal for the tort of its

employee/agent (including in relationships akin to employment) where the tort is perpetrated by the subordinate in the exercise of his duty or because of it. (Article 313 of the UAE Civil Code).

- 4A. Mr. Jafar's case is that, for the purposes of establishing vicarious liability under UAE law, the requirement that there be a pre-existing finding by a Court or Tribunal of liability against the primary tortfeasor (here, Mr. Naqvi) is a procedural requirement and so is not to be applied by this Court in its application of UAE law. If that proposition is disputed or it is found by the Court to be a substantive requirement, Mr. Jafar reserves the right to rely on the Judgment of the Sharjah Federal Court of First Instance referred to under paragraph 30 above to contend that the necessary finding (if one is required) has been made.

Further provisions relevant to attribution

- 4B. *The state of mind – including intention and knowledge – of an agent is attributed to the agent's principal (Article 152 of the UAE Civil Code).*

Express authority or agency

- 4C. *As a general principle, a corporate entity is liable for the acts of its proxy, to whom it has conferred express authority: see Article 153 of the UAE Civil Code. As a specific application of that general principle, pursuant to Decretal law No. 2 of 2015 (the provisions of which are now enshrined in the UAE Decree-Law on Commercial Companies No. 32 of 2021 ("CCL")) and in particular Articles 161, 163 thereof, a corporate entity is liable and/or responsible for the acts of its directors. Mr. Jafar's case is that, by virtue of the facts and matters pleaded under paragraph 32(1)-(4) above, Mr. Naqvi held express authority to act on behalf of [AGHF GP], [GHF] and GP8.*

Ostensible authority

- 4D. *A corporate entity further may be liable and/or responsible for the acts or omissions of a person who is not a formal director of it, and/or may have that person's knowledge attributed to it, pursuant to the doctrine of ostensible authority. The core principles of the doctrine of ostensible authority are as follows:*
- (a) *If there is an external appearance justifying the belief that there exists a relationship of agency between the principal and the apparent agent, the transaction carried out by the agent shall be binding upon the principal;*
 - (b) *Such an external appearance may arise from the principal's actions indicating a will to delegate to others to act in his name, such that a third party would justifiably believe that a principal-agent relationship exists;*

(d) *If the principal has contributed – negatively or positively – to the external appearance that would delude a third party acting in good faith and make him justifiably believe that there is a principal-agent relationship, then the third party is entitled to rely on the doctrine of ostensible authority as against the principal;*

(d) *The other party to the transaction need not be aware of the agency between principal and the agent.*

4E. *The facts which Mr. Jafar relies upon for the application of this doctrine are those pleaded in paragraphs 12A-18E and paragraphs 31-32 of the Re-Re-Amended Statement of Claim.*

Voluntary agency

4F. *A corporate entity further may be liable and/or responsible for the acts or omissions of a person who is not a formal director of it, and/or may have that person's knowledge attributed to it, pursuant to the doctrine of voluntary agency (Articles 325-331 of the UAE Civil Code). The core principles of the doctrine of voluntary agency are as follows:*

(a) *The asserted agent committed a voluntary act:*

i. *With the permission of a Judge; or*

ii. *In response to compelling necessity; or*

iii. *Pursuant to custom; and in any event,*

(b) *The voluntary act is ratified by the principal,*

4G. *The facts which Mr. Jafar relies upon for the application of this doctrine are as follows:*

(a) *Mr. Naqvi committed the voluntary acts particularised in the Re-Re-Amended Statement of Claim at paragraphs 5-6 and 19-27.*

(b) *Mr. Naqvi committed those voluntary acts in response to compelling necessity, namely to make the payments pleaded in paragraphs 5-6 in order to address the cash shortfalls in the accounts of the Former Healthcare GP, AHG and GP8. The compelling necessity arose from the facts pleaded in paragraphs 12A-18E, 29(A), 29(3)-(4) and 30(2) of the Re-Re-Amended Statement of Claim.*

- (c) *The voluntary acts committed by Mr. Naqvi were ratified by each of the Former Healthcare GP, AHG and GP8 for the reasons pleaded below in paragraph 4F.*

Ratification

4H. Subsequent ratification of a disposition shall be treated as a prior grant of agency (Article 930 of the UAE Civil Code). The Former Healthcare GP, AHG and GP8 ratified the voluntary acts of Mr. Naqvi that are pleaded in paragraphs 5-6 and 19-27 of the Re-Re-Amended Statement of Claim as follows:

- (a) *Messrs Lakhani, Dave, Siddique and Abdel-Wadood knew that the voluntary acts of Mr. Naqvi pleaded in paragraphs 5-6 and 19-27 of the Re-Re-Amended Statement of Claim had been committed; and accordingly knew that the Jafar Loans, and the proceeds of the Jafar Loans paid to the Healthcare Fund and GP8 as pleaded in paragraphs 5-6 of the Re-Re-Amended Statement of Claim, were derived from deceit. Paragraphs 12A-18E and paragraphs 30A and 44A of the Re-Re-Amended Statement of Claim are repeated.*
- (b) *The knowledge of Messrs Lakhani, Dave, Siddique and Abdel-Wadood is to be attributed to the Former Healthcare GP, AHG and GP8 by operation of Articles 152 & 153 of the UAE Civil Code and Articles 161 and 163 of the 2015 Act (as pleaded in paragraphs 4A and 4B above) and in light of the facts pleaded in paragraph 1(4A) and 1(5) of the Re-Re-Amended Statement of Claim.”*

1140. Accordingly, Mr Jafar bases his deceit claim on the following propositions:

- (a). By making the Reinvestment Representation and communicating the Overarching Message with the intention to deceive Mr Jafar, Mr Naqvi induced Mr Jafar to advance the Loans in reliance on his belief that what Mr Naqvi told him was true. As a result, the basic elements of a deceit claim under UAE law are made out. Liability under UAE law of Mr Naqvi arises both by reason of Mr Naqvi's misrepresentations arising from his statements (the Representations) but also by reason of his failure to inform Mr Jafar about the true extent and nature of the financial problems to which the Abraaj entities were subject. Such silence constitutes actionable deceit where Mr Jafar would not have made the Loans had he known the truth.

- (b). The Fund Parties are liable for that deceit because Mr Naqvi held express authority to act on behalf of the Fund Parties.
- (c). The Fund Parties are also liable for Mr Naqvi's deceit because Mr Naqvi had ostensible authority to act for them when negotiating the Loans.
- (d). Furthermore, the Fund Parties are vicariously liable for Mr Naqvi's deceit.
- (d). The Fund Parties are also liable because they participated (acting by their de jure directors) in Mr Naqvi's deceit because (a) they provided to Mr Naqvi (by way of emails sent by Mr Lakhani in June and December 2017) cash updates (as pleaded at [12F], [12G] and [17B] of the RRASOC) and (b) they dealt with the proceeds of the Loans knowing (because of the knowledge of their directors as pleaded at [30A], [32(4A)] and [44A] of the RRASOC) that the proceeds were derived from the deceit. They were therefore responsible for the deceit with Mr Naqvi and directly liable to Mr Jafar.
- (e). Mr Jafar is entitled to compensation for the harm he has suffered without the need to rescind, and even though he is unable to assert that he has rescinded, the Loan contracts.

Mr Jafar's claim that the AGHF and Fund IV are liable to him under UAE law in enrichment without cause

1141. Mr Jafar also claimed directly against the AGHF and Fund IV in reliance on the UAE cause of action of enrichment without cause. He pleaded this claim at [40]-[47] of the RRASOC (my underlining):

"40. In the premises, the [AGHF] and [Fund IV] have each received money from AH and AIML which they knew to be derived from the deceit of Mr. Jafar:

- (1) The [AGHF] received approximately US\$108 million, being the total of the sums pleaded at paragraph 5 above, and the [AGHF] and/or [GHF] was thereby enriched by that amount.*

- (2) *[Fund IV] received approximately US\$124 million, being the total of the sums pleaded at paragraph 6 above, and [Fund IV] was thereby enriched by that amount.*
41. *As a matter of UAE law, where a party receives money without valid cause, that party is liable to restore the money to the victim of the deceit whether the enrichment was as a result of a direct or indirect transfer from the impoverished party.*
42. *There was no valid cause for the enrichment of either the [AGHF] or [Fund IV] at the expense of Mr. Jafar. Further, the recognition of Mr. Jafar's interest in the sums by which the [AGHF] or [Fund IV] have been enriched at his expense is proportionate to any harm that may be suffered by others as a result of the [AGHF] and [Fund IV] being required to disgorge the same.*
43. *As a matter of UAE law, if a party receives money in good faith, in satisfaction of a debt, that may in principle amount to a valid cause. However, where a recipient has received funds with knowledge that they had been derived from wrongdoing, including deceit, that recipient is not treated as having a valid cause in UAE law for such receipt. The UAE law of enrichment without cause does not require Mr. Jafar to show that either of the [AGHF] or [Fund IV] had knowledge of the deceit, in order to make out his claim. Alternatively, if and insofar as the Defendants contend otherwise, Mr. Naqvi knew that the money received by or on behalf of the [AGHF] and [Fund IV] derived from the loans which Mr. Jafar made to AH and AIML, and he knew that the same had been obtained by deceit.*

PARTICULARS

- (1) *Mr. Naqvi knew the origins of the money as he directed its transfer.*
- (2) *Mr. Naqvi knew the loans had been obtained by deceit as it was he who deceived Mr. Jafar into making them.*
44. *The knowledge of Mr. Naqvi is to be attributed to each of AHG, the [AGHF] and [Fund IV] for the purposes of the claim in enrichment without cause for the reasons identified at paragraphs 31-32 35 above.*
- 44A. *Further and alternatively, because of the matters pleaded in paragraphs 12A-12B (the GP8 Air Arabia Loan), 13-18 (the Healthcare Air Arabia Loans), 18A-18D (the procuring of third party funding), 20-30 (the obtaining of the Jafar Loans) and 32 (the way the Abraaj Group was habitually controlled by Mr. Naqvi) above, Messrs Lakhani, Dave, Siddique and Abdel-Wadood knew that Mr. Naqvi had obtained the Jafar Loans by deceit.*

- 44B. Accordingly, none of the recipient entities has a valid cause for enrichment at Mr. Jafar's expense.
45. In the premises, each of AHG, the [AGHF] and [Fund IV] is liable under UAE law in enrichment without cause.
46. Further or in the alternative, to the extent that the [AGHF] and [Fund IV] had valid monetary claims against AH and AIML in amounts of or in excess of the amounts of the loan monies which AH and AIML transferred to them, Mr. Jafar contends that this is no answer to the claims under the UAE law of enrichment without cause which Mr. Jafar is pursuing against the [AGHF] and [Fund IV], given that the [AGHF] and [Fund IV] knew that the monies which were received by them from AH and AIML derived from the deceit of Mr. Jafar.
47. Further or in the alternative, if or insofar as the monies received by AHG are to be treated as the monies of AHG, rather than the [AGHF] of which it was and is an asset- holding, wholly-owned subsidiary, AHG was enriched without cause by the receipt of the same by reason of those some pleaded facts and matters.”

1142. Mr Jafar set out the propositions of UAE law on which he relied for this claim in the UAE Law Schedule as follows:

“Enrichment without Cause

5. *Where a party has received money without valid cause, and in circumstances where it would be unjust to retain the monies, the law may require that party to restore the money to a party that has been deprived of the monies. (Articles 318 and 319 of the UAE Civil Code).*
6. *Due to the doctrine of privity of contract, where the party that has been impoverished (the Plaintiff) does not have a contract with the person ultimately enriched, there is ordinarily no valid cause for the enrichment (Article 250 of the UAE Civil Code, read with Articles 318 and 319).*
7. *Unjust enrichment may occur indirectly, or through an intermediate person or entity. The plaintiff need not be the immediate provider of the funds to the enriched party, in the sense of having directly transferred monies to the enriched party. The plaintiff may be a party from whom the monies were ultimately derived (Articles 318 and 319 of the UAE Civil Code).*
8. *There is no requirement that the enriched party have knowledge that the monies were derived from the plaintiff by deceit for the purpose of an enrichment without cause claim. If a recipient receives monies in repayment of a debt, that may in principle amount to a valid cause for the enrichment, provided only that the recipient receives the monies in good faith. There will be no good faith, and*

therefore no valid cause, if the recipient knew, or ought reasonably to have known by making appropriate enquiries, that the monies were derived from wrongdoing by the paying party.

9. *In order to determine whether a recipient received monies in good faith in the respect set out in paragraph 8 above, the Court may apply the principles relevant to attribution and vicarious liability (as set out in paragraph 4 above) for the purpose of determining the state of knowledge of the recipient.”*

The expert evidence on UAE law

1143. The Court heard evidence from three individuals who claimed to be experts in UAE law concerning the UAE law of deceit and enrichment without cause. The experts were:

- (a). Dr Faraj Ahnish. Dr Ahnish is a UAE lawyer (a founding partner of Hadeef & Partners) who has been instructed by Mr Jafar. Dr Ahnish’s first report was dated 24 August 2023 (*Ahnish 1*), and his supplementary report was dated 20 October 2023 (*Ahnish 2*).
- (b). Professor Chibli Mallat. Professor Mallat’s first report was also dated 24 August 2023 (*Mallat 1*), and his supplemental report was also dated 20 October 2023 (*Mallat 2*). Professor Mallat has been instructed by the GHF Parties. Professor Mallat has prepared his reports with the assistance of Amna Al Jallaf (a UAE lawyer who assisted in providing advice on the UAE law questions).
- (c). Mr Ian Edge. Mr Edge is an academic with over forty years of experience researching and teaching the civil and commercial laws of the Middle East (including the UAE). Alongside that, Mr Edge has spent the majority of his professional practice advising on the civil and commercial laws of the UAE and other jurisdictions in the Middle East and has acted as an expert witness on such laws. Mr Edge has been instructed by GP8. Mr Edge’s first report was also dated 24 August 2023 (*Edge 1*), and his supplemental report was also dated 20 October 2023 (*Edge 2*).

1144. The experts also prepared a joint memorandum dated 24 November 2023 (the *Joint Memorandum*).

1145. Mr Jafar submitted that both Professor Mallat and Mr Edge did not satisfy the requirement for being experts in the relevant UAE law and therefore that their evidence should be disregarded. Mr Jafar invited the Court to prefer the evidence of Dr Ahnish on points in dispute. Dr Ahnish was a properly qualified, experienced (and indeed eminent) UAE lawyer and the only true UAE law expert, unlike Professor Mallat and Mr Edge. Dr Ahnish had practised as a judge, authored key UAE federal legislation that is relevant to the issues in this case, and trained UAE judges on the implementation of those and other UAE laws. Conversely, Professor Mallat and Mr Edge, neither of whom had practised or taught law in the UAE, as have thousands of foreign lawyers and academics, proffered tangential associations with UAE law built largely on having given expert evidence in the English language on other laws of other Middle Eastern jurisdictions. Both Professor Mallat and Mr Edge relied on their academic experiences as the main source of their knowledge and authority on UAE law yet neither was able to point to a single book, chapter, article of published research on UAE law across their entire careers. The issues which the Court had to determine related to how the UAE courts would determine contested issues of UAE commercial law and both Professor Mallat and Mr Edge were unqualified to be an expert in relation to these issues and to deal with this question. Accordingly, Mr Jafar submitted that the Court should rule that their evidence was wholly inadmissible as expert evidence. These are not just poorly qualified experts. This is, in the context of a field where there are literally thousands of UAE qualified and practicing lawyers.

1146. The Fund Parties argued that Mr Jafar's challenge to the qualifications to act as an expert of Mr Edge and Professor Mallat should be rejected. Both were eminently well and sufficiently qualified to act as expert witnesses on UAE law.

1147. The GHF Parties submitted that Professor Mallat was plainly an experienced and competent expert, suitably qualified to give opinion evidence on the content of UAE law in these proceedings. Professor Mallat has been described by Professor Owen Fiss from Yale Law

School, as “*the leading theoretician, indeed the founder, of [the] field*” of Middle Eastern law and by Mr Justice Fancourt in *Byers v Samba Financial Holdings* [2021] EWHC 60 (Ch) at [143] as “*immensely knowledgeable, particularly about Islamic law but also about the fundamental tenets of English, French and Roman law. A better qualified student of comparative Middle Eastern and Western law it would probably be hard to find. There is no question in my mind that he was more than amply qualified to give evidence about Islamic law and did so with some authority. Professor Mallat was scholarly in approach, but able to provide a broad overview of legal principle. He was able to read and understand the relevant legal texts and Regulations in Arabic.*” The GHF Parties noted that Professor Mallat’s qualifications and experience were set out in seven paragraphs in Mallat 1 and submitted that they demonstrated an unparalleled (certainly as amongst the UAE law experts) breadth and depth of knowledge of the subject of Shari’a law including the law of obligations. It was correct that Professor Mallat did not have rights of audience before UAE Courts but as Professor Mallat explained in Mallat 1, he had been assisted by a “*team of suitably qualified attorneys from both Mallat Law Offices and Al Jallaf Advocates & Legal Consultants, including Amna Al Jallaf*” who had “*helped [him] in providing independent expert advice on the UAE Law Questions, with a particular focus on matters of UAE legal practice.*” Ms Al Jallaf has over twenty years of UAE legal practice in the fields of civil/commercial litigation and family/personal matter law and was described by Professor Mallat as being conversant with commercial and corporate practice. It was therefore wrong for Mr Jafar to assert that Professor Mallat was not an expert in UAE law. His objection was premised on a fundamental misunderstanding of the make-up of UAE law. As Dr Ahnish had accepted in cross-examination, the law of the UAE is a combined federal civil law system based upon classical Islamic law (or Shari’a law) and civil law principles. Moreover, Dr Ahnish had accepted and emphasised in cross-examination that the Civil Code (the **LCT** or **CTC**) constituted “*a deliberate decision by the government demonstrated by a cabinet minister resolution to prepare a Civil Code on the basis of Sharia principles.*” Professor Mallat had extensive experience and knowledge of Shari’a law and of civil law. He had also written about the law of the UAE and appeared as an expert witness on UAE law in the courts of England and Wales (when he was again assisted by Ms Al Jallaf). The GHF Parties further noted that Professor Mallat had previously given expert evidence on Saudi law, which

evidence had been accepted by this Court in *AHAB-CICA* and by Mr Justice Fancourt in *Byers*. As Professor Mallat had said at [10] of Mallat 1, Saudi law shared with the UAE laws several features relevant to the present case, including a particular attention to the law of obligations in Islamic law and its Hanbali school. The GHF Parties further submitted that the failure of the English court to accept his evidence in *Dell Emerging Markets (EMEA) Ltd & Others v Systems Equipment Telecommunications Services SAL & Others* [2020] EWHC 561 (Comm) 803 did not undermine his credibility or his expertise since, as Professor Mallat had explained in re-examination, the Lebanese Commercial Court had made a finding of fact that meant that the relevant decree on which Professor Mallat had opined did not apply. The GHF Parties also submitted that Lord Falconer's criticism of Professor Mallat during cross-examination to the effect that the similarities between parts of his reports in *AHAB-CICA* and this case demonstrated that Professor Mallat had prepared his evidence in this case by using an unthinking cut and paste exercise was unjustified. Professor Mallat had explained the entirely proper reason why he had used some of the material from his *AHAB-CICA* report in this case ("yes, *I didn't do the work again, I did cut and paste because it was the same subject matter that I was being asked about in UAE law and in Saudi law, which shows the proximity of the two systems in relation to their originating or referential preference to the Hanbali law as opposed to the other schools of law in Sunniism.*" Day 23, page 25).

1148. The GHF Parties submitted that Professor Mallat was an honest, independent, and impressive witness who provided fulsome and clear responses to questions in his efforts to assist the Court despite the aggressive and somewhat ad hominem attacks in cross-examination on his expertise and experience.

1149. GP8 argued that as with Professor Mallat, Mr Edge was well qualified to give evidence on the content of UAE law in these proceedings having studied and taught Islamic and Middle Eastern law, including the laws of the UAE, for some 40 years. Mr Edge had held a position at the Law Department of the School of Oriental and African Studies in the University of London since 1979 and was the Founding Director of the Centre of Islamic & Middle East Law in the Law Department of SOAS from 1990 to 2018 (with which he remained actively involved). Mr Edge had also spent the majority of his professional practice advising clients

on the civil and commercial laws of the Middle East since the mid-1980s. He had also acted as an expert witness on Islamic and Middle Eastern laws in multiple jurisdictions including matters of UAE law. He was proficient in written Arabic and had made appropriate use of the original texts. Like Professor Mallat, Mr Edge withstood well the unnecessary *ad hominem* attacks in cross-examination. Mr Edge's evidence was honest, clear, and direct, and most importantly, supported by references to the LCT, the Explanatory Memorandum and cases of the UAE courts where appropriate.

1150. The Fund Parties submitted that Dr Ahnish's evidence was generally unsatisfactory and should be treated with care particularly where his opinions were not supported by the text of the LCT itself or the Explanatory Memorandum (and all the more so where they were contradicted by those sources). Dr Ahnish's opinions often ignored the clear language of the LCT in favour of a what GP8 labelled a "*distorted simulacrum of the relevant norms*." The Fund Parties argued that where there was a dispute between the experts the Court should prefer the evidence of Professor Mallat and Mr Edge over that of Dr Ahnish. The Fund Parties relied in particular on the following points. First, his reports and oral evidence exhibited the approach of an advocate for Mr Jafar as opposed to applying the independent and critical thought process of an expert whose duty to the Court is paramount and overrides any obligation to the party instructing him. Secondly, Dr Ahnish's evidence was in significant respects incoherent. Dr Ahnish's account of why he failed to make reference to the Sharjah Criminal Complaint judgment was a striking example of an incoherent account from him which also suggested a misunderstanding of the independence of an expert (see Dr Ahnish's evidence during his cross-examination (Day 21 pages 112-114)). Thirdly, Dr Ahnish's cross-examination revealed that he was labouring under a myriad of misunderstandings as to the essential factual background and the proper ambit of his evidence. For example, Dr Ahnish's evidence in cross-examination was that: (a) he was unaware that BOS was on risk for 15% of the First and Second Loans (despite stating in his report that he had read Mr Nerguizian's witness statement); (b) believed that the Fund Parties were contractual counterparties to the Loans (despite the fact the contrary is plain from the pleadings and the witness statements); and (c) was unaware that Mr Jafar did not have permission to rely upon Articles 320-324 of the LCT. Fourth, in cross-examination Dr

Ahnish had also exhibited a marked tendency to avoid questions, instead giving answers to questions he had not been asked despite multiple attempts to focus his attention on the question asked. Fifth, in Ahnish 2 he had argued only a lawyer who practised law in the UAE could properly opine on the content of UAE law. That was not only unjustified but also involved going beyond the proper role of an expert and surprising given the need for him to remain independent.

Discussion and decision

1151. In *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at [43] Lord Reed and Lord Hodge (with whom the other Justices all agreed) considered what needed to be shown in order for expert evidence to be admissible and as to the relevant witness's knowledge and experience. They said this (my underlining)

“43. Counsel agreed that the South Australian case of *R v Bonython* (1984) 38 SASR 45 gave relevant guidance on admissibility of expert opinion evidence. We agree. In that case King CJ at pp 46-47 stated:

“Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.”

44. In *Bonython* the court was addressing opinion evidence. As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence:

(i) whether the proposed skilled evidence will assist the court in its task;

(ii) whether the witness has the necessary knowledge and experience;

(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and

(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

All four considerations apply to opinion evidence, ...The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn.

...

50. The witness's knowledge and expertise: The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence. Where the skilled witness establishes such knowledge and experience, he or she can draw on the general body of knowledge and understanding of the relevant expertise: Myers, Brangman and Cox v The Queen [2015] UKPC 40; [2015] 3 WLR 1145, (above) at para 63. "

1152.I have carefully considered the submissions made by Mr Jafar (both in his written and oral submissions) that both Professor Mallat and Mr Edge did not satisfy the requirement for being experts in the relevant UAE law and therefore that their evidence was inadmissible and should be disregarded. Having done so, I reject them. I am satisfied that both Professor Mallat and Mr Edge have demonstrated that they have the relevant knowledge and experience of UAE law acquired by study or experience to make their opinions of value to the Court.

1153.I do not consider that it is essential for these purposes that the expert has practised or is a full-time practitioner before the local courts. The relevant and requisite knowledge and experience of UAE law can be acquired in various different ways. Professor Mallat's study in connection with his teaching and writing has involved him acquiring considerable knowledge and experience and a deep understanding (including from a comparative

perspective) of various systems and jurisdictions applying Shari'a law and their local laws. He is clearly a jurist with a high reputation for scholarship and expertise in these laws and the local legal systems. His writing covers UAE law albeit that he has never published a separate volume or chapter/article dealing exclusively with UAE law and he has given expert evidence on UAE law before the English courts. I am satisfied that he has appropriately and properly drawn on the expertise of well qualified local UAE lawyers to supplement his own knowledge without undermining the credibility or value of his opinions as representing his own work and analyses based on his own sufficient expertise. As he noted during his cross-examination by Lord Falconer, he relied on the assistance of local practitioners mainly for points of practice and procedure. He said that (Day 23, page 42) he had relied on such assistance “... in matters mostly of procedure, and in matters where I have the feeling from my long-term practise as a lawyer that the courts do not apply the text of a particular statute, I try to have it ascertained with local lawyers. It's a large range. But some of it is substantive but mostly it's procedural...”

1154. The same basic analysis and conclusion applies to Mr Edge. His lengthy experience of teaching and researching Islamic law and the modern civil and commercial laws of the Middle East concentrating particularly on Egypt and the Gulf States mean that he has acquired relevant knowledge and expertise on UAE and related laws. He also has significant UAE connections. He was invited by the founding legal counsel of the DIFC to be a member of the DIFC's Legislative Committee on which he served for more than ten years. He has also spent the majority of his considerable professional practice advising clients on civil and commercial laws of the Middle East and he estimated that 75% of his practice revolved around advice in legal matters concerning the Arabian Peninsula particularly Saudi Arabia and the UAE of which at least a third related to the UAE. His specific association with the UAE is of long standing having been involved in a major arbitration in Dubai and given advice on the laws and legal system of the UAE to major corporates and Emirati ruling families. He has also acted as an expert on UAE law many times.

1155. Of course, the additional knowledge and experience acquired by a full-time practitioner with local rights of audience and extensive time appearing in court may mean that the opinion of

that person should be given additional weight on issues relating to, affected by and which are dependent on the practice and procedures of the local courts including an assessment of how local judges are likely to react to and adjudicate on factual disputes or new and undecided points of law. Therefore, Dr Ahnish's lengthy (over forty years of) experience in practice and his regular appearances before the UAE courts in particular the Abu Dhabi courts, is a relevant consideration when weighing his views against those of Professor Mallat and Mr Edge. But it is also relevant to take into account the input they both received from experienced local practitioners.

1156. I found all three experts to be honest witnesses who were doing their best to assist the Court.

Because a number of the points in issue are not clearly or fully developed in the UAE law materials, and many are not the subject of clear decisions by local courts (recognising of course the formal absence of the doctrine of precedent) all three experts on occasions struggled during cross-examination to give clear and coherent answers to questions (or to hypotheticals that were posed by Leading Counsel). I must say though that Professor Mallat and Mr Edge, in my view, were more convincing in cross-examination and on balance I generally found their evidence to be both comprehensible and persuasive, because of the cogency, clarity and analytical rigour of their reasoning as well as their comprehensive analysis of and response to the authorities cited by Dr Ahnish. It seemed to me that Dr Ahnish frequently resorted to and was relying on his professional instincts and on general principles that could not be substantiated by reference to provisions in the LCT or clearly supported by dicta in this case and which overrode or significantly glossed the terms of the LCT. That is not to say that I have ignored or given only little weight to his views based on that instinct, derived from years of practice, or that I have not given proper weight to the role of Shari'a law and the core principles derived from it which form an important part of UAE law, particularly where gap filling is required. I have also recognised and sought to avoid the trap of assuming that because the result argued for by Dr Ahnish is not the same as that in Cayman Islands or because the underling reasoning is different from that applied in our Court, Dr Ahnish's opinion must be wrong. As I said earlier, I recognise that the UAE legal system and the law applied within it are in substantial respects different from ours and that difference needs to be respected and taken account of when deciding which expert opinion to prefer. I

have also sought to follow and apply the guidance given by Lord Hodge in *Perry v Lopag* 2023] UKPC 16, [2023] 1 W.L.R. 3494. But where Dr Ahnish's opinions conflicted with those of Professor Mallat and Mr Edge that appeared to be more closely based on and followed the text of LCT, as interpreted having regard to Shari'a principles, I have preferred and thought it appropriate, to follow their view. I also recognise and have taken into account the fact that Dr Ahnish was not as fluent in English as Professor Mallat and Mr Edge. On occasions I found him difficult to follow for this reason, but I have done my best to understand what he was saying and not discount his views because of the manner of their expression.

The key points in dispute

1157. It is helpful at the outset to identify the key points in dispute by identifying the Fund Parties' principal defences to Mr Jafar's case in deceit and enrichment without cause.

1158. As regards the UAE law deceit claim, the Fund Parties' main defences are as follows:

- (a). The Fund Parties rely on the same defences to the UAE law deceit claim as those maintained in respect of the Cayman Islands law deceit claim. The UAE law deceit claim failed for the same reasons as the Cayman Islands law deceit claim failed. Mr Naqvi did not make the representations pleaded in the RRASOC and in any event even if Mr Naqvi had done so Mr Jafar did not rely on and was not induced to advance the Loans by the Overarching Message and the Reinvestment Representation.
- (b). If the Court concluded, as the Fund Parties submitted that it should, that the pleaded Representations (and the Overarching Message) had not been made, Mr Jafar could not succeed and establish a UAE law deceit claim merely on the basis of deliberate silence. Dr Ahnish was wrong to assert that a claim in deceit could be based on mere deliberate silence. Silence was not a sufficient basis on which to maintain a tort claim in deceit.

- (c). Further and in any event, under the applicable UAE law Mr Jafar was unable to maintain a claim in deceit in circumstances where he had failed to rescind (or could not assert in these proceedings that he had rescinded) the contracts pursuant to which the Loans had been made. It was clear that Mr Jafar had not rescinded those agreements. Mr Jafar had accepted that he could not, and did not, maintain a positive case that he had exercised or could now exercise, a right to rescind them. The Fund Parties argued that the Court should reject Dr Ahnish's evidence that a deceit claim in tort could be maintained even where the claim related to misrepresentations made to induce a contract which was subsisting. There was either no claim or even if there was a claim there was no recoverable loss.
- (d). Even if the Court found that Mr Naqvi had made untrue statements to Mr Jafar with the intention to defraud him and in bad faith and even if such statements had induced Mr Jafar to make the Loans, Mr Jafar was unable to claim against the Fund Parties since under the relevant UAE law Mr Naqvi's fraud was not to be attributed to them, nor were they vicariously liable for Mr Naqvi's deceit.
- (e). The Fund Parties were at most only indirect authors of the harm suffered by Mr Jafar and as such were not liable to him in respect of such harm. UAE law provided that where there were direct and indirect authors of the harm only the direct author was liable. AH and AIML were the direct authors of Mr Jafar's loss, by failing to repay the Loans. UAE law considered that the failure to repay the Loans arose from the action of an intermediary. The Fund Parties, even if they were to be attributed with Mr Naqvi's deceit, were only indirect authors of the harm.
- (f). Even if the Court were to find that Mr Naqvi had been acting for the Fund Parties when negotiating the Loans and that the Representations made and the Overarching Message delivered by Mr Naqvi were to be treated as having been made by the Fund Parties as well as AIML (and AH), so that the Fund Parties could be said to have participated in the deceit and were responsible for the same harmful act as AIML (and AH), the Fund Parties' share would be limited both because their role

in any wrongdoing (if established) was negligible and because Mr Jafar contributed to his own losses. Since Mr Naqvi was acting primarily on behalf of AH and AIML when negotiating the Loans they were the primary wrongdoers (with Mr Naqvi), and the Fund Parties played no active role in the alleged deception of Mr Jafar. Each of the Fund Parties' liability should not exceed the extent to which it retained the benefit of Mr Jafar's loans and take into account the recoveries made to date by Mr Jafar. Further, the Court had a wide discretion to reduce the damages payable by reason of any contributory fault. In the circumstances a substantial reduction was appropriate. Mr Jafar was an experienced and successful businessman, who has considerable resources. Despite the clear red flags which the Fund Parties had identified and relied on Mr Jafar had decided to go ahead and advance the Loans. He did so without any real due diligence or measures to protect his position.

1159. As regards the UAE law enrichment without cause claim, the Fund Parties' main defences were as follows:

- (a). No claim in enrichment without cause could be made where payments had been made by Mr Jafar to AIML (and AH) pursuant to a valid and subsisting loan agreement. There was therefore a lawful basis for the receipt by AIML (and AH) of the Loan advances.
- (b). Dr Ahnish was wrong to assert that even where the Loan Advances had been paid and received pursuant to a valid and subsisting loan agreement a claim in enrichment without cause could still be maintained against the Fund Parties because they had (as Mr Jafar claimed) not been acting in good faith since their *de jure* directors were aware of Mr Naqvi's deceit or Mr Naqvi's deceit was to be attributed to them.
- (c). Good faith and bad faith were irrelevant to a claim for restitution for enrichment without cause. If there was a good cause for the enrichment, which Mr Jafar had not denied and which was implicitly part of his own pleaded case, then good faith

or bad faith did not come into the picture. Furthermore, even if bad faith were relevant, Mr Jafar had not demonstrated that the Fund Parties had acted in bad faith in receiving funds in partial discharge of the intercompany receivable arising from the misappropriation of their monies.

The relevant UAE law

A different legal system

1160. I am very conscious that UAE law, the UAE legal system and the approach of the UAE judges to the adjudication of disputes is in material respects very different from Cayman Islands (and English) law and the common law methodology governing dispute resolution. I have reminded myself when considering the issues in dispute that it is important not to apply Cayman Islands (or English) common law patterns of thought or the assumptions derived from years of working in the common law system and to focus and rely on the expert evidence.

Dealing with disputes in the expert evidence

1161. It is necessary to pay close attention to the expert evidence both as to what the experts have said about the substantive law issues in dispute but also about the different underlying principles and approaches applied and adopted by the UAE Courts. I have borne in mind and sought to follow the approach confirmed by the Privy Council in an appeal from this Court in *Perry v Lopag Trust Reg No 2 (Cayman Islands)* in particular that the task of the trial judge when there are disputed questions of foreign law is to determine what the highest relevant court in the foreign legal system would decide if the point were to come before it. The following paragraphs in the judgment of Lord Hope are of particular relevance:

“10. The starting point is that findings in relation to foreign law are findings of fact because a judge is not to be imputed to know foreign law: Nelson v Bridport (1845) 8 Beav 527. Absent agreement between the parties, foreign law is proved by suitably qualified experts in the relevant foreign law. Nonetheless, such findings of fact are in a special category. Judges frequently quote the dictum of Cairns J in Parkasho v Singh [1968] P 233, 250 that “the question of foreign

law, although a question of fact, is a question of fact of a peculiar kind". Findings of fact as to foreign law are in a special category in part because, in certain circumstances, in particular when the foreign law is a common law system analogous to the judges' domestic law, the judge at first instance and the judges in the appellate courts can use their legal skills and experience in the analysis of domestic law to analyse the foreign law. In such circumstances the appellate judges are not at any significant disadvantage in carrying out that analysis compared with the trial judge. While the circumstances of cases may vary widely, the Board derives some propositions from the case law.

11. *First, the task of the trial judge when there are disputed questions of foreign law is to determine what the highest relevant court in the foreign legal system would decide if the point were to come to it: Dexia Crediop SpA v Comune di Prato [2017] 1 CLC 969 ("Dexia"), para 34; Morgan Grenfell & Co Ltd v SACE Istituto per I Servizi Assicurativi del Commercio [2001] EWCA Civ 1932 ("Morgan Grenfell"), para 50. It is not sufficient for a party to identify a judgment of a foreign court of first instance which may be on point and assert that the task of the appellate court is simply to analyse that judgment.*
12. *Secondly, if the foreign legal system is a common law system which adopts a similar approach to legal reasoning and statutory interpretation to that of English law, the English judge at first instance is entitled and required to bring to bear his or her knowledge of the common law and the rules of statutory construction in analysing the foreign law. So too is the appellate court. In MCC Proceeds Inc v Bishopsgate Investment Trust plc [1999] CLC 417 ("MCC Proceeds Inc"), a case concerned with the construction of the Uniform Commercial Code which was part of the law of New York, a common law system, Evans LJ giving the judgment of the Court of Appeal stated (para 13):*

"When and to the extent that the issue calls for the exercise of legal judgment, by reference to principles and legal concepts which are familiar to an English lawyer, then the [appellate] court is as well placed as the trial judge to form its own independent view."

The important words in that statement are "to the extent" and the reference to familiar principles and legal concepts. The court went on to state that it was not entitled to substitute its own view for the view of the trial judge when there was acceptable evidence to support the judge's finding unless the English court interprets the statute in accordance with English rules of construction and there is no evidence that different rules would govern the foreign court's construction or evidence that the words would have a special meaning in a foreign context (para 20). The Court of Appeal in Dexia cited these passages in MCC Proceeds Inc with approval (paras 38 and 39). The Court of Appeal in Dexia also quoted from the judgment of the Court of Appeal in Morgan Grenfell paras 50 and 51, in which the court observed that where the court was faced with differing views

as to Italian law, which was not based in any relevant aspect on the common law, there was less room for the judge to apply his or her own legal training and experience to help to resolve the relevant question.

13. *Thirdly, where the foreign law is in a foreign language the trial judge will often be dependent on translations of the relevant texts, which may or may not be precise and which may or may not be disputed, and on the evidence of the foreign law experts to understand the meaning and nuances of the foreign language in the relevant text. Thus, in Byers v Saudi National Bank [2022] 4 WLR 22 (“Byers”), the trial judge had to address questions of Islamic law, of which the only authorised texts were in Arabic, and he had to work with translations and with the assistance of foreign law experts. The Court of Appeal concluded that it should be slow to interfere with the judge’s findings of fact on Saudi Arabian law and should do so “only ... in accordance with the principles applicable generally to findings of fact made by a trial judge who has based his findings on evidence from witnesses” (para 105). In reaching that view the court had regard to the foreign language of the authorised texts, the fact that the concepts and principles of Saudi Arabian law were far removed from the common law, the lack of any familiarity of the English courts with the practice and culture in the capital markets of Saudi Arabia, and the fact that the judge at first instance had depended on the assistance of extensive expert evidence to explore and explain the many Saudi Arabian court decisions to which the experts referred in support of their contentions.*
14. *Fourthly and more widely, where the first instance judge is dependent upon the evidence of foreign law experts, who disagree as to the interpretation and application of a foreign law, and has to decide issue by issue whose evidence to prefer, the judge will have regard to all the evidence presented to him. The judge will reach a view based on an assessment of each expert having regard to each expert’s evidence as a whole, and the way in which each expert answered the questions posed in chief and on cross-examination to justify his or her opinions. The judge will thus evaluate the experts’ reasoning. Not all the matters which have influenced the judge in forming a view on which evidence to prefer will always be recorded in any detail in a judgment or can be ascertained from reading a transcript of the proceedings. The judge will have regard to “the whole of the sea of evidence presented to him whereas an appellate court will only be island hopping.” Those words of Lewison LJ in FAGE UK Ltd v Chobani UK Ltd [2014] FSR 29, para 114 are in such circumstances as applicable to a case involving expert evidence on foreign law as they are to cases involving the evidence of witnesses of fact more generally. See the judgment of Longmore LJ in Dexia at para 42.*
15. *There is thus a spectrum of circumstances in which the principal variable is the degree to which the judge can use his or her skill and experience of domestic law and of the domestic rules of statutory interpretation to ascertain the foreign law and apply it to the case in question.”*

The UAE legal system

1162. In section C of Mallat 1 Professor Mallat provided a helpful overview of UAE law and the UAE judicial system (which was not controversial or disputed) (my underlining):

- “26. The UAE is a federation of seven emirates comprising Dubai, Abu Dhabi, Ajman, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain (the “Emirates”). The federation is governed by the UAE Constitution, which came into effect on 2 December 1971. The capital of the UAE is Abu Dhabi.
27. The UAE is a combined federal civil law system based upon (i) civil law principles, influenced by French and Egyptian laws, and (ii) Shari’a (Islamic law generally, with fiqh as the more technical corpus of Islamic law). The official language of the UAE is Arabic and all federal and local laws are expressed in the Arabic language. English is widely used in daily commercial transactions.
28. The UAE judicial system comprises two jurisdictions:
- (a) *The Federal Judiciary presided over by the Federal Supreme Court, as the highest judicial authority in the UAE; 5 and*
 - (b) *The local judicial authorities of the Emirates, established by the individual Emirates.*
29. *Each of the Emirates has the right to choose to either (i) operate under the Federal Judiciary, or (ii) maintain its own local judicial authority and courts, in which case the local judicial authorities cover matters not reserved to the Federal Judiciary. The Emirates of Sharjah, Ajman, Fujairah and Umm Al Quwain operate under the federal judicial system, and do not operate their own local judicial systems. The Emirates of Abu Dhabi, Dubai, and Ras Al Khaimah maintain their own independent judicial systems, whose jurisdictions cover matters not reserved to the Federal Judiciary.*
30. The UAE judiciary is comprised of three tiers of courts in both the federal and local courts, with the Federal Supreme Court at the apex of the federal system, and a Federal Court of Appeal and Federal Court of First Instance underneath it; and the Court of Cassation, a Court of Appeals and a Court of First Instance within the Emirates who have chosen to establish their own local judicial authority.
31. The two most important Courts of Cassation are those of Dubai (the “Dubai Court of Cassation”) and Abu Dhabi (the “Abu Dhabi Court of Cassation”) [Mr Edge added the Court of Cassation in Ras Al-Khaimah]. Their decisions are final and binding in their respective Emirates, and their judgments can also be

used in other Emirates as examples. Within the federal jurisdiction, Federal Supreme Court decisions are final and binding on all. In this context, final and binding means that the case cannot be further appealed.

32. *There is no formal system of precedent in the UAE. This follows the French and Egyptian systems and also conforms with classical Islamic law. The decisions of previous courts, especially higher courts, are nonetheless authoritative. One will find often in a decision the expression min al-muqarrar ('it has been decided'). This is a common formula in Emirati judgments which refer to previous cases, operating as the closest to the concept of precedent in the common law system. The full expression min al-muqarrar fi-qada' ('it is established by the judiciary') also appears occasionally.*

Sources of law

33. *The UAE is a combined federal civil law system based upon (i) classical Islamic law, and (ii) civil law principles, influenced by French and Egyptian laws.*

Islamic law

34. *The Shari'a is generally translated as "Islamic law" in English. A more technical, and more accurate term for lawyers, is "fiqh", which designates the corpus of law developed by thousands of scholars over the centuries.*
35. *There are two formal sources of Islamic law. First, the Qur'an. The Qur'anic verses, of which ca. 600 (out of 6,200) are legal and deal mostly with issues such as marriage and divorce. There are also verses concerning inheritance and very few on constitutional law, but also certain verses concerning obligations.*
36. *Second, the hadiths, the sayings and behaviours of the Prophet, which are considered authoritative in Islamic law. They number around 100,000, of which ca. 10,000 are legal.*
37. *There are in addition rules and maxims (qawa'ed) (like in Roman law) which are often used like the hadith. Although not as authoritative as the Qur'an and the hadith, they are often found in the text of the legislation and in judicial opinions.*
38. *There are four main Sunni 'schools of law'. They are called madhab, plural madhaheb, in Arabic, and are named after their earliest eponyms: the Hanafi school (after Abu Hanifa, d.767); the Shafi'i school (after al-Shafi'i, d.820); the Malikis (after Malik, d.795); and the Hanbali (after Ibn Hanbal, d.855). They are generally associated with various geographic areas in the Muslim world. In the UAE, the judge first has regard to the Hanbali and Maliki schools, and, if a solution is not found in those schools, to the schools of al-Shafi'i and Abu Hanifa, as is stipulated in the UAE Civil Transactions Code (CTC).*

Civil Law

39. The CTC of the UAE was enacted by Federal Law No.5, issued on 15 December 1985 (Qanun al-mu'amalat al-madaniyya li-dawlat al-imarāt al-'arabiyya al-muttahida). Several translations of the CTC are publicly available in English. I address the issue of translation below (footnote 13).
40. UAE courts resort first to the Codes, then to the Explanatory Memorandum, which usually cites the classical Islamic law sources (Qur'an, hadith, maxims and fiqh books (as well as cross-references to other Arab civil codes, see Article 1 CTC, below)).
41. If there is any doubt as to the interpretation and application of the civil codes, the judge can turn to classical Islamic law, including the Maliki and the Hanbali schools.
42. In this report I will discuss in particular the interaction between Islamic law and the CTC, including the extensive references of the Explanatory Memorandum which accompanies the Code with an article-by-article commentary, as well as the need for the judge to rely on Islamic law, preferably the Maliki and the Hanbali schools, if the text is unclear or provides insufficient guidance:

“Article 1 CTC

Legislative provisions shall be applicable to all matters dealt therein, in letter and context. In the presence of an absolutely unambiguous text, there is no room for personal interpretation. In the absence of a text in this Law, the judge shall adjudicate according to the Islamic Shari'a taking into consideration the choice of the most appropriate solutions in the schools of Imam Malek and Imam Ahmad ben Hanbal and, if not found there, then in the schools of Imam al-Shafi'i and Imam Abu Hanifa, as the interest so requires.”

1163. Further useful background was provided by Mr Edge in Edge 1 as follows (my underlining):

- “29. *The UAE is a complex hybrid Civil Law system. The LCT is ultimately based upon the Egyptian Civil Code (promulgated in 1948) (the “ECC”), which was based partly on French Law and partly on Shari'a (although it has a relatively modest Shari'a influence). The ECC is the basis for the majority of the civil codes in the Middle East, with subsequent codes including progressively more Islamic law. As the LCT is, however, ultimately based on the Egyptian Civil Code, Egyptian jurisprudence by way of cases and commentary is therefore of continuing influence 11 (as is other Middle Eastern jurisprudence) and used by lawyers in the UAE by way of argument; albeit it is never expressed as being the basis of the written judgments by the UAE courts.*

30. Law in the UAE therefore takes a mainly codified form. The main laws for civil and commercial matters are: (i) the Law of Civil Transactions 1985; (ii) the Civil Procedure Law 2022 (replacing a Law from 1992); (iii) the Law of Commercial Transactions 2022 (replacing a Law from 1993); and (iv) the Evidence Law 2022 (replacing a Law from 1992).
31. The LCT contains all the substantive legal principles concerning the general law of obligations and property. The LCT also contains the principal choice of law rules in matters relating to the conflict of laws which are meant to apply to international transactions and relationships that come before the various courts that operate in the UAE.
32. *The role of Islamic Law (Shari'a) in the UAE is circumscribed but underlies some Federal legislation. The Shari'a remains a source of legislation as a result of Article 7 of the UAE Constitution which states that "The Islamic Shari'a is a main source of legislation"; but in reality, the role of the Shari'a is limited. As addressed below, the Shari'a does have a gap-filling role within the UAE legal system, but it is not the primary source of law (this being the codes themselves). The LCT is itself a hybrid code, in that, although some of its Articles are based upon principles of Shari'a, many Articles have a secular Civil Law influence.*
- ...
35. *Further, as a result of differences between the Cassation courts and the FSC in a case involving invalid lifetime gifts of property, the Federal government established in 2019 a special court known as the "Authority/Commission for the Unification of Federal and Local Judicial Principles" (the "Authority for Unified Legal Principles") whose main remit is to produce decisions in areas where the apex courts disagree. The decisions of the Authority for Unified Legal Principles are final and binding on all UAE courts, unlike the decisions of the apex courts themselves.*
- (d) *The Interpretation of the LCT and Sources of Law*
36. *Article 1 of the LCT sets out the sources of law to be applied by courts as well as the way in which the LCT is to be interpreted by the courts...*
37. *On the sources of law and the interpretation of legislative provisions, I submit the following propositions of UAE law.*
38. First, consistent with Article 1 of the LCT, the legislative provisions of the LCT are to apply both in their letter and spirit/intention but the judge is not to exercise ijtihad in relation to provisions of definitive import. Ijtihad is a process involving the use of innovative reasoning to reinterpret or develop Shari'a in light of changing circumstances by, for example, changing or extending recognised

principles. It has sometimes resulted in quite radical reversals of mainstream thinking in some Arab states and is used frequently by Shari'a judges in Saudi Arabia. However, in the UAE, by the above Article, the courts do not have a general power or discretion to innovate, change or expand on the basis of ijtiḥād. Rather the courts must apply the law according to the hierarchy of sources listed in Article 1 and, where the relevant legal provision is of definitive import, give effect to that provision.

39. *Second, if the judge finds no provision in the legislation (i.e., the LCT) which addresses a particular legal issue, then he must refer to the Shari'a. The Shari'a therefore is a residual source of law to address gaps in the LCT, where there is no provision. It is not, as it is in some other Middle Eastern states, the sole or principal source of law in the UAE. If reference to the Shari'a is required, then the Article provides a hierarchy of schools of Islamic law to be referred to.*
40. *Third, the Shari'a is also a resource for the interpretation, explanation and application of the LCT. Article 2 of the LCT provides that "The rules and principles of Islamic jurisprudence (fiqh) shall be relied upon in the understanding, construction and interpretation of these provisions [i.e., the LCT]." For example: (i) The encyclopaedic writings of certain mediaeval Islamic jurists will often be referred to, which collectively are known as the works of fiqh or legal jurisprudence. (ii) Reference is also sometimes made to what is generally known as the Ottoman Civil Code 1876 or more simply "the Mejelle."*
41. *Fourth, if after consulting the Shari'a there remains a gap with there being no definitive provision, the judge must refer to custom as long as it does not conflict with public order or morals. Custom here will in most cases refer to commercial custom and requires evidence of established and consistent usage.*
42. *Fifth, important federal laws such as the LCT are promulgated together with an Explanatory Memorandum (produced by the Federal Ministry of Justice) which adds depth and detail to the provisions in the Law indicating their provenance and why they were added to the Law. Where an Explanatory Memorandum exists, it will be used by the courts to understand and interpret the relevant legislative provisions by referencing its legislative history. Generally, the Explanatory Memorandum of the LCT is the most important aid to the interpretation and application of the LCT used by the UAE courts.*
43. *Sixth, case law is not a formal source of law in the UAE. Consistent with this, it is not mentioned in Article 1 of the LCT. There is no doctrine or strict rule of binding precedent in the UAE. However, the significant decisions of the highest courts, namely those of the FSC and the Courts of Cassation of Abu Dhabi and Dubai are now regularly published and are available online. Although these decisions are not strictly binding upon the lower Courts, they are often used in pleadings to indicate how the highest Courts have interpreted existing legal provisions and may be used to show how the Courts are likely to act in future*

cases thereby offering good evidence of future judicial practice and interpretation.

...

45. *Seventh, in the practice of UAE law, reference is also made to other Middle East legal systems and the writing of jurists addressing those systems. Given the history of the UAE legal system, this is particularly so for Egyptian law and jurists writing on Egyptian law.....”*

1164. Dr Ahnish did not provide an overview of the UAE legal system and UAE law in Ahnish 1. However, in Ahnish 2 in response to and disagreement with parts of Mallat 1 and Edge 1, Dr Ahnish set out his opinion on a number of topics relating to the proper interpretation and application of the LCT (which he referred to as the Civil Code) (he did this not only to correct the UAE law evidence but to demonstrate his belief that it was necessary for UAE law experts to have active and participant knowledge of UAE legal practice, which Professor Mallat and Mr Edge did not have):

“The proper hierarchy for applying UAE Civil Code principles in commercial transactions

- 3.2. *The UAE, along with other countries in the region, has two major sources of contemporary legislation that govern transactions; (i) the law that governs civil transactions; and (ii) the law that governs commercial transactions. It is often said by non-UAE lawyers that the Civil Code, being the ‘mother of laws’, applies de jure as the general principles on commercial transactions, given that the commercial transactions law does not itself contain general principles*

- 3.3. *Mr. Edge is of the view that Article 1 of Federal Law No. 5 of 1985 (issuing the UAE Civil Code) was amended in 1987 so that the UAE Civil Code’s general principles apply to commercial transactions. While I acknowledge that this is the case under UAE law, this understanding should not (for a UAE law practitioner) overlook or relegate the importance of the following:*

- (a) *The 1987 amendment to the UAE Civil Code was enacted on 14 February 1987, which was 6 years prior to the enactment of the first UAE Commercial Transactions Law No. 18 of 1993. Therefore, this amendment could not have possibly been aimed at directing judges on how to apply legislation that did not exist at the time. Rather, this amendment explicitly directed judges to apply “existing laws and regulations until such time as the commercial transactions law is enacted”, meaning that the relevant laws and regulations of the respective emirates were to continue to be*

recognised as the applicable law to commercial transactions until a commercial transactions code was enacted.

- (b) *I remember vividly that Article 1 of the amended UAE Civil Code, was introduced in order to temporarily exclude the application the Civil Code provisions on commercial transactions until the promulgation of a commercial transactions code. The provisions of the Civil Code at the time were seen to have come into direct conflict with certain commercial customs in the UAE, including interest and liquidated damages. This policy has been reinforced and formally recognized in Article 2 of Federal Law No. 18 of 1993, concerning Commercial Transactions which is now replaced by Federal Decree-Law No. 50 of 2022. Article 2 (first drafted in 1993) specifically demotes the sequence of application of the UAE Civil Code to commercial transactions behind and only after:*

- (a) *party agreement to a commercial transaction;*
- (b) *the provisions of commercial transactions law;*
- (c) *specific commercial custom;*
- (d) *general commercial custom; and*
- (e) *“the provisions applicable to civil matters, to the extent that [these provisions] are not contrary to the general principles of commercial activity.”*

It is pertinent to note that Article 2 (as replaced in Federal Decree-Law No. 50 of 2022) to further emphasise the importance of “a specific commercial custom” in this hierarchy.

Article 2 now adds the following:

*“The rules of previous dealings between the contracting parties are deemed to be among the specific custom rules applicable to such case”.
(My translation)*

- 3.4. *I am therefore of the view that a judge applying UAE law must adhere to the above hierarchy, which a matter of policy was underlined in the 1987 amendment to Article 1 of the UAE Civil Code.*

The applicability of Good Faith / Bad Faith to all sources of liability under UAE law

- 3.5. *Article 246(1) of the UAE Civil Code speaks explicitly to the requirement for contracting parties to uphold good faith. The same requirement is adapted in Articles 105, 107, 120 and 262 of the UAE Commercial*

Transactions Law. As there are no equivalent provisions on good faith under the UAE Civil Code provisions which govern harmful acts (tort) or unjust enrichment, non-UAE lawyers sometimes argue that good faith and its antithesis bad faith is not applicable.

- 3.6. *I take the view that the principle of good faith under UAE law is not confined in its application to contracts. I address this in detail with respect to unjust enrichment at paragraphs 4.19 to 4.23 below. It is sufficient to state here that UAE case law is adamant on applying good faith/bad faith in upon examining and adjudicating on all sources of liability under the UAE Civil Code, whether contractual or otherwise. By way of example, in Appeal No. 310 of 2006 the Dubai Court of Cassation stated:*

“The provisions of Article 104 and 106 of Civil Code indicate – as per the judicial precedents of this court that the legislator places the principle of non-liability for the harms that may arise from the legitimate exercising of the right and determines four conditions for the legitimate exercise of right which meets the description of "abuse", the first of which is that this abuse is meant to incur harm to a third party, and this intention is inferred from the non-existence of any interest in exercising the right in a way that makes a third party incur harm whenever claimant is aware of this. The second is that exercising the right is for attaining a certain illegitimate interest, and it is that way if it is intended to breach the rules of Islamic Sharia or the provisions of law, or if the attainment thereof contradicts with public order or ethics. The third is that the exercising of the right entails attaining interests of low importance and is disproportionate to the harm incurred by others. The fourth is that the person transgresses the common norms and traditions, which means that a person may not abuse the right thereof, and this occurs of any of the cases stated in the aforementioned Article 106, and the general characteristic in the four cases is that they are vitiated with malice and bad faith and nothing is intended from them but to incur harm to others. The burden of proving this lies on the litigant which claims the abuse of right and it does not suffice to establish the thought of claimant on the probability of occurrence of any harm due to the exercising of the right thereof since this does not per se prove the intention of harm. Based on the aforementioned, if the employer exercises the right thereof in terminating the open-term contract in exercising the right thereof granted by law as previously stated, it shall not be deemed abusive in exercising this right, except if the employee proves that any of the conditions set forth in the aforementioned Article 106.”

- 3.7. *I believe the above extract demonstrates that under UAE law a judge would recognise and apply good faith, including with respect to tortious*

liability and unjust enrichment, because Articles 104 and 106 of the UAE Civil Code (as cited in the above extract) represent overriding maxims in the Introductory Book (General Principles), Chapter 5, subsection 1, entitled The scope of exercise of rights. The provisions of the Introductory Book, and its subsections, appear before and thereby apply to Book 1 on Sources of Obligations and Personal Rights, which includes, inter alia, provisions regulating contracts, harmful acts and unjust enrichment. A UAE judge would therefore understand the weight given by the legislator to the principle of good faith as it applies to all sources of legal obligations.

The Particularities and Force of the UAE Civil Code

- 3.8. With due respect, I have seen in the reports of both Professor Mallat and Mr. Edge, references to the loose notion of Arab and Middle Eastern jurisdictions and laws under the rubric of “Middle Eastern Law.” Whilst I am very fond of learned law practitioners who exert considerable efforts and thoughts in producing legal materials on “Arab and Middle Eastern Laws,” such generality runs the risk of misapplying principles and interpretations of a second or third Arab jurisdiction. UAE law has an underlying policy and is drafted in a way that is fundamentally different from second or third Arab jurisdictions. The plain reality is that there are significant differences between each and every piece of legislation across the ‘Arab World’. The UAE Civil Code is a good example, as I aim to illustrate below.
- 3.9. The UAE Civil Code is the second serious attempt by an Arab country in modern times to codify, but not amend, the principles of “Shari’a” as articulated by Sharia jurists for the last 1,400 years or more. Some of these jurists were judges, and the principles that have been recognized as Shari’a principles, were laid down following the review and rendering of real-world judgments and opinions delivered by scholars of Shari’a. These two countries are Jordan and the UAE.
- 3.10. In 1987, at the request of the Founding President of the UAE and pursuant to Federal Cabinet of Ministers’ Resolution No. 50/26 1978, a pan-Arab jurists committee was established and commissioned to draft a number of cornerstones pieces of legislation, including a civil code on the basis of Shari’a principles. Al Sanhuri was obviously not a member of that committee. The product of a sub-committee to the above-mentioned committee, was the present UAE Civil Code which departs, in many significant aspects, from so many other so-called Middle Eastern jurisdictions, including Egypt and Iraq. The latter jurisdiction is of interest as the Iraqi Civil Code, unlike the Egyptian Civil Code, was heavily drafted (like the Jordanian and the UAE Civil Codes) on the basis of

Shari'a principles. Two examples of departures from these two jurisdictions are mentioned below.

3.11. *Article 282 of the UAE Civil Code reads as follows:*

“The perpetrator of any harm (idrar) even if not discerned shall be bound to repair the prejudice” [or using terms as close to the text as possible, “shall render the doer thereof liable to make good the harm”].

3.12. *In comparison, Article 163 of the Egyptian Civil Code, which is often referred to as the equivalent of UAE Civil Code Article 282, reads as follows (my translation):*

1. *“Every fault, which causes injury to another, imposes an obligation to make reparation upon the person by whom it is committed”.*

2. *“When an injury is caused by a person not who is not discerned, the judge may, if no one is responsible for him, or if the victim of the injury cannot obtain reparation from the person responsible, condemn the person causing the injury to pay equitable damages, taking into account the position of the parties”...*

3.13. *These differences are not merely semantic. The emphasized words reflect fundamental distinctions in the way UAE and Egyptian judges are directed to handle harmful acts. Under Shari'a principles and consequently under UAE law, Article 282 implores judges to grant compensation as soon as it becomes apparent that a harm has been committed, even where such harm was visited upon persons undiscerned. Whereas, under Article 163 of the Egyptian Code the judge is asked to take as their point of departure, the “error” (khata) leading to and distinct from harm. The historic origins of Article 282 are clearly adumbrated in the Explanatory Memorandum:*

“The Code has adapted the Islamic jurisprudence approach by the important, clear, and concise expression that anybody who causes harm to another person in his property or his person by a positive or a negative active shall be obliged to make compensation out of his own property whether or not he is a person of discretion [i.e. adult or not, or mental competent or not]”.

3.14. *The Explanatory Memorandum itself advises that the Civil Codes of Jordan, Syria and Iraq have corresponding Articles but not the Egyptian Civil Code. For this reason, I would very much advise a lawyer who is advising on UAE law to approach a ‘comparable jurisdiction’ with caution.*

3.15. Another example is the commentary and analysis at paragraphs 6.48 – 6.56 of my Expert Opinion of 24 August 2023, which illustrates that the concept and operation of vicarious liability under the UAE Civil Code is unmistakably different from the concept and operation of vicarious liability under the Egyptian Civil Code.

...”

1165. There was also a useful summary of the evidence regarding the structure and contents of the LTC in Annex 3 to the GHF Parties written closing submissions:

“The CTC

10. Enactment and Interpretation

11. *The CTC was enacted by Federal Law No.5, issued on 15 December 1985. Dr Ahnish’s evidence is that the CTC constitutes a “serious attempt” to codify but not amend the principles of Shari’a law. As Dr Ahnish explained in cross-examination: “it was a deliberate decision by the government demonstrated by a cabinet minister resolution to prepare a Civil Code on the basis of Sharia principles, and that’s what I meant by saying “serious.” It’s adopted formally by the state.”*
12. *Article 1 of the CTC provides that the provisions of the CTC: “shall apply to all matters dealt with by those provisions in the letter and in the spirit. There shall be no scope for innovative reasoning in the case of provisions of definitive import. If the judge finds no provision in this Law, he must pass judgment according to the Islamic Sharia. Provided that he must have regard to the choice of the most appropriate solution from the schools of Imam Malik and Imam Ahmad bin Hanbal, and if none is found there, then from the schools of Imam al-Shafi and Imam Abu Hanifa as dictated by expediency.”*
13. *The schools referred to in Article 1 are the four Sunni schools of law, to which Professor Mallat refers: “They are called madhab, plural madhaheb, in Arabic, and are named after their earliest eponyms: the Hanafi school (after Abu Hanifa, d.767); the Shafi’i school (after al-Shafi’i, d.820); the Malikis (after Malik, d.795); and the Hanbali (after Ibn Hanbal, d.855). They are generally associated with various geographic areas in the Muslim world. In the UAE, the judge first has regard to the Hanbali and Maliki schools, and, if a solution is not found in those schools, to the schools of al-Shafi’i and Abu Hanifa, as is stipulated in the CTC.”*
14. *The CTC was promulgated with the Explanatory Memorandum, which can properly be said to be authoritative when it comes to interpreting the meaning*

of the provisions in the CTC, notwithstanding that it does not have (in the words of Dr Ahnish) statutory authority.

15. *UAE courts typically resort first to the CTC, then to the Explanatory Memorandum, and if there is any doubt as to the interpretation and application of the CTC, the judge will have regard to classical Islamic law, including the Maliki and the Hanbali schools. Dr Ahnish's evidence was that there was a "flow of case law" that the UAE judge "now would have the opportunity to look into." However, there is no formal system of precedent in the UAE. The decisions of previous courts, especially higher courts, are nonetheless authoritative.*

Structure

16. *The CTC is split into the Introductory book and four further books. The relevant Articles are found within the Introductory Book, Book One (concerning, "Personal Obligations and Rights"), and Book Two (concerning, "Contracts").*
17. *The Introductory Book is also split into five parts.*
18. *Part One of the Introductory Book contains the "[p]rovisions relating to the application and effect of the law in time and place." Articles 1 to 3 and 11, to which Dr Ahnish refers at paragraph 13 of the JEM are within this Part. Each Article relates to the application and effect of the CTC in time and place.*
19. *Part Two of the Introductory Book contains, "[c]ertain jurisprudential (or fiqh) maxims and rules of interpretation." The Articles in Part Two contain "maxims" which are then refined or adjusted in more detailed circumstances in the Books that follow. In cross-examination, Dr Ahnish described Part Two as follows: "I always say this part, the instructive part, always remember, it's like the jacket, it's like the coat, it's always something, the umbrella. Whenever you consider any provision under the Civil Code or in fact under any law that governs our life in general, as civilians, as civil, always look into these principles because these are the governing, the umbrella that you have to look at, and interpreted the law in accordance with these principles."*
20. *Articles 32, 42, 54, 56, and 68 to which Dr Ahnish also refers at paragraph 13 of the JEM are within this Part 2: "Q. As such, they are all therefore, as you put it, fundamental maxims that the court or everyone should wear as a jacket every day when interpreting provisions of the CTC? A. Yes."*
21. *Article 42 is one such fundamental maxim. It reads as follows: "'(1) No harm shall be done, nor harm done in return. (2) Harm shall be removed."*
22. *Article 42(1) embodies the hadith injunction not to cause harm and Article 42(2) embodies the hadith that "harm shall be removed." There are other provisions in the CTC deriving from this hadith. One such a provision is Article 282.*

...

24. *Part Five of the Introductory Book contains the provisions concerning, "Rights." Articles 104 and 106 are within this Part.*
25. *Article 104 provides that the "doing of what is permitted by law negates liability and no person who lawfully exercises his rights shall be liable for any harm arising thereout" and Article 106(1) provides that a "person shall be held liable for an unlawful exercise of his rights." Article 106(2) provides the four circumstances in which the exercise of a right will be considered unlawful. The "general characteristic in the four cases is that they are vitiated with malice and bad faith and nothing is intended from them but to incur harm to others."*

...

28. *Book One is also split into two chapters: Chapter One concerns the "Sources of obligation or personal rights;" and Chapter Two concerns "The Effects of a Right." Article 124 (in Chapter One) lists the five sources of obligations: (1) contracts; (2) unilateral dispositions; (3) harmful acts (torts); (4) beneficial acts; and (5) the law. Each source of obligation is addressed a specific part of Chapter One. Mr Jafar's claims arise out of (alleged) acts causing harm (i.e., under Part Three) and (alleged) acts conferring a benefit (i.e., under Part Four).*
29. *Book Two concerns, "Contracts." It is split into five chapters, each concerning a different type of contract as follows: (1) contracts conferring ownership (including loan contracts); (2) usufructuary contracts; (3) contracts of work (including contracts of agency); (4) contracts of hazard; and (5) contracts of personal guarantee."*

The UAE law of deceit

1166. The following points were agreed by all the experts and are a useful starting point.

1167. The general rules on liability for harmful acts (tortious liability) in the UAE are set out in Articles 282 to 298 of the LCT with the general principles being found in Articles 282 and 283 of the LCT.

1168. Article 282 LCT states that:

“Any harm (idraar) done to another shall render the doer thereof, even though not a person of discretion, liable to make good (daman) the harm (dirar).”

1169. There is no express requirement within Article 282 itself that the act causing the harm must be an unlawful act or that there must be any requirement of fault. This could, therefore, be interpreted in isolation as providing for a general rule of strict liability for all acts that cause harm. However, Article 282 of the LCT is to be read alongside Article 283 of the LCT which adopts the Shari’a distinction between harm that is caused directly and indirectly. Article 283 of the LCT states that:

“(1) Harm may be direct (mubashira) or by causation (tasabbub).

(2) If the harm is direct, it must be unconditionally made good and if it is consequential there must be a wrongdoing or a deliberate act or the act must have led to the harm.”

1170. The commentary to Article 282 of the LCT in the Explanatory Memorandum explained the background to and provenance of Article 282 in more detail as well as the way it should be applied:

“This article demonstrates succinctly and clearly the rule of liability for a harmful act in its three elements. Liability to make compensation will arise out of any harm done, and the harm can pertain to an act or a failure to act, and it must have arisen out of the damage, and there must therefore be both the act (either positive or negative) and the harm, and then the causal relationship between them.”

1171. The Explanatory Memorandum refers only briefly to the types of harm that the LCT covers:

“The use of the word 'harm' in this context makes it unnecessary to use the various other kinds of word that have been used in this context, such as 'unlawful act', or 'act contrary to the law', or 'act prohibited by law' etc. It is self-evident that if the provisions of the legislation were to enumerate the acts out of which harm in this sense might be caused, that would be no more than to give examples, and it could not result in the creation of a comprehensive and exhaustive statement. The determination of what amounts to harm is left to the discretion of the judge, who will be guided therein by the general guiding elements to be deduced from the nature of the prohibition in the law against causing harm.”

1172. The Explanatory Memorandum then discusses direct harm as follows:

“In summary, if an act in itself leads to harm, then the loss arising therefrom must be made good, because it will be a prohibited act so far as concerns the result thereof, and the consequences will be borne by the perpetrator of the act, even though he may be a person of no competence or of defective competence [in the legal sense]; that will not affect the fact that his act has caused harm to a third party, that the legislature requires be made good on the basis of the ḥadīth ‘no harm must be done nor harm done in return’, whereby there is an absolute obligation to remove the harm, whether or not caused by a person who can be held accountable for his actions ...

The Code has adopted the Islamic jurisprudence approach by the important, clear and concise expression that anybody who causes harm to another person in his property or his person by a positive or a negative act shall be obliged to make compensation out of his own property, whether or not he is a person of discretion [i.e. adult or not, or mentally competent or not].”

1173. The commentary in the Explanatory Memorandum on the distinction between direct and indirect harm in Article 283 of the LCT is as follows:

“This article deals with the modes of causing harm, and the question whether it is necessary for there to have been a deliberate act or a wrongful act or not. The words ‘deliberate’ and ‘wrongful’ are not synonyms. The meaning of deliberate here is the deliberate causing of harm, and not the deliberate doing of the act.

The meaning of a wrongful act is that the person doing it does not have the right to perform the act out of which the damage has arisen. A person may deliberately perform an act but not intend any harm thereby, but harm may in fact be an unintended result of it. If the harm is ‘akin to a destruction’ directly, there is no requirement that there should be a deliberate act or a wrongful act, and if the damage arises in a causative sequence, then there must have been some deliberate act or a wrongdoing. These two rules are worded in Islamic jurisprudence in two rules, which are firstly that the direct causer is liable notwithstanding that he may not have acted deliberately or wrongfully, and that the indirect causer is liable only if he has acted deliberately or wrongfully.

Damage will be direct if the act causing the loss is done directly on the thing itself, and such a person is called the direct actor, as where for example he breaks a pot. It will be causative if he does an act on something else which leads to the damaging of the thing, as for example where he cuts a rope from which a lantern is hanging and the lantern falls and breaks. That is the direct causing of damage to the rope, and the causative damaging of the lantern, or as in the case where one digs a well and a person falls into it and dies; that is causative.

The criterion for distinguishing between direct damage and indirectly caused damage is that if it is direct then that is an independent cause and reason for the damage in itself, and it will be no excuse to plead that there was no deliberate act or no wrongdoing. So far as concerns causative damage, that is an act that is not the direct cause, and in that event there must be an element of deliberateness or wrongdoing in order for it to give rise to liability...

It has been said by way of application of the above: If a person digs a hole in a public road without permission from one entitled to give it, and another's property falls into it and is damaged, he will be the indirect causer of the damage and will be liable to make it good, because he acted wrongfully in doing what he did, and the damage arose as a result of it.

However, if somebody digs a hole in his own property and an animal or person falls into it and is hurt, he will not be liable, because he was not acting wrongfully in digging the hole as he was digging it in his own property, and he will therefore not be held liable.

If the indirect causer acts deliberately, he will be liable, notwithstanding that he was not acting wrongfully. Thus, if a person digs a hole in his own property with the intention of causing damage to another person's livestock, and it is damaged, he will be liable because he acted deliberately in causing the damage, even though his act was not of itself a wrongful one."

1174. Article 285 of the LCT provides:

"If a person deceives another he shall be liable to make good the harm resulting from that deception."

1175. In addition to Article 285 of the LCT there are also separate provisions in the LCT concerning misrepresentations made by a contracting party:

(a). Article 185 of the LCT regarding deceit by a contractual counterparty is as follows:

"Misrepresentation is when one of the two contracting parties deceives the other by means of fraud by word or deed which leads the other to consent to what he would not otherwise have consented to."

(b). Article 186 of the LCT provides:

“Deliberate silence concerning a fact or circumstance shall be treated as a misrepresentation if it is proved that the person misled thereby would not have made the contract had he been aware of that fact or circumstance.”

(c). Article 187 of the LCT states:

“If one of the contracting parties makes a misrepresentation to the other and it transpires that the contract was concluded by a gross cheat, the person so misled may cancel the contract.”

Deceit - Mr Jafar’s submissions

1176. Mr Jafar relied on Dr Ahnish’s evidence. The key parts of Dr Ahnish’s analysis and opinion on the deceit cause of action (as set out in Ahnish 1) are as follows (my underlining):

The Fundamental Principle: Deceit Vitiates Consent

5.1. Article 185 of the UAE Civil Code (the “Civil Code”) [I have defined this as the LCT] states that deception takes place “when one of the contracting parties deceives the other by trickery by word or deed which leads the other to consent to what he would not otherwise have consented to”. As detailed further below, deception gives rise (among other things) to a claim in tort recognised under UAE Law.

5.2. As described by the Federal Supreme Court:

“...Deception is the usage by one of the contracting parties of fraudulent means that lead to the inducement of the other contracting party to enter into a transaction that he intended to create a legal effect which would render [the other contracting party’s] intention defective. Furthermore, the rule that (fraud invalidates acts) is – as customarily held by this court – a sound rule even if there exists no specific provisions for it in the law... It is based on the moral and social considerations for combating fraud, deceit and deviation from the path of good faith which must be followed in transactions and procedures in general in order to protect the interests of individuals and society...” (Judgment No. 524 of 2000, Judicial Year 20, dated 18.04.2000).

5.3. *Elaborating upon this overview definition, the constituent elements of a deceit or deception under UAE Law are considered under the following sub-headings.*

Fraudulent means or devices

- 5.4. Deceptive means or devices include the making of statements that are untrue, with the intention that they be believed and relied upon by the party to whom they are made. Misrepresentation as a means of deception that invalidates consent is recognised under Article 185 of the Civil Code, ...
- 5.5. Deceptive means or devices include, for example, the presentation of forged documents that portray a particular untrue or misleading state of affairs. Based on the requirement of the Islamic Sharia of honesty and fair dealing in all transactions, UAE law takes an extremely serious view of deception through misrepresentation. This is illustrated by Article 190 of the Civil Code, which renders a transaction voidable even if the misrepresentation was made by a person other than a contracting party, if the contracting party knew of the misrepresentation...
- 5.6. Commonly, deceptive means or devices are comprised of positive acts or statements but under UAE law deliberate silence by one of the parties about a circumstance or a fact that would influence a party's decision to enter or refrain from entering a transaction amounts to misrepresentation under Article 186...
- 5.7. UAE courts have repeatedly held that deliberate silence is regarded as deceit if it is established that the person misled would not have concluded the contract had he/she been aware of that fact or circumstance. (Dubai Court of Cassation, Appeal No. 349/2002) (Exhibit 4). In this case, the Court of Cassation ruled that the non-disclosure by a party to a joint venture contract of the fact that some of the equipment which formed part of the assets under the contract were mortgaged to a bank was in this circumstance tantamount to deceit.
- 5.8. *As such, deliberate silence may nullify consent as an essential element for concluding a valid contract, if the facts of the case clearly indicate the deliberate silence on a particular fact or circumstance, provided that the party who concluded the contract would not have done so had he been aware of that fact or circumstance. (Federal Supreme Court, Appeal No. 30/Judicial Year 26- 30/ 11/ 2005).*
- 5.9. *The two decisions cited in paragraphs 5.7 and 5.8 above, constitute an iteration of the provisions of Article 186 of the Civil Code. The fundamental requirement of honesty, fairplay and good faith are golden threads that underlie the entire jurisprudence of the Islamic Sharia. In recognition of these cardinal requirements, in addition to the Articles cited above, UAE law equates silence as being equivalent to speech in other contexts too...*

Knowledge and intention on the part of the deceiving party

- 5.12. *Under Article 185 of the Civil Code, if the deceiving party makes a false representation that induces the deceived party to enter into a transaction that the deceived party would not have otherwise entered into, the deception is*

complete. It is not essential that the deceiving party must know that the representation was false at the time he made it – what is relevant is that the deceived party did not know it was false. It is sufficient if the representation was false and the deceived party relied on it to enter into a transaction he would have not entered into, had he known that the representation was false.

Inducement or Causation

- 5.13. *In order to be actionable, the deceit must have induced the other party to enter into a transaction that the deceived party would not have otherwise entered into. Other reasons, motives or objectives that the deceived party may have had for entering into the transaction are regarded as extraneous (irrelevant) factors in determining whether deception within the meaning of Article 185 has occurred. If the deceived party was persuaded to enter into a transaction he would not have otherwise entered relying on the misrepresentation of the deceiving party, the tort of deceit has been committed.*

Who committed the deceit?

- 5.14. *Under Article 190 of the Civil Code, if a misrepresentation is made by a third party, then it will have no bearing on the contract unless the party who alleges deceit proves that the other party to the contract was aware of the misrepresentation made by the third party... In such circumstances, it would be considered unconscionable to permit a contracting party to take the benefit of a transaction concluded on the basis of a misrepresentation made by the third party, which the contracting party knew was false.*

Available causes of action or remedies

- 5.15. *As to the remedies that may arise in the event that a deceit is proven, and inducement is also proven, under Article 187 of the UAE Civil Code, deception may give the person deceived the right to rescind the contract if the deception resulted in gross “ghubn.” I translate ghubn as beguilement, rather than hardship, the latter being a term that I have occasionally seen in translations of Article 187. I have also seen the term being translated as “cheat.”*
- 5.16. *The meaning of ghubn in Islamic jurisprudence is interpreted as “outdoing or outwitting someone, especially in market transactions.” Therefore, as the Explanatory Memorandum of the Civil Code attempts to explain, a ‘normal’ or ‘accepted’ level ghubn is expected in any transaction. The Explanatory Memorandum differentiates between “normal and gross beguilement.” It says: “gross beguilement occurs as a result of falling of one of the contracting parties into deception... which gives [him] the right to rescind the contract for the bad faith... exercised by the other party”. It seems, therefore, that if ghubn is exercised in bad faith, gross beguilement will be assumed to have occurred.*

5.17. *In my view, Article 187, read with the comments of the Explanatory Memorandum, seems to suggest that gross ghubn is found where a contract results in an unconscionable bargain that no ordinary person conversant with that market would contemplate as reasonable. If this happens, then gross ghubn would have legally existed without any requirement to assess the amount of damage sustained. In short, there is no need to prove that damage was sustained as a result of the deception; this is presumed, and the right to rescind flows from that.*

5.18. *However, seeking rescission as a result of consent vitiated by misrepresentation is a right or entitlement. Deception, does not, ipso facto, render a contract void ab initio. The person who is deceived may, instead of seeking rescission and compensation, simply claim damages for the harm sustained by under Article 274 and 380(2) of the Civil Code.*

“Deception” as a Tortious Act /Tortious Liability for Deceit

5.20. *Under UAE law, deception entitles the victim to compensation under the general principles of tortious liability.*

5.21. *Article 282 of the UAE Civil Code enunciates the general principle: ...*

5.22. *Further, in a specific application of this general rule, Article 285 of the Civil Code provides: “if a person deceives another he shall be liable to make good the harm.” Article 285, which refers to deception is, therefore, a particular example of the general principle of “tortious liability” laid down in Article 282.*

5.23. *The core principles for what amount to deceit (for the purpose of a claim in tort) are materially the same as those considered in the previous sub-section of this opinion.*

5.24. *The Explanatory Memorandum enumerates the three elements of tortious liability under Article 282, namely: (i) tortious (harmful) act/omission; (ii) harm caused; and (iii) a causal link between them: “This Article [Art. 282] demonstrates succulently and clearly the rule of liability for a harmful act in its three elements. Liability to make compensation will arise out of any harm done, and the harm can pertain to an act or a failure to act, and it must have arisen out of the damage, and there must therefore be both the act (either positive or negative) and then harm, and then the casual relationship between them.”*

5.25. *Thereafter, the Explanatory Memorandum proceeds to define these three elements.*

Harmful Act

- 5.26. “Harm” is a comprehensive term that encompasses all harmful conduct. The use of the term “harm” in this context makes it unnecessary to use the various other kinds of words and expressions that are often used in this context, such as “unlawful act”, or “act contrary to the law”, or “act prohibited by law” etc.”
- 5.27. The law does not provide an exhaustive list of harmful acts: “It is self-evident that if the provisions of the legislation were to enumerate the acts out of which harm, in this sense, might be caused, such a list would be no more than examples, without creation of a comprehensive and exhaustive list of all harmful acts and omissions.”
- 5.28. Harmful acts includes acts and omissions. “Harm [means...] an attempt to go beyond the limits at which one should stop, or to fail to reach that limit to which one should go in acting or in refraining from acting, in such a way as to cause harm. The law thus deals both with negative acts and with positive acts, and it includes both deliberate acts and mere negligence equally. Islamic jurisprudence recognizes both a positive error, and also a negative error, which [may be called] a default, or failure of care, and excess, and the like.”
- 5.29. The commentary contained in the Explanatory Memorandum, under Article 389 of the Civil Code, states:
- “In the cases of fraud and gross error, contractual liability falls under the same category as liability for a harmful act, because with the exception of those two cases the obligor will not be liable for the natural result of his mere failure to perform, unless that result could ordinarily have been foreseen at the time the contract was made. If the result that in fact ensued does not satisfy that condition, then it will fall outside the scope of contractual liability and there will be no obligation to pay compensation for it. In this respect, the law will take into account what the contracting parties have foreseen by way of damage requiring compensation not only in respect of the source or cause of such damage, but also the amount and extent of such damage”*
- 5.30. Based on the above extract, it may be stated that in determining whether or not a “harmful act” has been committed under UAE law, the considerations set out above with respect to what can constitute “Fraudulent means or devices” would be applied. It follows that a “harmful act”, for the purposes of Article 282/285, would include the making of a misrepresentation or deliberate silence about a material prejudicial fact or set of circumstances.

Harm

- 5.31. A minimum threshold for imposing liability under Article 282 is whether the conduct alleged is harmful (i.e. wrongful or unreasonable to the extent it causes harm (idrar)) to the person alleging harm.

5.32. The determination of what is considered harm is left to the discretion of the judge, “who will be guided therein by the general guiding elements to be deduced from the nature of the prohibition in the law against causing harm. There is an obligation imposed upon everybody not to cause harm to others. A breach of that obligation is one which involves harm. This obligation requires an examination of conduct, and this gives rise to the principle of the care to be taken by the prudent man.”

Causal Link

5.33. A causal link arises when a harmful act by a person causes, directly or indirectly, loss to another person. If the causal connection between the act and the damage is severed, there will be no obligation to pay compensation.

5.34. A causal link is assumed to exist when a harmful act causes harm. If the perpetrator of the harmful act wishes to deny liability, then the onus of proving that the harm caused was a result of an extraneous event, would be on that perpetrator. This is a principle that has been consistently held by UAE Courts. As recent as May of this year, the Dubai Court of Cassation ruled: “... a causal link is assumed by the occurrence of the wrongdoing and the damage. The debtor may not be relieved of it, save by proving [that the damage existed] by a force majeure, or an extraneous cause, or act of a third party.” (Dubai Court of Cassation, Appeal No. 6/2023, Commercial, dated 23.05.2023).

Remedy

5.35. *If the elements identified above are established, a UAE Court would award damages to the wronged party. The measure of damages for a harmful act is the actual loss and damage suffered by the claimant....*

1177. Mr Jafar submitted that the fundamental starting point for the law of deceit under the UAE Civil Code is “*la darar wala dirar*” and “*al dirar uzal*” – no harm shall be done, no harm done in return; and harm shall be removed. He argued that once the powerful policy of UAE law was understood, it could be seen that the policy must drive the interpretation of the relevant provisions of the LCT. UAE law will not readily permit a victim to go uncompensated (or incompletely compensated). It was not amenable to artificial technical defences and contrivances constructed to evade liability.

1178. Under Article 185 of the LCT there is a cause of action for contractual claims arising from deceit. The essential features of the legal test were straightforward and mirror the tests applicable under Cayman Islands law. Mr Jafar said that there was no dispute about the

requirements of Article 185 of the LCT, nor any dispute that, separately from an Article 185 contractual claim, a deceit may give rise to liability under Articles 282 and 285 of the LCT. He submitted that Article 282 was the overarching provision concerning tortious liability (or liability for “*harmful acts*”) which required that a plaintiff establish the occurrence of (1) a harmful act, (2) harm, and (3) a causal link.

1179. Mr Jafar argued that the requirements of Article 282 of the LCT were plainly satisfied by the very same facts that give rise to a deceit claim under Cayman Islands law. This was accepted he said by all the experts (see Mallat 2 at [31] where Professor Mallat said that: “*I agree with Dr Ahnish that if Mr Naqvi was found to have made untrue statements to Mr Jafar, such statements having induced Mr Jafar to make the loans, Mr Naqvi’s conduct would constitute an actionable deceit giving rise to a valid claim in tort.*”)

The UAE law issues in dispute

1180. Mr Jafar submitted there were four main issues in dispute (I have reordered these to sequence them into what seems to me to be a more helpful sequence):

- (a). Did Mr Jafar’s failure to rescind the contracts to lend the Loans and the Loans prevent him from bringing a claim in tort for compensation for Mr Naqvi’s deceit?
- (b). Did Mr Naqvi’s silence as to the true financial position of AIML, AH and the Abraaj entities and of the existence of a Ponzi scheme give rise to a claim in deceit?
- (c). Did the UAE rules as to attribution and vicarious liability result in the Fund Parties being liable for Mr Naqvi’s deceit?
- (d). If Mr Naqvi’s deceit could be attributed to the Fund Parties (the Funds’ general partners) or if they were vicariously liable therefor, had Mr Jafar as regards the Fund Parties only suffered indirect harm and if so was he thereby prevented from bringing a claim in tort for deceit against them?

Rescission

1181. The issue is what remedies are available to a victim of deceit against a third-party in circumstances where a deceit is perpetrated by the counterparty to the contract and a third party, and the innocent party has elected not to rescind the contract but rather has affirmed the contract. The question is whether in those circumstances the innocent party is able to bring a claim for damages against the third party. As to this:

- (a). Dr Ahnish was clear that the absence of rescission was not a bar to a tortious claim in deceit under Articles 282 and 285 of the LCT.
- (b). Mr Edge's evidence was that the deceived contractual counterparty's sole remedy remained rescission where the deceit complained of was a fraudulent misrepresentation inducing the formation of the contract unless the contract was rescinded. Where there was an independent wrong such as in the performance of the contract, then a claim in deceit in respect of that was not barred by the continued existence of the contract (including with respect to a third party). Where a third party had made the misrepresentation inducing the contract, there was no need to rescind the contract to bring a claim under Article 285 against the third party.
- (c). Professor Mallat's opinion was that where a plaintiff opted not to rescind a contract then a claim in tort could still be brought against a contractual counterparty or a third party to the contract "*but that it would be an odd situation for the UAE court not to go to the damage that is done by the non-performance of the contract and the ensuing consequences of putting back the parties in the situation where they were before the contract and ... alternatively compensating them for the damage done for lost profits*". In other words, the harm would be regarded as the failure to perform the contract, not the inducement into entering into it once it has been affirmed.

1182. Mr Jafar said that this was the main issue on which there was disagreement between the experts – what was the effect (if any) of rescission (or its absence) on a deceit victim’s ability to bring a tortious claim. In Ahnish 2, Dr Ahnish explained his opinion as follows (my underlining):

“Whether UAE [law] precludes a contractual counterparty’s right to seek remedies in tort

- 4.3. Mr. Edge states in paragraph 19 of his Report that if deceit occurs in a contractual context “different considerations arise and the matter must then be addressed by reference to the provisions concerning deception in contract, which are found in Articles 185 – 192 [of the] LCT and which provides as follows... While the contract exists, a party cannot instead elect to claim in tort as opposed to exercising its right to rescind and claim restitution”. This statement is (i) inaccurate and (ii) conflicts with the principle laid down by UAE Supreme Courts.*
- 4.4. There is nothing in Articles 185 - 192 of the UAE Civil Code which provide (as Mr. Edge suggests) or even supports Mr. Edge’s statement.*
- 4.5. Further, Mr. Edge’s statement conflicts with the principle laid down by UAE Case-Law. Despite UAE law, as demonstrated by case law, adhering to the principle that parties to a contract must enforce their mutual rights and obligations on the basis of contractual liability rather than tort, this rule falls away when any one party to a contract commits any of the following acts: (a) A crime; (b) A deception (c) An act of gross negligence.*
- 4.6. The rationale for this departure is that if a party commits any of these egregious acts, that party can no longer benefit from the sanctity of the mutual understanding enshrined in the contract. This departure has been reiterated in a number of UAE Cassation Courts judgments, including with respect to disputes arising out of commercial transactions.*
- 4.7. In Appeal Number 95 of 2014 the Dubai Court of Cassation ruled on an appeal submitted by a claimant (a professional football manager based in the UAE) who was a party to a commercial contract. His appeal against the judgment of the Lower Court of Appeal was, inter alia, on the basis that the Defendants (the other party to the Contract and his agent) introduced deception while concluding of the contract, demonstrated by offering a retention price, without declaring the high return that the Defendant would stand to be enriched by, as a result of utilizing the footballers image in advertising material across the Gulf. The Dubai Court of Cassation ruled, that it: “...is satisfied that the financial difference due to the claimant as a result of his participation in the production of marketing materials, should be in accordance with the market rate [as determined by the Court’s appointed expert], and such difference resulted from exercising*

deception upon the claimant which in turn resulted in moral loss demonstrated in emotional pain that the claimant sustained as a result of [such] deception.”

...

- 4.8. *It is notable that in the above appeal the Dubai Court of Cassation judgment was rendered after having been previously returned by the same court to the Court of Appeal for re-trial. In the first Cassation appeal, the Dubai Court of Cassation upheld the report of a court appointed expert that established that the football manager had been subjected to acts of deception at the time of signing a contract with the Defendant. It was found that the Defendant concealed from the football manager the template contract that the manager was supposed to have signed, instead making him sign documents without providing detailed explanation about the true extent, and that the Defendant concealed the full value of the consideration that the Defendant obtained from the resale of his rights under the primary contract to a marketing agent. It is noticeable here that the Dubai Court of Cassation, in both the first and second appeals, ordered the right of the Claimant to receive compensation for a deception in a contract without referring in any way directly or indirectly to rescission. Furthermore, from the rationale of both decisions, it was not apparent that the Defendant had even raised rescission as either the only remedy under the contract, or as a pre-requisite to claiming under deception.*
- 4.9. *In Appeal No. 636 of 2015 (Commercial), before the Dubai Court of Cassation, rescission was alleged by the Defendant as the sole remedy available to the Claimant (who were parties to a contract for the sale and purchase of shares in a commercial company). The Claimant requested payment for compensation equivalent to the true value of the shares he sold to the Defendant as a result of the concealment by the Defendant of the true value of the company. The Dubai Court of First Instance and the Dubai Court of Appeal both upheld the Defendant's argument, and refused the Claimant's claims on the basis that rescission was the only remedy available to him under Articles 185 and 187 of the UAE Civil Code.*

- 4.10. *The Dubai Court of Cassation dismissed this argument, stating that:*

“The contention [of the Appellant] is correct. As it is established in this jurisprudence of this Court that although the court presiding over the merits of the case...has the discretion to establish its judgement on a new understanding of the reality of the case, nevertheless, it is bound ... to restrict itself to the reality of the claim [submitted before the court] and the legal reason for relying on it and to give it the correct legal basis... without having to be bound by the literal meaning of the expressions used by the opponent; and it is also the jurisprudence established by this court that, pursuant to Article 282 of the UAE Civil Code which states (any harm caused to a person obliges its perpetrator – even if not discerned – to make

good the harm) means that every act that inflicts another with harm preordains that the actor pays compensation on the basis of what has been determined under Islamic Shari'a 'no harm shall be done, nor harm done in return', and 'harm shall be removed'. It is also preordained that pursuant to Article 285 of that law, which states (if a person cheats another he shall make good the damage resulting from the cheating), which means – as stated in the explanatory memorandum of that law that deception – inherent danger – has been recognised by jurists in the event of resorting to techniques to induce a person to accept what he would not have accepted had the other party not deceived him."

4.11. In furtherance of its reasoning, the Court of Cassation specifically pointed out the hideous nature of deception:

"If a person carried out a transaction as a result of the coercion and inducement of another person through fraudulent techniques giving a view that [diametrically] opposed reality, thus resulting in deception, the deceiver – if he acts in bad faith – shall compensate through financial means for the harm that has been inflicted upon the deceived."

4.12. It is also interesting that the Dubai Court of Cassation in this case, although adjudicating on deception as a harmful act, also mentioned that concealment as provided for under Article 186 of the UAE Civil Code may also constitute deception, as a harmful act in tort. Concealment is therefore on equal footing with any other act of deception. [Exhibit 3]

4.13. To demonstrate the rationale behind this departure, I take the opportunity to bring in extracts from a judgment of the Federal Supreme Court:

"...if there is a contractual relationship particular to the parties to it and particular to the scope of it, and damage has been sustained by one of the contracting parties by reason of a breach by the other in the performance of the contract, then the provisions of the contract will apply ... If, however, it is established that the act committed by one of the contracting parties leading to harm to the other is a criminal offence or if it amounts to fraud or gross error, then the party in breach will have been guilty of breach of a legal obligation, which will give rise to a liability in tort, because in no circumstances would he be allowed to commit such an act, whether a contracting party or not." (Federal Supreme Court, Appeal No.'s 408 and 464, Judicial Year 29/2010, 20-10-2010 – Commercial. [Exhibit 4])

4.14. The same principle was reiterated by the same court in Appeal No. 426/523, Judicial Year 18, 1997 and Appeal No. 98, Judicial Year 24/2005).

4.15. *This departure is also explicitly recognized by the Explanatory Memorandum, which was extracted in paragraph 5.29 of my Opinion of 24 August 2023. For ease of reference, I reproduce it in part here:*

“...in cases of fraud and gross error, contractual liability falls under the same category of liability for a harmful act.”

4.16. *I note that Professor Mallat agrees with me on this principle of UAE law...*

4.17. *Lastly, this departure seems to be recognized by many if not all of the so-called Middle Eastern jurisdictions... ”*

...

Whether rescission is a mandatory prerequisite for a claim under the UAE law of deception

4.24. *Mr. Edge states that rescission is a necessary precursor to bringing a claim for deception, where a contract between parties exists. Professor Mallat echoes this proposition in paragraphs 6.2 and 2.3 of his Expert Report. This reading or understanding of UAE law is wrong. I dare say it is a misconceived interpretation of the intention by the legislator to enable a party under a contract to seek rescission where deception has been perpetrated. Article 187 of the UAE Civil Code reads as follows:*

“If one of the contracting parties makes a misrepresentation to the other and it transpires that the contract was concluded by a gross cheat, the person so misled may rescind the contract”.

4.25. *For the avoidance of doubt, I am of the view that the Whelan translation of the word “cancel” is inaccurate. The Arabic word as it appears in Article 187 is “faskh”, which can only be translated to English as ‘rescission’. I note here that Mr. Edge reproduces Whelan’s incorrect translation of Article 187, but immediately after uses the word ‘rescission’ not ‘cancel’.*

4.26. *I am also of the view that the word “may” under Article 187, although loosely equivalent to the Arabic word “jaza”, it does not precisely convey the full thrust of the term “jaza”, which means ‘permissible’ or ‘a possibility open to the deceived’. I hope that this will clarify the legislator’s intention in Article 187. Article 187 does not contain any prohibition or restriction or requirement for a victim of deception to seek any remedy available under UAE law.*

4.27. *This opinion is supported by the Dubai Court of Cassation. In Cassation No. 20 of 2017, the Dubai Court of Cassation overruled the Dubai Court of Appeal (Appeal No. 421 of 2014, Commercial). The Court of Appeal ruled on a dispute involving parties to a commercial contract (sale and relinquishment of 51%*

shares in a commercial company). The Dubai Court of Appeal had ruled in respect of a party's claim for compensation under the UAE law for deceit, that the party was restricted to claim for rescission as a consequence of deception and therefore denied compensation. The Dubai Court of Cassation overruled this decision, and upheld the Appellant's contention that:

"...his two partners (the second and the third respondents) were managing... the company in which he has 51%, have deliberately concealed the true financial position of the company...which induced him to transfer his shares to the fourth respondent for a million and eight hundred thousand dirhams only and then he learnt thereafter that the company, according to its classification and activity, has a value of not less than thirty five million dirhams... and such acts fall under Articles 282 and 285 of the Civil Code. The Appealed Judgement contravened this view, and ruled that these acts are treated under Article 187 of the [UAE Civil Code] which deals with the rescission of a contract in the event of exposure to gross ghubn [and this] in violation of the explicit requests of the Appellant for material compensation... and as such the Appealed Judgement is found contrary to the law and erred in the application thereof and therefore must be overruled":

4.28. *In view of the above, the Dubai Court of Cassation ruled as follows:*

"Overturning the Appeal Judgment and that the perpetrators severally pay the appellant (the victim of deception) AED 7.5 million plus 9% interest from the date of judgment being issued until full settlement."

4.29. *This judgment echoes, albeit in some detail, a judgment of the same court in 2014. See an extract of the Dubai Court of Cassation in Appeal no. 95 of 2014, reproduced in Paragraph 4.7 of this Supplementary Report. The same principle had also been adopted by the same court in Appeal no. 835 of 2013.*

4.30. *It is relevant to recall that Article 187 is located under subsection b of Section 4 (acts vitiating consent), Chapter 2 of Book 1 of the UAE Civil Code, which aims to determine the factors that may vitiate the consent of a party to a contract. Deception is only one of three conditions under Section 4, that would enable a party who is subjected to any of these three conditions to rescind a contract or to proclaim or claim that it is not binding upon him. In other words, cessation of a contract is a consequence of vitiated consent, and it is not in and of itself a remedy to the party who was the victim of a perpetrated wrong. That perpetrated wrong would still have to be looked upon to decide whether the victim is entitled under UAE law to compensation.*

4.31. *In conclusion to the above (paragraphs 4.17 – 4.27), I am of the view that it is neither material nor determinative whether or not Mr. Jafar exercised any right to rescind the loans he made to AH and AML on 21 and 27 December 2017.*

Acting or omitting to rescind has no effect whatsoever on his claims either in tort or for unjust enrichment under UAE law. Nor does it affect his UAE law claim in unjustified enrichment, because under UAE law a UAE trial judge is confined to dealing with the claimant's request and it would be implausible for the Judge to deny a claim on the basis of deceit, simply because the claimant did not opt for rescission, which in any event is not available to a contractual counterparty as a unilateral right. Article 267 of the UAE Civil Code states:

“If the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, or to vary or cancel it, save by mutual consent or an order of the court, or under a provision of the law.”

4.32. Finally, a UAE trial judge would not in my view overlook deceit and victimhood, and deny his right for compensation under any provision of the UAE Civil Code pending enquiry into Mr. Jafar's entitlement to exercise rescission under a contract procured improperly. All that is required of a claimant is to prove to a UAE judge that deception actually took place.”

1183. Mr Jafar said that the question for the Court was whether the absence of rescission of the contracts for the Loans precluded him from advancing a claim for tortious damages under Articles 282 and 285 of the LCT. Mr Jafar submitted that the expert evidence showed that UAE courts unanimously adhered to the principle that in case of, *inter alia*, deceit, a contracting party may pursue a tortious claim in deceit instead of submitting a contractual claim.

1184. Mr Jafar submitted that the positions of Dr Ahnish and Professor Mallat were aligned for the most part on the basis of their written reports. At [50] of Mallat 2 Professor Mallat had noted that at Edge 1 at [19(ii)] Mr Edge had said that no tort claim could be brought in the absence of rescission (*“the innocent party to a fraud which induced the contract cannot bring a tortious claim for the fraud against the other contracting party. The only available remedy is for the innocent party to rescind the contract (on condition that the fraud is so serious as to be considered a “gross cheat”) and the innocent party will then receive restitution of benefits conferred under the contract so to be restored to the position prior to the contract: this being an application of the principle of unjust enrichment”*), and then said (my underlining):

“I understand that Mr Jafar is not seeking to cancel the loan agreements. It is a most unusual situation where the contracting party holds onto the contract and, at the same time seeks compensation for having been allegedly deceived into it. It is unusual because it undermines the alleged harm necessary for a deceit claim. The reason is that when the person alleging deceit which induced the contract does not seek to rescind the contract, she is not harmed by the alleged deceit but by the non-performance of the contract. In my view, the judge would therefore dismiss the tortious action for lack of harm here (which is an essential element in the tripartite theory). Accordingly, whilst I do not consider that a claim in deceit is technically barred if the contract has not been rescinded (see Edge 1, §19.2 [19(ii)]), the practical result is the same.”

1185. Professor Mallat was cross-examined about this analysis and Mr Jafar submitted that any substantive reservations on the part of Professor Mallat in terms of the viability of any such tortious claim were shown to be feeble, arising in large part from a failure to engage with the factual basis of the dispute before the Court. When he was invited to engage with that factual basis, it became apparent that he agreed with Dr Ahnish on the issue. Mr Jafar relied on the following exchanges (Day 23, pages 90-91):

“JUSTICE SEGAL: Can I just be clear, because I think we do need to be very clear as to the examples and the hypotheses you are being given. But if you take lender as A, lends to B, as a result of the deceit by C, and B is unable to repay A in full, because B is insolvent, that I think is the hypothesis.

LORD FALCONER: Correct. Exactly right.

A. So lender A, just to make sure that I understand, lender A gives money under a loan to borrower B and then a third party is accused of having deceived lender A into the contract, would there be an action from lender A against the third party? I think, yes, he's entitled to have an action against the third party.

JUSTICE SEGAL: Yes. And what Lord Falconer has put to you is that A in that example can sue C, the third party who has induced A to enter into the contract by deception without the need to rescind the contract between A and B.

A. Yes, I think I have accepted that in my report.

LORD FALCONER: Yes, indeed. I would be right in saying, would I not, that the UAE courts, if the assumptions were all proved, would have no difficulty in giving damages, assuming the assumptions are proved, assume that means that a third party had indeed deliberately deceived A into entering into the loan and then A couldn't be recover the loan because of the insolvency of B, that would be an action that the UAE courts would have no difficulty with, assuming the fact were proved?

A. Yes, assuming that the third party has deceived the lender, yes, there would be an acceptable claim of the lender against the deceiver, the third party.

JUSTICE SEGAL: I think Lord Falconer is putting to you a question, a quantum question, and is asking you, can A in my example sue C for the full amount of the unpaid loan? Is that the question?

LORD FALCONER: Correct, exactly.

A. I think the position of the court is that the harm must be commensurate to the damage which is done, and so yes, if there is a deceived and there is money that is acquired by fraudulent means by whoever, party C or party D or party E, then there is a claim against this party to the extent of the loss that they have suffered following that deceit, yes."

1186. Mr Jafar invited the Court to prefer the evidence of Dr Ahnish (and Professor Mallat). Their aligned position, he said, was that while a UAE judge will look to ensure that parties to a contract enforce their obligations on the basis of contractual liability to the extent possible and in line with the terms of the relevant contract, there was nothing in UAE case law or the LCT which prevented a contractual party from pursuing a tortious claim in deceit in addition to, or instead of, a contractual claim.

1187. Mr Jafar argued that Mr Ayres had cross examined Dr Ahnish on this issue (Day 22) and Dr Ahnish's evidence had remained consistent (my underlining):

"Q. But the contract would not be cancelled unless the party had applied to cancel it under article 187, would it?

A. Yes, but in respect of the claim you make on harmful act, the contract, the provisions of the contract, would not be considered by the court, would be just

ignored, in the instances - in the three instances as abundantly made by the court decisions and also in the explanatory memorandum, if a crime was committed, if there was a gross negligence or there was a deceit, the parties, the victim of any of these events would have the right to forget about the contract completely and apply for remedy on the basis of a harmful act.

Q. But the analysis is the actual contract stays alive, it is not cancelled in those circumstances, it is simply just ignored; yes?

A. It is completely ignored. I don't know what you mean by "alive". But for the purposes of receiving compensation it would not be regarded."

1188. Mr Jafar also relied on the cross-examination of Dr Ahnish by Ms Tresman for the GHF Parties (on Day 22):

"Q. The third principle is that if a contract is affirmed, it is binding; is that correct?

A. You mean it was ratified, there was something wrong with the contract but nevertheless it was ratified by the person who has the right to object to that matter? The ratification, are you referring to ratification here?

Q. I'm referring to affirmation. If a contract is voidable, so there is an option to cancel or rescind, but you instead choose to affirm the contract, that contract is a binding contract, isn't it?

A. You can, yes.

Q. And it is binding in that situation?

A. It will be binding if you affirm it, yes.

Q. And binding means valid and enforceable, doesn't it?

A. Yes.

Q. I'm going to move on to the third topic of unjust enrichment.

A. I want to make one comment, please, if I may.

Q. You may.

A. In relation to the loan agreement, you are absolutely right and that's what the law says: if there is a valid loan agreement then it is the right of the borrower to take the money and once the money transferred to that borrower, it would be his

money. But if later on it was discovered that there was a - there was a, if you like, the intention, the consent of the lender is vitiated by one of the instances that is being given effect, that is given effect under the law, that does not mean that the money would be the borrower's money forever. And the principles on unjust enrichment just confirm that. The Article 320, it says if one gives something out, thinking that he is obliged to do so and it turns out later on, in layman terms, translation, he was not obliged to do that, then he would have the right to return his money back, subject only to that caveat."

1189. Mr Jafar also relied on Dr Ahnish's answers and explanation in response to my clarificatory questions raised on this issue later on during Day 22. Mr Jafar says that Dr Ahnish maintained his position:

"JUSTICE SEGAL: So let 's say you have got A makes a payment to B, B has deceived A and induced A to make the payment, but A decides not to or is unable to seek to have the contract cancelled at any point, has A made a payment where there was no obligation on him to do so?

A. As I said earlier this morning, the right to cancel the contract is a right, not an obligation. Number one. Number two, that's under UAE law. There is no provision under UAE law which says that cancellation of a contract is a prerequisite to seeking remedies in the event of deception. Deception is a cause that stands alone in seeking remedy because of the existence of deceptions. As the court says, the UAE courts repeatedly said, in case of a deception then you just put the contract aside and rule on the basis of deception."

1190. Mr Jafar argued that it did not matter that, as Dr Ahnish had said, a contract which was not rescinded remained valid and enforceable. The real question was whether UAE law precluded claims (such as deceit and enrichment without cause) where it was established that there was a subsisting contract between the parties. And on this question, Dr Ahnish's expert opinion was clear. Notwithstanding that the contract remained formally valid and binding, UAE law will not preclude a claim in deceit. Claiming compensation or restitution was not inconsistent with the contract remaining binding.

1191. Mr Jafar said that it was important to note that, as Dr Ahnish had confirmed in his unchallenged evidence (Day 22, page 38), rescission cannot be performed unilaterally – a

party must apply to the Court. That meant that a party could not be criticised for a failure unilaterally to rescind a contract and it made it entirely understandable that a party, such as Mr Jafar, would proceed directly to bring a claim in tort, whilst keeping the contract alive in the hope of securing at least some measure of recovery in a liquidation.

1192. In any event, Mr Jafar argued, reliance could be placed on the UAE authorities which provided that an absence of rescission should be no bar to compensation, as was confirmed in particular in the Dubai Court of Cassation Judgment (No. 636 of 2015) quoted at Ahnish 2 at [4.10] (Dr Ahnish's Exhibit 3). As Dr Ahnish explained in his report, the Court of Cassation held that the lower courts were wrong to consider that the deceived claimant (who had been deceived into selling shares below their true value) was confined only to a claim for rescission (see the relevant passage quoted above). Mr Jafar said that it was telling that, during the course of almost two days of cross examination, the Fund Parties had failed to challenge Dr Ahnish on the conclusions he reached with regard to this case or the others that he had referred to on this issue in Ahnish 2.

1193. GP8 submitted that the position under UAE law was that where a deceit was perpetrated by the counterparty to the contract and a third party and the innocent party had elected not to rescind the contract but rather had affirmed the contract, the deceived contractual counterparty could not bring a claim in tort for deceit. His sole remedy remained rescission. However, where there was an independent wrong such as in the performance of the contract, then a claim in deceit in respect of that was not barred by the continued existence of the contract (including with respect to a third party). GP8 relied on the evidence of Mr Edge on this issue. His position was summarised in Edge 2 as follows (my underlining):

“33. *As regards paragraph 5.40 of [Ahnish 1], again, I disagree with [Dr Ahnish] in some respects. If a contract is rescinded due to fraudulent misrepresentation, the deceived party could then make a claim for any extra damages caused by the deceit. Many of the cases exhibited show this occurring. However, the deceived party cannot elect not to rescind the contract and claim compensation or damages as an alternative. If the loan contracts were rescinded then I agree with FA that there is an obligation on the contracting parties to return each other to the financial position prior to the contract. This is stated in Article 274 LCT: “If the contract is*

cancelled with or without a positive act the two contracting parties shall be restored to the position they were in before the contract was made, and if it is not possible compensation shall be ordered.”

34. *Article 274 LCT deals only with the liability as between the contracting parties: it does not involve a contracting party being able to claim directly from third parties who had benefitted from the contract. The contracting party who cannot make restitution must pay compensation instead as provided in the above Article. As mentioned at Part VI of my original Report, before the decision of the Authority for Unified Legal Principles in 2019 any subsequent contracts would also be annulled upon rescission of the first contract, and the contracting party might then be able to obtain further redress. Since the decision in 2019 the annulment of the subsequent contracts will depend upon whether the recipient acted in bad faith. But none of this will affect the obligations of the original contracting parties inter se and it will not give the originally deceived contracting party any direct claim against any third party.*
35. *At paragraph 146 of my original Report, I express my opinion that “an action in tort on the same facts is not possible as long as there is an existing contract; but becomes possible once the contract is rescinded unless the tort arises from an unlawful act or major fault outside the contract” by reference to Dubai Cassation case DCC 216 & 224/2008. I also expressed my opinion in the same paragraph that “an action in tort on the same facts as an action in contract would not be available where the contract is confirmed and approbated.” I note that [Professor Mallat] states at paragraphs 5.1 and 5.3 of [Mallat I] follows: “5.1: Where A maintains that the contracts remain valid and in force (i.e., he does not claim the contracts have been cancelled or rescinded), it does not affect C and D’s liability as tortfeasors (if their deception is otherwise established) 5.3: Mr Jafar, A, alleges deceit in contracts entered between A and B, the consequences of which would be the rescission of the contracts. C and D are third parties to the contracts. Where money was paid pursuant to contractual loan agreements with some (but not all) of the alleged tortfeasors, the principle is that the alleged tortfeasors who are third parties to the contracts are not liable for remedies under the contract. This is summarized in ‘Ali Haydar’s comment cited below: “If a party strange to the contract commits deceit, the victim of the deceit (here ghubn) has no case” (see also below, Article 252 CTC, §6.4). However, they remain potentially liable in the tort of deceit.”*
36. *I take this to mean that it is possible for third parties to a contract to be sued in tort if there are grounds other than the contract and outside the contract which support the action against them in tort. This is supported by the case [Professor Mallat] refers to at paragraph 6.8 of [Mallat I] which states clearly that a contracting party may be liable in both contract and*

tort but not out of the same facts. The case explicitly states that “..tortious liability is engaged based on the fact that he has breached another legal obligation different from his contractual obligation” and that hence “...each of the two liabilities gives him the right to compensation for the damage he suffered in a different way than the other provides.”

37. *Thus, there can be no alternative claim for damages in tort for deceit, alone and on the basis of the same facts, where there is fraudulent misrepresentation, and the contract is not rescinded by the deceived party. This is in effect an affirmation of the contract so that a claim in tort claiming fraudulent misrepresentation is not available.*
38. *[Professor Mallat] also states at paragraph 6.3 of [Mallat 1] as follows: “Third parties are prima facie unconcerned by a contract to which they are not a party (Article 252 CTC). A’s claim to pursue a contractual claim in deceit against alleged tortfeasors C and D, who are third parties to the contract between A and B, therefore fails. C and D remain potentially liable in the tort of deceit, although as noted in the answer to question 6(a) above, if a person argues that a contract is still valid, and does not seek to rescind it, then the allegation that she is harmed as a result of the deceit cannot stand”.*
39. *Therefore, although looking at the issue from a different perspective, CM and I both agree that such a claim would not succeed before a UAE court either because it simply could not be maintained, or because the contract is still valid and has been affirmed.”*

1194. Professor Mallat’s evidence on this issue, which the GHF Parties submitted should be accepted, was summarised at [6.2] and [6.3] of Mallat 1 and at [28]-[33] and [50] of Mallat 2 as follows (my underlining):

“Mallat 1

a. Contractual counterparties (being AH)

- 6.2 *I am not aware of a situation before the courts in the UAE where the plaintiff admits that the contract which is the basis for the alleged deceit still stands and refuses to see it rescinded. If a person argues that a contract is still valid, and does not seek to rescind it, then the allegation that she is harmed as a result of the deceit cannot stand. The basic element of harm in the tripartite theory is absent in that case, since the plaintiff insists that the contractual counterparty must honour obligations which are outstanding under the contract.*

b. *Alleged tortfeasors who are third parties to the contracts (being the Fund Parties)?*

6.3 *Answer: Third parties are prima facie unconcerned by a contract to which they are not a party (Article 252 CTC). A's claim to pursue a contractual claim in deceit against alleged tortfeasors C and D, who are third parties to the contract between A and B, therefore fails. C and D remain potentially liable in the tort of deceit, although, as noted in the answer to question 6(a) above, if a person argues that a contract is still valid, and does not seek to rescind it, then the allegation that she is harmed as a result of the deceit cannot stand.*

[Mallat 2]

28. *The reliance on Articles 274 and 380 CTC in §5.18 of Ahnish 1 is also an incorrect basis for asserting that a plaintiff can be compensated for deceit without rescinding the contract, because both Articles are irrelevant to deceit.*

28.1 *Article 274 is related to the effect of rescinding a contract where it is not possible to return the parties to their situation before contracting. It states that "If the contract is cancelled automatically or by the act of the parties, the two contracting parties shall be restored to the position they were in before the contract was made, and if that is not possible, compensation shall be ordered";*

28.2 *Article 380 gives priority to implementing the contract. The court may order compensation based on the debtor's request only if it does not prejudice the creditor's position. Article 380 CTC states:*

(1) *An obligor shall, after being given notice, be compelled to discharge his obligation by way of specific performance, if that is possible.*

(2) *Provided that if specific performance would be oppressive for the obligor, the judge may, upon the application of the obligor, restrict the right of the obligee to a monetary substitute unless that would cause him serious loss.*

29. *Whether the contract was rescinded or not, a deceived party has an action in tort against the tortfeasor. However, the present case is an unusual situation (where the plaintiff claims the contract continues but seeks to claim damages for deceit), and in the absence of any relevant court decision, I consider that, a UAE judge is likely to disregard a tortious claim for deceit by a party who continues to claim the validity of the contract (see also §6.2 of Mallat 1, and §§46-50 below).*

30. §5.37 of Ahnish 1 says that “[t]he rule that all damage caused by a harmful act must be made good is a rigid one.” I disagree. Since Article 282 CTC renders a tortfeasor liable to remedy it, the UAE courts always apply the tripartite test, including the proven fault of the alleged tortfeasor, and the fault of the alleged victim, including his duty of care and diligence of the prudent man in the light of the business relationship with the alleged tortfeasor. (see Mallat 1, §§ 4.8-4.10, and p. 12 Eng of Exhibit 5 of Ahnish 1, a father and son relationship was taken into account by the court, and §5.32 of Ahnish 1 which considers the prudent man).
31. I agree with Dr Ahnish that if Mr Naqvi was found to have made untrue statements to Mr Jafar, such statements having induced Mr Jafar to make the loans, Mr Naqvi’s conduct would constitute an actionable deceit giving rise to a valid claim in tort (Ahnish 1, §5.38). However, Mr Naqvi is not a defendant in this case, and so this is a different matter from establishing the liability of any of the Defendants in the case either by attribution or otherwise. I consider that the absence of Mr Naqvi from the claim would be a relevant factor for the court, for it raises the question of (a) the validity of any attribution to him (attribution is discussed below at §§51-54), and (b) his role as participant in the deceit and the compensation resulting from his liability. In order for the court to find Mr Naqvi responsible for part or all of the deceit it would typically have to listen to him, which is not possible as he is not a defendant. In his absence as the primary defendant in this case, the court may not be in a position to assess the portion of compensation allotted to the Second and Third Defendants as participants.
32. The participation of third parties in the deceit (Ahnish 1, §5.39) and the allocation of compensation at the discretion of the judge (Ahnish 1, §5.40) are agreed in principle with Dr Ahnish. I should clarify again in this context, that proof of deceit by third parties to the contract requires their fraudulent means and intent with bad faith (see above §16, again attribution is another matter).
33. §5.39 of Ahnish 1 mentions examples of fraudulent means in UAE court decisions, but Dr Ahnish includes as a third example the argument that the Defendants were “dealing with the proceeds of the Jafar loans”. Even if established, this would fail because it concerns acts that are post facto to the alleged act of deceit. Fraudulent means cannot occur post facto to the act of the tortfeasor, for it would defeat the necessary contemporaneity with the contract allegedly induced. Evidently, the Defendants’ ill intent cannot be established post facto either (it must have existed at the time the contract is said to have been induced).

...

50. I understand that Mr Jafar is not seeking to cancel the loan agreements. It is a most unusual situation where the contracting party holds onto the contract and, at the same time seeks compensation for having been allegedly deceived into it. It is unusual because it undermines the alleged harm necessary for a deceit claim. The reason is that when the person alleging deceit which induced the contract does not seek to rescind the contract, she is not harmed by the alleged deceit but by the non-performance of the contract. In my view, the judge would therefore dismiss the tortious action for lack of harm here (which is an essential element in the tripartite theory). Accordingly, whilst I do not consider that a claim in deceit is technically barred if the contract has not been rescinded (see Edge 1, §19.2), the practical result is the same.

Silence

1195. Mr Jafar argued that the Fund Parties had sought to raise a defence that as a matter of UAE law no liability in tort could arise from a failure to speak or an implied representation and that any claim based on the Overarching Message will fail as it was based on a failure to speak. Mr Jafar submitted that such a defence was in any event misconceived since Mr Jafar's case was clearly not a silence case. It was based on express representations from which an implied representation arose. If the Court disagreed and it became necessary to consider whether liability for an implied representation or from silence was actionable in respect of tortious claims under UAE law, Dr Ahnish's evidence made it clear that they were actionable.

1196. Dr Ahnish, Mr Jafar submitted, gave cogent evidence that silence could found a claim under Articles 282 and 285 of the LCT. In Ahnish 2 he had said the following:

"Whether deliberate silence constitutes a deceptive act in tort

4.33. Mr. Edge states in paragraphs 50(i) and (iv) of his Expert Report, that silence as a means of deception is relevant only to deception as an act vitiating consent under Articles 186 and 187 of the UAE Civil Code and cannot therefore be considered as deception for tortious claims under Article 285. This reading is not only wrong, but conflicts directly with the simple fact that deception under UAE law (including its material components) exists under a unified concept in UAE law, whether exercised by a party to a contract or in exacting a natural harm. The fact that silence/concealment was explicitly provided for as a means of deception in Article 186 of the UAE Civil Code is because this article falls under the provisions of the UAE Civil Code dealing with deception as one of the

three elements that vitiate consent (under subsection b of Section 4, Chapter 2 of Book 1).

4.34. Taken in another way, Article 285 of the UAE Civil Code does not logically envisage specifying all acts of deception and whether deception took the form of acts or omissions. Professor Mallat shares this view in paragraph 4.2 of his Expert Report. This view is supported by UAE case law when extrapolating the elements that can constitute deception. By way of example, in Appeal No. 584 of 2020 (Commercial), the Dubai Court of Cassation stated:

“Deception comprises two elements, material – in two forms, either in positive acts or negative acts - and incorporeal.”

4.35. In Appeal No. 231 of 2020 (Real Estate), the Dubai Court of Cassation repeated this statement verbatim in defining deception.

4.36. Finally, in support of my view, may I reproduce to the Honourable Court the extract from Appeal No. 636 of 2015 (Commercial) before the Dubai Court of Cassation, which establishes the two principles of [“la darar wala dirar” and “al dirar uzal”] (meaning in English: “No harm shall be done, no harm done in return; and harm shall be removed”), as overriding doctrines of the UAE Civil Code in Article 42(1) and (2), in determining that all forms of deceit, irrespective of their manifestation or tools, contravenes Islamic Shari’a principles as codified in the UAE Civil Code.”

1197. Mr Jafar also relied on the following statement of the position by Dr Ahnish at [31] of the Joint Memorandum (my underlining):

“Deceit as a harmful act may be demonstrated by any deceptive means, whether in the form of an act or omission. Deliberate silence is an omission. Article 282 of the Civil Code (which provides for the essence of “tortious liability” does not differentiate between harm in the form of an act or omission, including deliberate silence. Therefore “tortious liability” can arise from either an act or omission or both in conjunction. The Explanatory Memorandum expressly states: “liability to make compensation will rise out of any harm done, and the harm can pertain to an act [or] a failure to act ...” (the Explanatory Memorandum, Whelan, page 191). Silence is definitely a form of “failure to act”. See also the judgement of the Dubai Court Cassation quoted in Paragraphs 4.34 of my Supplementary Expert Opinion dated 20 October 2023. I believe it is worth giving a relevant example: A person receives money (for whatever reason) knowing that the money received is tainted by an illicit act, such as embezzlement or deceit. In fact, in any of these cases, his silence, if associated with knowledge, may also render that person guilty of a crime under the UAE Penal Code. See e.g. Article 451 of the UAE Penal Code is quoted in full and commented upon in paragraphs 5.2 and 5.6 of my Supplementary Expert Opinion dated 20 October 2023.”

1198. Mr Jafar submitted that Professor Mallat's and Mr Edge's evidence that deliberate silence applied only in the case of contractual deceit (in a claim under Article 186 of the LCT) represented an implausible position. It was common ground and indeed the subject of Professor Mallat's own evidence that there was a unifying or unified theory of harm under UAE law (see Mallat 1 at [1.9]) and that damage leading to compensation or daman unified both fields of tort and contract. There was no reason, and none was properly identified as a matter of principle or solid clear case law for the proposition that there should be such a wild divergence between what can found a contractual deceit claim and what can found a tortious deceit claim. In the judgment of the Dubai Court of Cassation in Case 636 of 2015 it was said that *"...is a request to obligate the Defendants to compensate for the damage they caused by deceiving him by deliberately concealing the real value of the company according to the classification and activity thereof and deliberately concealing the fact of their letting for rent the labour accommodation thereof - and even more, concealing this incident from him - a thing which was regulated by Articles 282, 285..."* Mr Jafar submitted that this case showed that as a matter of UAE law what is described there as deliberate concealment was a clear proper basis for a claim under Articles 282 and/or 285 of the LCT.
1199. GP8 relied on Mr Edge's evidence. Specific provision was made in Article 186 of the LCT addressing deliberate silence by a contractual party setting out the circumstances in which such conduct amounted to a misrepresentation. However, there was no such provision as regards deliberate silence by third parties with respect to liability in tort. Mr Edge's opinion was that given the absence of any such provision deliberate silence only applied to contracting parties and not third parties (see Edge 1 at 123]).
1200. In Edge 2, Mr Edge had set out his response to Dr Ahnish's evidence (my underlining):

"9(v). Deceit in tort is provided for specifically in Article 285 LCT, but this is merely a specific example of the application of the general principles on liability for harmful acts provided for in Articles 282 and 283 LCT. As such, Article 285 is governed by the general rules as regards liability for harmful acts which requires a threefold finding of (i) a harmful act, (ii) cause and (iii) loss. If the harmful act is caused directly then it must be compensated for howsoever it arose; but where the harmful act is caused indirectly then

there must be a finding of wrongdoing by way of intention or negligence. Deceit is generally an example of indirect harm as the harm typically arises due to reliance or action by the deceived party or a third party, and so a finding of acting intentionally or negligently is a condition of liability (which means that there must be a positive act in order to establish a deceit in tort). It is for this reason that Article 285 LCT does not expressly refer to silence or deliberate failure to omit facts as being within the notion of deceit in tort in contrast to Article 186 LCT which applies to contract claims. These principles are set out in detail in paragraph 48 et seq of IE.

27. *For convenience, I briefly restate my opinion on the tort of deceit under UAE law as above and as discussed in Part VI of [Edge 1]. The tort of deceit, provided for in Article 285 LCT, is a specific example of the application of the general principles of compensating for harmful acts which appears in Article 282 LCT. It is also subject to the provisions of Article 283 LCT on the distinction between direct and indirect harm, and by its nature the deceiver is held to be an indirect causer of harm as provided for in the Explanatory Memorandum commentary to Article 285 LCT. There is nothing in the provisions for harm for deceit in the LCT which establishes that tortious liability can arise from deliberate silence.*
28. *I disagree with paragraph 5.23 of [Ahnish 1] where [Dr Ahnish] says that the core principles that apply to fraudulent misrepresentation in contract are materially the same as the principles that apply to deceit in tort for the same reasons as set out above and in Part VI of [Edge 1].*
29. *At paragraph 5.30 of [Ahnish 1] [Dr Ahnish] seeks to apply the Explanatory Memorandum commentary of Article 389 LCT - which relates solely to the question of assessment of compensation - to the wider consideration of the principles that apply to the separate issues of deceit in contract and tort. By these means it is sought to apply the definition of fraudulent misrepresentation in contract to the tort of deceit so as to include the specific provision in fraudulent misrepresentation in contract on deliberate silence to the tort of deceit. There is no express provision on deliberate silence in Article 285 LCT for the good reason that deceit in tort requires deceit committed by action by word or deed as underlined by the Explanatory Memorandum commentary to Article 285 LCT.*

1201. In cross-examination by Lord Falconer, Mr Edge's view was challenged (Day 24, pages 24-31):

- “Q. What you are saying, as I understand it, is that when one is looking at deliberate silence under articles 185 to 190, they only apply to the contracting party and not to the third party?

A. Yes, where deliberate silence is involved, yes. There may be cases where there is deliberate silence alongside a representation which may affect the assessment of damages where there is an overvaluation or [an] undervaluation, rather, of a company. But deliberate silence on its own cannot be a representation.

Q. That's your clear view, both in relation to article 190 and in relation to article 285? Is that your evidence?

A. Yes.

Q. [Lord Falconer showed Mr Edge the decision of the Dubai Court of Cassation No 636 of 2015].

Q. Would I be right in saying as well it is probably one of the best indicators, what these courts say, as to what the law is in the UAE?

A. Yes, I would say it is very important.

Q. Are you acquainted with this case?

A. I remember having seen it.

Q. The petitioner claimed for damages. He said - you see the words: "In explanation of such, he said that he was a partner with a share of 51% with the Second and the Third Defendants in the First Defendant, and that they were both managing the same in full and he, in his capacity as the local partner in the company, he followed up with official authorities and was able to secure land ... Which was used as a labour accommodation, and then, his two partners offered him to get dissociated from the company and to assign his shares in the company after they concealed from him the truth about the financial position thereof. So, he agreed to the assignment to the Fourth Defendant ... whom he joined later as an opponent in the case for judgment to be made against him and against the other Defendants in whatever might be awarded to him. Then, he learnt after the dissociation that his two partners were renting the labour accommodation for a huge amount annually and that they were taking all the rent amount, exclusively to him, for themselves." Then he learned something else. It was a case concerning deliberate concealment by his partners before they bought him out of a particular source of revenue.

A. That was part of it, yes, but not the whole of it.

...

Q. *Am I right that this is a case where there are two - more than two, but there are contracting parties. There is the person who has sold his share in the company and there are the people who have bought it; correct?*

A. *Yes.*

Q. *The complaint that the seller is making - and there may be other complaints, but a part of his complaint is "I wasn't told about the fact that you have rented out some accommodation and made money from that and as a result that has contributed to me paying too little under the contract."*

A. *Yes. It is a three-partner company with a local partner who owns 51% because under the law at that time you had to have a local partner and the two partners, the two non-local partners, clearly wanted to get rid of the local partner and so suggest it's undervalued and the local partner then sells to another local partner at that undervalue. The court - so that there is a case, because they are not - the two partners are not party to the contract, there can be a claim in deceit against them.*

Q. *Hold on. We are talking here about the question of deliberate silence at this point. You exactly describe the underlying principle right, which is the man is complaining that they never told me about the stream of income that is coming from the labour accommodation.*

A. *Yes.*

Q. *It was deliberately concealed from him?*

A. *Yes.*

Q. *The court finds, does it not - I will come back to the question of whether this is a contract claim as well - yes, the local partner, the one who was deceived, has a claim under 285.*

A. *Against the two partners, yes.*

Q. *No, it's 285 is the claim, which is the claim in tort.*

A. *Yes, the claim in tort against the two partners.*

Q. *So, they have been guilty of deliberate deceit, they have been guilty of concealment, deliberate silence, he has a claim against 285.*

A. *Yes.*

Q. You told his Lordship a few moments ago there would be no claim in deliberate silence?

...

A. At the bottom of page 6, [of the judgment] the court is talking about how the partners acted. Seven lines up from the bottom, it says: "That is in addition to that they deluded him that the company occurred grave losses in 2009 as a result of the global financial crisis - a thing which led him to make such assignment." That to me suggests that they made a positive representation alongside the deliberate silence about the valuation.

Q. Let's be clear what you are saying. Suppose the position were that somebody says, for example, "Our business has suffered big losses because of a particular problem, the global slowdown" and they don't mention that they are making big profits on the letting of the labour accommodation; that could constitute the basis of the tort of deceit? Because looking at the whole thing, they have failed properly to disclose what's happened and it gives a misleading impression?

A. What I'm saying, my Lord, is that you cannot have deliberate silence as a misrepresentation on its own. But here there was, it was part of the whole misrepresentation, including the positive statement.... Therefore, you can then use the fact of concealment as a reason for assessing the damages that are payable.

...

Q. We are talking about deliberate silence here. What you are saying, as I understand it, is if you look at the whole case, because they said there was a bad situation here, you read that representation along with them not saying that they were making money from the letting out of the labour accommodation. Put the whole thing together and that constitutes an actionable deceit under 285?

A. Yes.

Q. So take this hypothesis: if you say, "I have got a short-term cash flow problem, can I borrow money for a short period of time," whereas in fact the company is hopelessly insolvent - assume that's the representation being made by the company - as a matter of fact on those assumptions it would be open to a UAE judge to come to the conclusion that that was an actionable misrepresentation under UAE law under 285?

A. Yes, I think it could be.

Q. In fact, if you look at ... the way that the judge has characterised the case, you see: "... and as such the proper legal characterisation of the case according to such demands is a request to obligate the Defendants to compensate for the damage they caused by deceiving him by deliberately concealing the real value of the company according to the classification and activity thereof and deliberately concealing the fact of their letting for rent the labour accommodation thereof - and, even more, concealing this incident from him - a thing which is regulated by articles 282, 285 of the aforementioned Transactions Law." So, the judges themselves regard it as a concealment case. ... It is, is it not, in their eyes a deliberate concealment case?

A. No, the deliberate concealment is part of the whole misrepresentation, and the importance of the concealment is that that is what the court uses to value the damages. But concealment on its own would not have been enough.

Q. It has to look at the whole structure in relation to it?

A. The whole of what the third party is doing. And here they were doing more than just not saying that the company had - they were doing more than just concealing the value of the company without actively saying it is doing badly..."

1202. GP8 submitted that Mr Edge had explained that his reading of this authority was that an express statement had been made taking the case outside a pure case of deliberate silence. Lord Falconer had subsequently put to Mr Edge a hypothetical of an accountant sitting in the room when a contracting party made a false representation to another. He had implicitly suggested that it would be absurd for the contracting party to be liable for misrepresentation whilst the accountant would not be. However, GP8 argued, the conclusion did not follow from the premise. The wording of the LCT was clear and the provisions concerned did not deal with potential accessory liability (upon which Mr Jafar had brought no claim under UAE law and which he had abandoned under Cayman Islands law).

1203. GP8 invited the Court to find that as a matter of UAE law a third-party would not incur direct liability in tort in a case of deliberate silence (i.e., deliberate non-disclosure). However, as Mr Edge had fairly accepted, the making of a tangential representation may well be sufficient to take a case from one of pure deliberate silence to deceit more broadly. Whether that was the case would be a function of what was expressly said and its meaning.

1204. The GHF Parties submitted that Professor Mallat's opinion was also that deliberate silence applied only to contractual deceit under Article 186 since deliberate silence was not mentioned in Article 285. Dr Ahnish's evidence that deliberate silence may constitute the relevant fraudulent means was premised on Article 282 (he had said that the relevant act under Article 282 may be a negative act, and that silence was a form of a failure to act). However, actions in the tort of deceit are brought under Article 285 and not under Article 282. Dr Ahnish had given a series of examples of where UAE law equated silence as being equivalent to speech, but all of those examples concerned contractual liability. There was no equivalent provision equating silence to speech for the tort of deceit. Although Dr Ahnish's evidence was that "*Article 285 ... [did] not logically envisage specifying all acts of deception and whether deception took the form of acts or omissions*" the fact that UAE law positively equated silence to speech only in the Articles (dealing with contractual issues) which Dr Ahnish had relied on suggested that the absence of an equivalent provision in Article 285 means that the legislator did not intend to equate silence to speech for the purpose of the tort of deceit under that Article. The cases on which Dr Ahnish relied were of no assistance as they concerned liability for deceit in contract.

Attribution

1205. The opinions of the experts were summarised at [44]-[45] of the Joint Memorandum:

"44. The Experts agree that Articles 161 to 163 CCL apply to the (i) directors, and (ii) managers of a relevant company with some reservations.

45. The Experts have some reservations:

FA: I have dealt with this matter in para 6.10-6.20 of my Expert Legal Opinion dated 24 August 2023. I also wish to reiterate that attribution in respect of commercial companies under the UAE Law on commercial companies is not limited to directors and general managers. It also applies to any person authorised to manage a commercial company (irrespective of its form or kind), as the company "shall be bound by any act or disposition carried out by the entity authorised to manage the Company in the ordinary course of such management. The Company shall also be bound by any act of any of its employees or agents who are authorized to act on behalf of the Company, where such authority has been relied on by a third party dealing with the Company (my translation)." (Article 23 of

the CCL) (see the Exhibit produced by FA and exhibited to this JME as Exhibit 5/JME).

CM: If under Article 161 CCL, the acts of the directors of a company are attributable to the company, Article 162 CCL makes an exception when the directors' acts were committed fraudulently or in abuse of authority or in violation of the company's statutes. Attribution is conditioned on evidence of the company's directors participating in the fraud. Knowledge is insufficient. The Plaintiff needs to prove that the directors of the company committed deceit by fraudulent means with ill intent. (CM1 §§1.21 and 16.6).

IE: It is not agreed that Arts 161 to 163 CCL apply to all directors and managers of a company. Art 161 CCL makes the acts of the Board of Directors within the limits of their powers (as a Board) binding on the company. Art 161 CCL also provides that the company is liable for the unlawful acts of the Chairman and Board Members while managing the company. Article 162 CCL allows the company that is liable for the acts of the Board members and its executive management (not all management) to recoup its losses from the actors in certain cases and makes the actors liable to third parties for inter alia acts of fraud; it must be noted however that Art 162 CCL does not appear to be part of the Claimant's pleaded case and so I do not consider it further. Art 163 CCL makes the acts of a Board member to a bona fide third-party binding even if internal company procedures of election or appointment have not been followed. It does not apply to managers (see IE1 Paras 85 to 97)."

1206. Article 161 of Federal Law No. 32 of 2021 on Commercial Companies (**CCL**) states as follows:

"The company shall abide by the work carried out by the Board of Directors within the limits of its competence and shall also be liable to compensate the damage arising from the unlawful acts committed by the Chairman and members of the Company's Board of Directors."

[The Company shall be bound by the acts of the board of directors within the limits of its powers. The Company shall also be liable for the damage due to unlawful acts by the Company's chairman and Board Members while managing the Company] Lexis Nexis translation cited by Mr Edge

1207. Article 162 of the CCL states that (my underlining):

"1 The members of the Board of Directors and the Executive Management are responsible towards the Company, the shareholders and third parties for all acts of fraud and abuse of authority, and for every violation of the law and the

Company's Articles of Association, and any condition to the contrary shall be nullified; the Executive Management is each of the General Manager or the Executive Director or the CEO of the Company and their deputies, and all those at the level of senior executive positions, and officers of the Executive Management who have been personally appointed to their positions by the Board of Directors.

2. *The responsibility provided for in paragraph (1) of this Article shall fall on all members of the Board of Directors if the error arises from a decision issued by consensus, but if the decision in question is issued by a majority, the opponents shall not be held accountable for it when they have proved their objection in the minutes of the meeting. If a member was absent from the meeting in which the decision was issued, his responsibility shall not be excluded unless it is established that he was unaware of the decision or that he was aware of it but was unable to object to it. The responsibility provided in paragraph (1) of this Article shall fall on the Executive Management if the error arises by a decision issued by it.*
3. *Without prejudice to any penalty stipulated in this Decree-Law or any other law, each of the Chairman or any of the members of the Board of Directors of the company or any of its Executive Management, if a final judicial decision is issued proving that any one of them committed acts of fraud or abuse of power or concluded transactions or deals that involve a conflict of interests in violation of the provisions of this Decree-Law or the decisions implementing it; his candidacy for membership of the Board of Directors of any joint-stock company in the state, and his performance of any tasks in the executive management of the company, are not accepted until three years at least have passed since the date of his dismissal. The provisions of Article (145) of this Decree-Law shall be applied regarding the filling of the new position of membership of the Board of Directors of the Company. If all members of its Board of Directors are dismissed, the Authority must invite the General Assembly to elect a new Board of Directors."*

1208. Article 163 of the CCL states as follows (using the Lexis Nexis translation):

"Article 163 - Acts of the Board Member

The Company shall be bound by the acts of the Board Member towards a bona fide third party, even if it is found thereafter that the procedures of election or appointment of the member are invalid or that the applicable conditions for such election or appointment are not available."

1209. The above provisions are found in the section of the CCL dealing with joint stock companies (JSC) although Article 104(1) of the CCL provides that the JSC provisions may apply to

limited liability companies (LLC) but only to the extent not covered in the section on LLCs and if consistent with the nature of an LLC.

1210. Mr Jafar submitted that Articles 161 to 163 of the CCL made it clear that managers as well as directors of an entity could by their acts cause liability to arise on the part of the entity that authorised them to act. Where there was fraud committed by the manager, the manager will also be held personally responsible but not to the exclusion of liability on the part of the entity but in addition to it.

1211. Mr Jafar noted that Professor Mallat had been taken first to clause 6.5 and then clause 6.6 of the AGHF LPA during his cross-examination by Lord Falconer and the following exchange had occurred:

“Q. The [AGHF] is conferring on the manager, which is a company, the power to manage the business of the [AGHF]. Do you follow that?”

A. Yes.

Q. That would plainly be recognised under UAE law as properly authorising the manager to run the affairs of the partnership or the [AGHF] - can I call it "the fund" to avoid getting myself confused – and anything that the manager did, which is AIML, then if they did it whilst they were acting as the manager of the fund, the fund would be liable?”

A. Yes.

Q. So, if the manager, for example, told lies in a way that gave rise to an article 285 claim under UAE law in the course of acting as the manager, the fund would be liable?”

A. Yes.

...

Q. That means, does it not, that a responsible officer of the manager, which is AIML, has the authority to do everything authorised by this agreement?”

A. Yes.

Q. So, if the position were that Mr Naqvi was a responsible officer of AIML and AIML were authorised to conduct all of the partners' business then if in

doing that Mr Naqvi committed the tort of deceit under article 285 then the funds would be liable for that?

A. Yes."

1212. Mr Jafar invited the Court to accept that Professor Mallat's opinion was that under UAE law, in view of Mr Naqvi's position as a director of AIML his deceit gave rise to liability on the part of the Fund Parties.

1213. Mr Jafar invited the Court to reject Mr Edge's evidence in so far as it was inconsistent with the opinions of Dr Ahnish and Professor Mallat.

1214. The GHF Parties submitted that Articles 161 and 163 of the CCL only applied to directors. Article 162 of the CCL, which referred to managers, had not been pleaded by Mr Jafar and so he was not entitled to rely on it. In any event, Article 162 did not provide for attribution of acts to a company.

1215. The GHF Parties noted the following responses given by Professor Mallet when cross-examined by Lord Falconer (Day 23, page 22):

"Q. ...Is your position that if the senior management commit a fraudulent act towards a third party whilst acting either as a director or a senior manager, then the company will be liable for that unlawful act alongside the managers?

A. That's right.

Q. If the position was - and this is an assumption - if Mr Naqvi is a senior manager of the funds and he tells lies whilst acting as a senior manager of the funds, then the funds would be liable if those acts gave rise to a claim in deceit?

A. If that is the assumption, yes."

1216. The GHF Parties said that Professor Mallat's analysis was not wrong. It was premised on Article 84 of the CCL which had not been pleaded. The GHF Parties invited the Court to

ignore any claim based on Article 84 of the CCL and Dr Ahnish's attribution analysis that relied on that Article.

1217. GP8 submitted that Dr Ahnish's evidence was that the law of attribution did not apply regarding Mr Naqvi because he was not a director of GP8 or the AGHF GP at the relevant time. It followed that Mr Jafar's case on attribution under UAE law fell to be dismissed. To the extent that (a) Dr Ahnish sought to attribute the knowledge and conduct of "*senior managers*" to GP8, this failed since Mr Naqvi not being a senior manager of GP8 or (b) relied on articles of the CCL which he had not pleaded, Mr Jafar should not be allowed to rely on them.

Agency

Actual agency

1218. The experts agreed that agency is regulated under Articles 149 to 156 and in Articles 924 to 961 of the LCT.

1219. Under Article 149 of the LCT, a contract may be made by a principal, and it may also be made by an agent unless the law stipulated otherwise. The agency "*may be by agreement or by law.*" Article 150 of the LCT provided that if the agency was by agreement, the "*deed of agency (power of attorney) issued by the principal shall specify the extent of the powers of the agent.*" If the agency was by law, "*the law shall specify such powers.*" Article 924 defined agency as being "*a contract whereby the principal puts another person in the place of himself in an ascertained, permitted dealing.*" Article 925 of the LCT established the conditions required for a valid agency: (1) the principal has the right to deal himself in the matter which he delegates; (2) the agent is not prohibited in dealing in the matter delegated to him; and (3) the subject matter of the agency must be ascertained and must be such as is capable of being performed by proxy.

Ratification

1220. The experts agreed that Article 930 of the LCT provided for ratification. That Article states:

“Subsequent permission for a dealing shall be regarded as a prior grant of agency.”

1221. However, the experts did not agree on the circumstances in which a principal may ratify the act of an agent. At [58] of the Joint Memorandum the position of the experts was recorded as follows:

“FA: Article 930 applies in a situation where the principal gives its approval to a transaction/disposition carried out by its agent even if the latter was not permitted under any form of agency to do so. Please see my comment on how the Federal Supreme Court gives Article 930 a wider, rather than restrictive, application. (Paragraphs 7.10 & 7.11 of my Expert Opinion dated 24 August 2023). The Explanatory Memorandum seems to support this approach. It provides that acts under Article 930 “shall be treated as having been done under an actual prior grant of agency, and it will be treated as if they were acts done by the principal”. It is of pertinence to realize that the Explanatory Memorandum does not refer to any restriction or qualification in this regard. Article 930 applies in two scenarios: (a) where there exists an agency relationship between the principal and the agent, but the latter acted outside the authority granted to him by the principal who authorizes such acts by his agent, or (b) where there exists no agency relationship but a person acts on behalf of another person and the latter ratifies / accepts the acts of the first. It’s pertinent to highlight the difference between this scenario (b) and “Fadhala” under Articles 325 – 332 of the Civil Code. In the latter case, there exists no principal/agency relationship.

CM: Article 930 CTC cannot be applied to the acts of an apparent agent operating without the existence of a written deed. Article 930 CTC is related to acts of an agent acting beyond the limits of his contractual/written agency. The alleged agent (Mr. Naqvi) was never held out to act as agent for the Second and the Third Defendants. (CM2 §§70-71)

IE: Art 930 is related to, and defined by, Arts 926 and 927 and applies only to special and general agencies where the agent is acting outside the limits of his authority. It does not permit ratification of tortious acts of such an agent; but is limited to the ratification of contracts/transactions entered into by the agent outside his authority. As there must be an existing agency for Art 930 to apply, it cannot apply to apparent or ostensible agency (see IE2 Paras 111 to 114).”

1222. The GHF Parties said that Professor Mallat’s opinion was that Article 930 of the LCT applied only where there was a contract of agency (meaning a written contract) and where an agent acted beyond the limits set down by that contract. They invited the Court to accept Professor Mallat’s evidence. Dr Ahnish’s view, that Article 930 also applied where “*there exists no agency relationship, but a person acts on behalf of another person and the latter ratifies/accepts the acts of the first*” should be rejected. It was not supported by Article 930 of the LCT, that sat within Section 1 (containing the “*General Provisions*”) of Part Three of Chapter Three of Book Two, which provisions required there to be a contract of agency.
1223. Mr Jafar said that Dr Ahnish’s evidence was that if an agent/proxy acted within his authority his acts would be binding on the principal and so the principal will be liable for a tort. Dr Ahnish had noted (in Ahnish 1 at [6.17]) that Article 161 of the CCL which stated that where a proxy made a contract within the limits of his proxy [authority] in the name of the principal the contract and the rights and obligations derived therefrom devolved on the principal.
1224. Mr Jafar noted that Dr Ahnish’s opinion was that the Inner Circle’s knowledge or actions would fall to be attributed to the Fund Parties of which they were directors. In Ahnish 1 at [6.24] – [6.26] Dr Ahnish had said as follows (my underlining):

“6.24 Similarly, I understand that the individuals identified in paragraphs 4.17 and 4.19 above were the directors of ADV 1 Limited (which was, in turn, the director of the Second and Third Defendants) and of the Fourth Defendant. Any acts or omissions of those individuals, acting in that capacity, would be considered those of ADV 1 Limited by virtue of Article 161 of the CCL (set out above), and, by necessary extension, any acts or omissions of ADV 1 brought about by the acts or omissions of its directors would be considered those of the Second and Third Defendants (also by virtue of said Article 161) or the Fourth Defendant respectively. By operation of the same principles and the provisions of Article 152 of the Civil Code (set out in Section 7 below), the knowledge of those individuals would be deemed to be the knowledge of the said entities. The Defendants would be “bound by the acts carried out” by their directors and “liable for any damage caused by [their] unlawful acts.”

6.25 *The same analysis does not appear to me to apply with respect to Mr Naqvi vis-à-vis the Second to Fourth Defendants, given that Mr Naqvi was not formally a Director of those entities. However, for the reasons analysed*

below, I consider that a UAE Court would accept the contention that in respect of the Second to Fourth Defendants, Mr. Naqvi was acting as an “apparent/ostensible agent.”

- 6.26 *Even if the Court were to conclude that Mr Naqvi did not have authority on behalf of the Defendants, and that the alleged torts committed by him are therefore not to be attributed to them, there is an alternative basis on which I consider UAE law would deem the Defendants to be responsible to compensate Mr Jafar for the torts: namely, that, by reference in particular to the principles identified above under the CCL as to the attribution of company directors’ knowledge, acts and omissions to the company, the knowledge and acts of omissions of the directors of each of ADV 1 and APEF IV is to be attributed to those companies. In particular, based on the factual assumptions noted in section 4 (Factual Background), I consider that a UAE court applying UAE law would conclude that those directors, by knowing of and acquiescing in Mr Naqvi’s alleged acts of deceit and accepting funds derived from them, render the Defendants liable in respect of that deceit.”*

Ostensible authority

1225. Mr Jafar submitted that UAE law was not confined to actual, express agency and company law. UAE law also recognised the doctrine of *mandat apparent* which was to a great extent co-extensive with Cayman Islands law as to ostensible authority (but may go further). The core principle was that “*a contracting party may claim that a principal is bound by the actions of its ostensible agent (apparent agent) if at any time such principal has held out in any way to such contracting party that the apparent agent has been empowered to act on his behalf*” (see Ahnish 1 at [6.28]). At [6.30] Dr Ahnish went on to say that “*...the mandate can be legally established and has a legal effect if the particular circumstances clearly show that a person acting on behalf of another was implicitly authorised or, alternatively, that the relevant act was ratified by that other person.*”

1226. Dr Ahnish had stated (at [6.35(a)] of Ahnish 1) that the general rule was that if a formal agency did not exist pursuant to a contract or by operation of law (such as the general rule that a director of a corporate entity was treated as its agent) or the agent exceeded his authority, a natural person’s acts or omissions would not be treated as those of another person “*unless [there is] an external appearance justifying the belief that there exists an*

agency between the principal and the agent is established, in which case the transaction carried out by the agent shall be binding upon the principal [even] if the other party was not aware of the agency; [such effect is recognised] on the basis of an ostensible agency...” (citing the judgment in 281/1994, Judicial Year 15, Federal Supreme Court, 30/01/1994 annexed to Ahnish 1 as exhibit 13).

1227. Dr Ahnish had also noted (at [6.35(c)] of Ahnish 1 that a person who transacted with an agent was deemed to be a third party in respect of a principal-agent relationship. This required the third party to ascertain the status of the agent who purported to act on behalf of the principal when conducting the transaction. But this requirement was dispensed with “*if the principal’s actions indicate his will to delegate to others to act in his name, such as an external appearance attributable to him that...makes the third party justifiably believe that a principal-agent relationship exists. In such case, the third party may have the right to rely on these attributable circumstances to argue that an agency exists on the basis of an ostensible agency and not on the basis of an actual agency which does not exist*” (citing the judgment in another case, 317/1996, Judicial Year 17, Federal Supreme Court, 21/01/1996, annexed to Ahnish 1 as exhibit 14).

1228. Dr Ahnish’s evidence in cross-examination by Mr Ayres (Day 21, pages 120-122) as to the conditions for the UAE equivalent of ostensible authority was as follows (my underlining):

“Q. *There are three points I want to ask you about. The first one is that for there to be apparent or ostensible authority there must be what in English we call a holding out by the principal. Do you agree with that?*

A. *I don't know what you mean by "holding out", can you explain it, please.*

Q. *What it means is a situation where the principal communicates in a relevant way that the putative agent is in fact an agent of the principal.*

A. *Does it have to be necessarily a positive in an action, the mere silence, sometimes, the leading the apparent agent to act on behalf of the principal without saying anything, it is a kind of ratification. So, an action, yes, it requires some sort of action or omission from the principal. And by saying omission here, I mean silence, knowing that the agent, the apparent agent,*

the person who was not been formally appointed by the principal carried out certain acts on behalf of the principal and the principal do nothing.

Q. You obviously rely on silence in that respect. But whether by words or conduct the principal has to communicate in such a way, you may say by silence as well, as to indicate that the individual who is the putative agent is in fact an agent of theirs. Do you agree with that?

A. If silence is included in what you say, the answer is yes, I agree with you.

Q. That's holding out and I've asked you about that. The other aspect of UAE law which is fundamental to the concept of apparent or ostensible authority is the grounding that there always must be a verification of the capacity in which the potential agent is operating. Do you agree with that?

A. A verification by who?

Q. By the counterparty to the contract.

A. Not necessarily. As a matter of reality, as a matter of practice, particularly when it comes to deal with juridical entities, if someone is acting, has been acting, has been seen acting on behalf of a company in the UAE, binding the company, acting on behalf of the company, signing contracts, the counterparty, if he so wishes, he may want to find out whether that particular person has the authority and request evidence of that. But this doesn't happen quite regularly.

...

Q. [Mr Ayres referred Dr Ahnish to Mr Edge's opinion at [75] of Edge 2 that "The starting point is that there is a general duty to verify an agent's capacity which may be displaced only where there is a clear holding out by the principal that the agent is clothed with authority to act for them."] Focusing on that last sentence, you would not disagree with what Mr Edge says, would you?

A. I disagree.

Q. Why?

A. Because if it is a duty on each and every counterparty to verify then the concept of ostensible agency would be ridiculous, it would not be relevant at all.... The concept of ostensible authority or agency, or "agence apparente" as they say it in French, it implies that that person has no authority whatsoever. So, if you are saying that you have to verify to find

out whether that person has authority is the very, very antithesis of ostensible agency.”

1229. Mr Jafar noted that during his cross-examination Professor Mallat had suggested that Mr Jafar was under a duty to verify on whose behalf Mr Naqvi acted and was reluctant to accept that verification by Mr Jafar was not a requirement. Dr Ahnish, as I have just noted, disagreed with this view. Furthermore, Mr Jafar argued that ultimately in answers to questions from me Professor Mallat had appeared to accept that verification may not be necessary. The exchange was as follows (Day 23, pages 115-117) (my underlining):

JUSTICE SEGAL: What is your opinion as to whether verification is required in a holding out case?

A. I think it does depend on the circumstances, particularly because apparent agency is not properly regulated in the Civil Code. So the courts have a tendency, when they see that there is a genuine claim, to err on the side of allowing the apparent agency to go through as a matter of that particular instance in the decision; but that drawing the various strands of a large number of cases that Dr Ahnish and I have noted, the holding out and the verification tend to be the norm, or at least the majority of cases that you have seen.

JUSTICE SEGAL: You are saying, as I understand it, verification may be required in some circumstances?

A. It is usually required.

JUSTICE SEGAL: In what circumstances? I think you have just said verification may be required in some circumstances.

A. That's right.

JUSTICE SEGAL: The question is: in what circumstances?

A. I think we would have to go to every case where this verification is not required.

JUSTICE SEGAL: Is there a principle or -- you say you have got to look at all the cases to see when the courts have decided that verification is required.

A. Well, you know, you go by the various decisions and draw obviously a conclusion on how insistent the courts have been in requiring verification; and both myself and Dr Ahnish, I believe, have cited

those. And if that particular case dispenses with it, I'm happy to accept it.

1230. Mr Jafar submitted that the error in the argument that verification was necessary was demonstrated by asking what would have happened if Mr Jafar had sought to verify Mr Naqvi's authority. It would immediately have been confirmed that he had the authority to speak on behalf of the Funds and to make agreements on behalf of the Abraaj entities, which demonstrated that the verification test would have corroborated Mr Naqvi's authority. Mr Jafar also argued that Professor Mallat had accepted that it would be a question of fact for a UAE court to decide whether the silence of a principal — permitting a putative agent to speak on its behalf — could amount to a sufficient holding out.

1231. Mr Jafar argued that the contention that ostensible agency required a contract (which was Professor Mallat's position) was illogical and wrong. The whole point of ostensible authority was that it arose where there was no express agency.

1232. As regards ostensible authority the Fund Parties said that Dr Ahnish had agreed that for a person to be considered an apparent agent for the principal that person must have been held out by the principal to the other party as empowered to act on his behalf. It was expressly agreed or conceded by Dr Ahnish in cross-examination that an agent cannot himself make the necessary representation or cloak himself with authority. They submitted that in his cross-examination by Mr Ayres, Dr Ahnish had accepted that it would only be in the most obvious case of express holding out by a principal that the principal will be held liable for the acts of an apparent agent and that, as regards an allegation Mr Naqvi was held out "by the Abraaj Group", UAE law would require a holding out on behalf of each company in the group in order for each of the companies to be bound as principal. As regards this latter point, Mr Ayres (Day 21, page 148) asked Dr Ahnish "*Do you agree with me that in order for that situation to arise where each and every company in a group was bound to a contract made by an ostensible agent, that each one of those individual entities which you have recognised has a separate corporate personality would have had to have undertaken some sort of holding out towards the third party contractual counterparty?*" and Dr Ahnish had replied "*I agree with you, yes.*"

1233. The Fund Parties submitted that in this case, as was the position under Cayman Islands law, there was no holding out of Mr Naqvi to Mr Jafar by the Funds' general partners. On Dr Ahnish's evidence there had to be a holding out to Mr Jafar by the relevant entity, namely the Funds' general partners or the Funds themselves acting by the general partners or AIML as their manager. The evidence showed that there had been no such holding out. As Ms Tresman put it in her oral closing submissions (Day 29, page 166) Mr Jafar's evidence was that prior to Mr Naqvi's arrival in his office on the morning of 20 December, Mr Jafar had not heard of the AGHF. GP8 argued that its position was even stronger since Mr Naqvi had not mentioned, and Mr Jafar had been unaware of, Fund IV.

Voluntary agency

1234. The doctrine of voluntary agency is set out in Article 325 of the LCT as follows: *"Whoever performs an act beneficial to a third party otherwise than upon the latter's instructions, but by leave of a judge, or under compelling necessity, or by the dictate of custom, shall be deemed to be acting on his behalf, and the following provisions shall apply to such person."*

1235. In Ahnish 1 Dr Ahnish opined that on his understanding of the facts of this case Mr Jafar was able to rely on voluntary agency. He said this:

"6.45 It is clear from Articles 325 and 326 of the Civil Code that the principles of agency under the Civil Code (which have been dealt with above) will apply if two conditions are satisfied, namely:

- (a) the voluntary act was with:*
 - (i) the permission of a judge; or*
 - (ii) in response to compelling necessity; or*
 - (iii) pursuant to custom; and in any event*
- (b) the voluntary act is ratified by the principal.*

Conclusion on Voluntary Agency

- 6.46. *Therefore, in my view, Mr Jafar, on the basis of the factual narrative provided to me (which is set out in Section 4 above), would be able properly to claim that Mr. Naqvi acted as a Voluntary Agent on behalf of Second to the Fourth Defendants because the Jafar Loans were procured as result of the “compelling necessity” manifested in the critical financial position of the entire Abraaj Group, including the Second to the Fourth Defendants; and the said Defendants, clearly, ratified Mr. Naqvi’s actions by accepting the proceeds of the Jafar Loans.”*

1236. Dr Ahnish’s cross-examination by Mr Ayres on whether the receipt of funds was sufficient to establish voluntary agency was as follows (Day 21, pages 162-163) (my underlining):

“Q. *What I’m asking for your expert opinion evidence on is if I was qualified and I went to the UAE court and I said I had a necessity, a compelling necessity, which involved the continued deception of auditors, investors, creditors and other stakeholders in Abraaj and the concealment of fraudulent misappropriation of funds on the scale of millions and millions of dollars and concealment of the management of a private equity fund’s capital commitments and investment proceeds, the UAE court would laugh me out of court and say, under no circumstances is that a compelling necessity which they are going to bless for the purposes of this doctrine. Do you agree?*

Y. *Yes, I do.*

Q. *In terms of voluntary agency, there is no basis, is there, for saying that a voluntary agency which requires compelling necessity would arise out of what I describe as the mere receipt of funds. Just because you receive funds from somebody, that doesn’t give rise to a compelling necessity, because it doesn’t have the characteristics of a compelling necessity that we have seen. Do you agree?*

A. *Receiving funds is different from the existence of a compelling necessity. The two are different.*

Q. *Just to answer my question, the mere fact that you receive funds, that’s not capable of giving rise to the factual situation of compelling necessity for the purposes of UAE law?*

A. *It depends on the circumstances. It may or it may not.*

Q. *What are the circumstances that might make a difference?*

- A. If there is a compelling necessity and you receive the funds for that compelling necessity then the concept of fadaala and doing a good deed for you, it applies.
- Q. My question is that the mere receipt of funds is not good enough, there may be a different compelling necessity which arises, but that is separate, you need to have something separate.
- A. You need to have a compelling necessity.

1237. GP8 submitted that that Dr Ahnish in his cross-examination had accepted that the need to conceal the misappropriation of monies from investors and other interested parties would not be accepted by a UAE court as a compelling necessity within Article 325 of the LCT (when he agreed with Mr Ayres' statement that if Mr Ayres appeared before a UAE court and argued that there was a necessity, a compelling necessity, which involved the continued deception of auditors, investors, creditors and other stakeholders in Abraaj and the concealment of fraudulent misappropriation of funds on the scale of millions and millions of dollars and concealment of the management of a private equity fund's capital commitments and investment proceeds, the UAE court would laugh him out of court and say, under no circumstances was that a compelling necessity which they were going to bless for the purposes of this doctrine). Further, GP8 submitted, voluntary agency was a contractual concept and not a tortious principle. It had no application in the present case. In any event, pursuant to Article 326 of the LCT, it was necessary for the principal to ratify the voluntary act which required a clear and express declaration by the purported principal which had not occurred in this case.

Direct-indirect harm

1238. The Fund Parties submitted that the alleged deceit committed by Mr Naqvi only caused indirect harm to Mr Jafar. As a result, even if Mr Jafar were correct on the other elements of his claim (a) the Fund Parties could only be liable if it could be shown that they acted with knowledge and intent to deceive Mr Jafar, which the Fund Parties say they did not and (b) if the Court concluded that the harm suffered by Mr Jafar was caused by multiple

parties, some directly and others indirectly, only the direct author of the harm would be liable.

1239. Dr Ahnish dealt with this issue at [5.42-5.47] of Ahnish 1 as follows (my underlining):

“5.42. *Article 283 makes a distinction between direct harm and causative (often wrongly translated into English as “indirect”) harm. Causative harm, under UAE law, means a harmful act that only causes direct harm but also, in the normal course of events, causes some additional or other harm. The Explanatory Memorandum provides the example of a rope on which a lantern is hanging being cut, which results in the lantern falling and breaking. Here the act of cutting the rope is a harmful act that results in causative harm, i.e. the breaking of the lantern.*

5.43. *In the case of direct harm, the doer is liable to make good the harm unconditionally. This means that he has strict liability to make good the harm, irrespective of whether or not the doer intended to cause harm. If the harm is causative (one cause leading to another) the doer shall be liable only if there exists “a wrongdoing or intention to cause harm or the act must have led to the harm”. This distinction as codified in Article 283 is unclear. 5.44. The Explanatory Memorandum attempts to establish a legal distinction between “direct” and “causative” harm:*

“these two [forms] are worded in Islamic Jurisprudence in two rules, which are firstly that the direct causer is liable notwithstanding that he may not have acted deliberately or wrongfully, and that the indirect causer is liable only if he has acted deliberately or wrongfully.”

5.45. *The Explanatory Memorandum then goes on to further elaborate that “deliberate” act and “wrongful” act are not synonymous. “Deliberate” means “the deliberate causing of harm, and not the deliberate doing of the act; and wrongful act “means that the doer does not have the right to perform the act out of which the damage has arisen.”*

5.46. *I do not believe that the Explanatory Memorandum was successful in attempting to explain that distinction.*

5.47. *My interpretation of Article 283 is that if harm is “causative”, i.e. one act leads to another act or event that causes the harm, the doer of the act shall not be responsible for making good the harm unless: (i) the doer deliberately commits the act or (ii) the doer intends to cause the harm; or (iii) the act, in the normal course of events, lead to the harm being caused. In this case, the harm allegedly caused to Mr Jafar arises from the alleged*

deceit, which directly gave rise to harm. In my view, the concept of causative harm does not arise in this case.”

1240. Mr Edge’s evidence on this issue was set out in Edge 1 at [82], [83] and [87]:

“82. *The commentary to Article 285 LCT 55 in the Explanatory Memorandum provides detail as to its operation and how it fits within the structure of the LCT concerning deceit:*

“The Code has preferred to state the general rule without giving examples.

The word 'ghurūr' [deceit/deception] as to the subject matter is used by the jurists in the meaning of making somebody accept what is no good by lying and misleading means, inducing him to proceed, in a circumstance where if he had known the truth he would not have proceeded.

Thus, there is no ghurūr [deceit/deception] save where it is exercised in respect of the subject matter, and is used as a means of inducement by the deceiver by false and lying means designed to make facts appear otherwise than as they are, practised deliberately by the deceiver, and in bad faith.

Deception may be by word or by deed. An example of the first is a false and misleading description whereby another is induced to act. The second example is where a person deliberately refrains from milking a ewe, so as to let the milk collect in its udders to make it look as if it is a good milk producer.

Deception may also be in contracts and in actions. If it is practised in a contract, the result will be that the contract will be non-binding 56 on the victim of the deception, as stated earlier in the section on contracts.

As for deception by acts, that may be where one persuades another to go along a road in the pretence that it is safe, whereas it is in fact beset by thieves, or where one persuades another to perform an act, leading him to believe that it is not dangerous, when in fact it is dangerous, and loss results.

If the deception is by an act, then the deceiver will be held liable as an indirect causer, and the rule relating to indirect causation shall apply”.

83. *Consistent with this, as a matter of UAE law, there are the following three points to note.*

....

87. *Fourth, a deceit or deception in itself does not cause direct harm as a matter of UAE law; rather it is the action of the victim/deceived party which causes the harm. For this reason, there is a fault element to deceit claims. As the Explanatory Memorandum to Article 285 LCT 59 says the deceiver is an indirect causer and the rules on indirect causation of harm apply.”*

1241. Professor Mallat’s evidence on this issue was set out in Mallat 2 as follows:

- “34. *I agree with Dr Ahnish that there is a lack of clarity in Article 283 (Ahnish 1, §5.42-44). I note that Dr Ahnish refers to a distinction in Article 283 between indirect and “causative” harm. In the classical law of mubashara (directness, immediacy) and tasabbub (indirectness, causation), ‘indirectness’ (i.e. indirect authorship) is my preferred translation to avoid confusion between ‘causation’ under this narrow theory of liability and causation as the third element in the tripartite test adopted by the UAE courts.*
35. *The causation (or causality) in classical law as codified into Article 283 is a very different causality from the one understood in both Western law generally and in the UAE tripartite formula, which, as explained in my report (Mallat 1, §§1.23-1.31), comes from responsabilité délictuelle/tortious liability in the French Civil Code of 1804 (then Art. 1382, id. n.26).*
36. *At §5.33 of Ahnish 1, Dr Ahnish confuses causality in the tripartite test, and causation (or causality) in direct (mubashir) and indirect (mutasabbib) liability, which is a narrower theory. In the tripartite theory of liability, causation must be established between the harm/damage and the harmful act/the author, and it makes no sense to mention ‘indirect’ or ‘direct’ causality in this context. Under the second, narrower theory of liability expressed in Article 283, where the court finds the case is one of direct and indirect authors, only the direct author is responsible. Causality is irrelevant.*
37. *The main distinction between direct and indirect authorship is the presence of an intermediary (Mallat 1, §11.8 citing the ADCC on intermediary). The intermediary can be an act or event (in the example at Ahnish 1, §5.42 of the lantern which falls and breaks, the one who cut the rope which holds the lamp is considered the ‘indirect’ author, a case mentioned in the Explanatory Memorandum but which is not apposite here), but it is generally an act committed by another person, who is then the direct author. The better example in classical law, also cited in the Explanatory Memorandum, is the case of the well and the mule: a person digs a well on his property, and a mule is pushed into the well by another person. The loss of the mule must be compensated by the one who pushed the mule. He is the*

direct author. The owner of the well who dug it is the indirect author. He is not responsible for the loss suffered by the owner of the mule. (Mallat 1, §11.5 for Explanatory Memorandum. In his reference treatise on torts, 'Ali Khafif mentions this example specifically at p.59 (CM-136)).

38. *The facts of the FSC decision cited in Mallat 1 §11.7 and exhibited as CM-053, give a clearer understanding on how the UAE courts apply liability in cases of direct/indirect authorship. The facts presented in that decision suggest that a driver lost control over the vehicle he was driving, and it collided with the metal barriers at the side of the road; his wife and another passenger died. The court ordered him to pay compensation (diya). Upon following up with the insurance company, it turned out that the policy had expired on 23 August 2009. The defendant claimed that the true expiry date was 11 October 2009 as mentioned in the vehicle's ownership deed. He presented a claim against the Traffic and Licensing Department and its employee alleging that he incurred losses because of the wrong information recorded on the document by the Department's employee. The FSC found that the act of the driver was the direct cause of the harm, but the wrong information recorded by the employee was an indirect act. The FSC ordered that the driver, the direct author, alone bears the liability pursuant to Article 284 CTC, and gave the following explanations:*

“Per the natural course of events, this wrongful act [mistake], of which the respondent is accused, does not cause the harm/damage the Appellant suffered through paying the blood money [the compensation] and remedies had it not been followed by and accompanied with the latter's [Appellant's] wrongful act [his fault when driving] because of the crash of the vehicle which he was driving and its collision with the metal barriers at the side of the road that resulted in the death of two passengers. Therefore, the harm/damage results from the Appellant's direct wrongful act [fault] and the defendants' indirect act.”

39. *I agree in part with §5.46 of Ahnish 1. The Explanatory Memorandum took the concept of direct and indirect harm from classical Islamic law, which is often unclear, and sometimes contradictory, therefore leading to two parallel regimes in addressing cases of multi-authorship. But I disagree with Dr Ahnish's interpretation of Article 283 at §5.47 and his conclusion that “the concept of causative harm [by which he means indirectness] does not arise in this case.” If the UAE judge considers the authors to be direct (mubashir) and indirect (mutasabbib), only the direct author(s) is liable under Article 284 CTC. Article 291 does not apply. (Mallat 1, §11.6). If the judge finds that Mr Naqvi is a direct author and the defendants are indirect authors, Mr Naqvi alone is responsible.*

40. *If the judge concludes that direct/indirect harm does not arise in this case, he will resort to the concept of participation (see next section). It is up to the judge to decide whether this is a case of direct/indirect, or a case of participation."*

1242. Professor Mallat was cross-examined on this issue by Lord Falconer (Day 23, pages 128-130) (my underlining):

"Q. Am I right in saying that an act is an indirect cause of harm within the UAE code if there is an intervening act between the harmful act and the harm it causes?

A. That's absolutely correct.

Q. And that is agreed between you and Dr Ahnish as the right principle to take?

A. Yes.

Q. If one characterises the harm here as entering into the loan, the fraud induced Mr Jafar to enter into the loan, then there is obviously no intervening act between the wrongful act, namely the fraud, and the damage?

A. If there is no intervening act, it is obviously direct.

Q. In fact, the direct/indirect does not apply... If you look at [Mallat 2 [31]]: "I agree with Dr Ahnish that if Mr Naqvi was found to have made untrue statements to Mr Jafar, such statements having induced Mr Jafar to make the loans, Mr Naqvi's conduct would constitute an actionable deceit giving rise to a valid claim in tort..." ...Assume for these purposes that one could substitute the words "I agree with Dr Ahnish that if the funds were found to have made untrue statements to Mr Jafar, such statements having induced Mr Jafar to make the loans, the funds' conduct would constitute an actionable deceit giving rise to a valid claim in tort"?... Assume that the funds' deceit led to him entering into the loan, there is no intervening act of any sort, therefore entering into the loans and all that flows from that is direct harm....

A. If I may, then in that case there would not be need for going to the theory of direct and indirect harm and I would certainly accept that if the fund has deceived Mr Jafar without an intervening act or an intervening person, they would be obviously responsible for the loss that arises from that deceit but you don't need direct or indirect here, it would be a misplaced concept because the direct/indirect theory under article 282 and 283 are going to

be totally unnecessary for that purpose. They assume as a basis that there is an intervening act or intervening author. Is it clear?

Q. No. If the position were, Professor Mallat, that the fraud by the funds caused Mr Jafar to enter into the loans, there is no intervening act between the wrongful act which is the deceit and the harm. Is that correct?

A. I see. So, you are assuming that when the fund causes Mr Naqvi to enter into the contract then the question of direct and indirect does not arise, it's just as if Mr Naqvi did not exist? But at the same time –

Q. Take Mr Naqvi out of the picture –

A. If you take out of the picture then we don't need direct/indirect, they are responsible. But if there is an intervening act then the court in the UAE would have to consider it.

Q. If the position is that Mr Naqvi is treated as acting on behalf of the funds –

A. That's different.

Q. Make that assumption. Am I right in saying that what you are saying is that the funds' act is a direct cause of the harm in this case?

A. Yes, I think there's a confusion in the terms of direct here. If we are talking about the theory of direct/indirect, and the intervening act, then you don't need - then you are in an altogether different situation and the directness that you are mentioning is one that is premised on the absence of an intermediary. If there is not - if there is no intermediary, what you say is direct is not - how do you say? – pertinent because it doesn't include the two articles that require intermediary. If there is no intermediary, then it can't be indirect. It is direct in the sense of a general concept of real. It would be the same thing as real. It is not within the realm of the direct/indirect specific consideration of the code under 282 and 283. Is that clearer?

Q. Not really. Is the position this: if we treat Mr Naqvi as acting on behalf of the funds for the purposes of article 161, which makes the funds liable, then am I right in saying the question of direct or indirect doesn't arise because it is direct loss caused by the funds?

A. No. I'm sorry. If Mr Naqvi is acting on behalf of the funds and that agency has been established then yes he is substituting himself to the fund and the fund becomes as principal responsible for it...But if the situation is understood as an act by the funds, that includes an intermediary, who is Mr Naqvi, then the court is faced with a situation where it needs to consider

whether articles 283 and 284 are applied and in that case it is Mr Naqvi who is the intermediary, who is responsible for the direct act and the fund would be indirect. Is that clearer?

Q. No it's not and the reason I'm having difficulty is because in your expert reports you have never said it is Mr Naqvi is the intermediary who causes the question of direct or indirect, you said it is the nonpayment of the loan that has done it and that's why I'm confused. Can I show you the bit I am talking about?

A. This I believe is a different matter....”

1243. In her closing submissions, Ms Tresman argued that Professor Mallat’s evidence (made clear at Mallat 2 [35]) was based on an important distinction between causation under Article 283 of the LCT and causation as it arises in the tripartite theory and perhaps as a matter of Western law. She submitted that Professor Mallat made three points in this paragraph. First, that causation in classical law as codified into Article 283 of the LCT was very different from causality as understood in both Western law generally and in the tripartite theory. Secondly, Professor Mallat said that under the tripartite theory there must be a causal link between the damage or harm and the harmful act and author. Under Article 283 of the LCT, the principle was not strictly one of causation but it of direct and indirect harm. Professor Mallat had described and characterised the harm in this case as the loss of money. At [1.32] and [1.33] of Mallat 1 Professor Mallat had said:

“1.32 Applying the three elements of the tort of deceit above, since A claims to have been deceived by B, C and D, A must prove that:

- (a) He entered into the loan contract with B on the basis of misrepresentations by B and the other tortfeasors through false and lying means which show the loan contrary to its reality and truth;*
- (b) With the respective tortfeasors’ intent (showing bad faith) to deceive A, into entering into the loan; and*
- (c) That without the respective tortfeasors’ misrepresentations, A would not have concluded the loan contract.*

1.33 The judge then applies the tripartite theory, which governs liability generally. He establishes that the following three elements are met in the case of established deceit:

- (a) *The act of deceit committed by the author(s) (which will have to be proved by establishing each of the elements described above);*
- (b) *The harm (loss of money by A);*
- (c) *The causal link between the harm and the established deceit.*

....

a. *Would Mr Jafar be considered to have suffered direct or indirect harm (or harm by causation)?*

12.1 *Answer: In applying the provisions of Article 283 CTC and the relevant cases available, if the alleged deceit claimed by A is proven, then he would have suffered direct harm from B because B did not return the money that A gave him on the basis of the loan agreement between them. B in that case is the direct author of the harm since he borrowed the money from A and did not return it.*

b. *Would each, or any, of the Defendants be considered direct or indirect actors?*

12.2 *Answer: According to the facts as presented in A's pleadings, the alleged harm he suffered was caused by the Defendants' misrepresentation, including C's D's, either by attribution or vicariously. A does not allege that C and/or D is/are responsible for the act of non-repayment (referred to in §12.1 above).*

12.3 *If B, C and/or D are found to be liable for the deceit of Mr Naqvi by way of attribution or vicarious liability principles, and A proves that that deceit caused the alleged harm, B, C, and/or D would be considered indirect authors of that harm, because of the presence of the intervening act of B's non-repayment causing that same harm. Applying Article 284 CTC, B would be liable as the direct author of the harm by the non-repayment.*

1244. Ms Tresman submitted that Professor Mallat's opinion was that the direct authors of the harm in the present case were AH and AIML, who were the borrowers under the Loans who did not repay the advances (save for the Third Loan in respect of which there was no claim for damages). The indirect author of the harm was the ultimate deceiver. As regards Professor Mallat's answers during his cross-examination, Ms Tresman submitted that Lord Falconer's questions had wrongly assumed that the harm was to be characterised as entering into the loan. Professor Mallat's answer had been caveated by saying that he

assumed that there was no intervening act. The critical question was whether there had been an intervening act? Mr Jafar's case that entering into the agreements to advance Loans had caused the harm improperly conflated causation in the classical law sense, as codified in Article 283 of the LCT and the very different causality test as understood in Western law generally and in the tripartite theory. This had led to the erroneous submission that the deceiver in this case or deceivers were the direct authors of Mr Jafar's harm. Ms Tresman summed up the position as follows:

"The process under 283 is to identify the harm. Professor Mallat has done that and identified it as the loss of the money. The authors of that harm are AH and AIML, who caused Mr Jafar the same harm as the deceivers but as the intervening actors in that piece they are the direct authors of the harm and the deceivers would be indirect authors. My Lord, if I may contextualise this so it doesn't feel counterintuitive. As I submitted a moment ago, this is relevant because it goes to the question of intention. Of course, if you are a direct author of harm then enshrining the hadith we see in article 42 and 282, classical Islamic law and the CTC impose essentially strict liability upon you to make good the damage you have caused. If you are on this analysis the indirect actor, being the deceiver, you have to act with intention. So it is not in a sense a defence, you can't say, I'm subject to article 284, you can't as a matter of classical Islamic law, say I'm not liable to make good the harm because I'm an indirect author. All it means is you must act with intention. That is an important piece of the jigsaw because it slightly dilutes any sense of injustice or counter-intuitiveness."

1245. Professor Mallat and Mr Edge agreed that under Article 284 of the LCT, if the Court finds that this is a case of direct and indirect authorship of the harm (the same harm being caused by direct and indirect authors) only the direct author would be liable (see [22(a)] of the Joint Memorandum). Dr Ahnish did not engage with Article 284 since in his opinion the deceit in this case caused Mr Jafar direct harm and so the Fund Parties are direct authors of the harm so that even under Article 284 they would still be liable.

1246. Mr Jafar submitted that Professor Mallat's approach to the application of Article 283 of the LCT and the indirect/direct harm distinction could not be supported and in particular he was wrong to characterise the harm suffered by Mr Jafar as being the non-payment of the Loans. In his oral closing submissions on this issue, Mr Krsljanin submitted that it was wholly artificial to suggest that there could have been any intervening act between the

deceit and the harm sustained. It was the deceit that in any real sense was the immediate or direct cause of a person entering into the contract. He said as follows:

“Indeed, and we do not accept the proposition made by Professor Mallat, which he did not, as far as we can tell, particularly pursue in cross-examination, that the cause of the harm is the non-repayment of the loan. That is in part because there is a degree of illogicality. Logic would dictate that when the deceit is committed and the lies are told and then there is reliance and the person enters into the contract, that is the moment of harm and that is the cause of harm, rather than some later date of non-repayment. Nor do we accept and in fact we strongly disagree with Mr Edge's analysis, which appears in, among other places at [Edge 1 [87]] that “A deceit or deception in itself does not cause direct harm as a matter of UAE law; rather it is the action of the victim/deceived party which causes the harm.” Common sense dictates that that is an unlikely proposition to suggest that the victim is the author of their own harm in every deceit case. That is the consequence of what Mr Edge is saying. If for the moment we take Professor Mallat's characterisations about discerning between direct and indirect harm by asking, is there an intervening act or an independent cause or an intermediary, one cannot truly say that the victim choosing to enter into the contract was an independent cause or an intervening act. It was because of the deceit. In any event, we say that the natural and proper analysis endorsed by Dr Ahnish is that the direct causer of harm in the case of deceit is the deceiver. In any event and by way of conclusion both on this point and my submissions more generally, [when at Day 24, page 62] Lord Falconer questioned Mr Edge as follows: “Question: ... what Professor Mallat is saying in its conclusion seem to be the same, which is we can ignore the question of direct or indirect damages if the Court is satisfied there is an intentional fraud here?” “Answer: Yes.” [So] if there is intentionality, it is an immaterial distinction.”

Apportionment of compensation

1247. UAE law also provides for the apportionment of liability for a harmful act. Article 291 of the LCT provides: *“If a number of persons are responsible for a harmful act, each of them shall be responsible in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability as between them.”*

1248. The UAE law experts agreed that a UAE judge has a wide discretion to assess liability and to apportion compensation (rather than liability). Their views are set out in the Joint Memorandum at [40] and [41]:

40. *We agree that the Judge has discretion on the apportionment of compensation, within reason, provided that (1) his reasoning is based on the facts and documents in the case under review, and (2) his reasoning is not contrary to law.*

41. *However, the Experts have their own respective comments as follows:*

FA: In exercising discretion to order damages to redress the victim of a deceit, a UAE judge would have due regard to two main factors: (i) The extent of conflict between the acts of deceit and the tenets of Islamic Shari'a i.e. the extent of hideousness and egregiousness of the particular acts; and (ii) the losses/harm suffered by the Victim (both material and moral) including compensation for moral damages, particularly where the deceit had become known to the public through media and press coverage or other dissemination of information.

CM: I have no comment on the question different from the answer in Paragraph 34 under the section on Joint and Several Liability above.

IE: I have nothing to add beyond what is already stated in my two Expert Reports (see IE1 Paras 96 to 102).

1249. As to the criteria to be applied by the Court in exercising this discretion, I formulated the following proposition during Ms Tresman's oral closing submissions which she considered to be a fair summary of the expert evidence:

"It is a kind of rationality test, is it, reasoning based on the facts and documents. So the reasoning for the apportionment has to be rationally related to the - without wishing to substitute words for what is said there, is it right that in essence that means there has to be a rational relationship between the approach to apportionment and the relevant facts and documents and that the result is not inconsistent with an applicable principle of law?"

1250. The Fund Parties invited the Court to apportion compensation under Article 291 of the LCT on a separate basis, taking account of AH and AIML's failure to repay the Loans, which Professor Mallat had said may be taken into account by a UAE judge. Further the Court should not exercise its discretion to find the Fund Parties jointly and severally liable for Mr Jafar's loss. In circumstances where AH and AIML were the borrowing entities and the Fund Parties had no representative in the room when the alleged deceit took place and could only be held liable on the basis of a rule of attribution it was appropriate that the Fund Parties should not be held liable or responsible for any compensation. The

compensation payable by the Fund Parties should be assessed at zero. If the Court decided in its discretion to apply Article 291 of the LCT as opposed to Article 284 of the LCT, the Fund Parties invited the Court to exercise its discretion to apportion compensation on that basis.

Enrichment without cause

1251. I have already set out [5]-[9] of the UAE Law Schedule in which Mr Jafar sets out the propositions of UAE law on which he relies. This is a UAE cause of action.

Double actionability?

1252. Before considering the applicable UAE law, there is a preliminary point that needs to be addressed. Mr Jafar argued that the double actionability rule did not apply to this cause of action. That rule, as a matter of Cayman Islands law, only apply to claims in tort (or analogous claims, like dishonest assistance). Enrichment without cause was a receipt-based liability and was not a claim in tort. In such circumstances, Rule 250(1) of Dicey Morris & Collins on the Conflicts of Law applied so that the law governing the claim in unjust enrichment would be UAE law. Rule 250(1) states as follows:

“A non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, which concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict which is closely connected with that unjust enrichment, is governed by the law which governs that relationship.”

1253. Mr Jafar submitted that the reasoning supporting Rule 250(1) was set out as follows at [36-026] of Dicey, Morris & Collins:

“Where a non-contractual obligation arises out of unjust enrichment, including payments of amounts wrongly received, and this concerns an existing relationship between the parties such as one arising by contract or from a tort closely connected with the unjust enrichment, then it is to be governed by the law applicable to that relationship. There is an obvious attraction in the law applicable to the relationship

between the parties also determining whether there has been a breach of the terms of that relationship and the aftermath of that relationship. Where the existing relationship is contractual, if the parties have expressly chosen the law to govern the contract, it is realistic to suppose that, had they given the matter any thought, they would have expected this law also to deal with any related non-contractual obligations arising between them.”

1254. Mr Jafar said that the Fund Parties had argued that Chief Justice Smellie in his judgment in *AHAB – GC* had held that the double actionability rule applied to all restitutionary claims including this claim. Mr Jafar submitted that the learned Chief Justice’s judgment did not decide that issue. The relevant passages from the judgment of Chief Justice Smellie were as follows (my underlining):

- “10. *Under the law of the Cayman Islands, a civil wrong committed elsewhere must be civilly actionable both under the law of the Cayman Islands and the place where the wrong occurred.*
- 11. *For the purposes of the double actionability rule, ‘actionability’ excludes liability which is exclusively criminal.*
- 12. *The rule applies to equitable and restitutionary claims (including claims for knowing receipt and dishonest assistance, such as those advanced by AHAB against the GTDs in the present case) as well as claims in tort: OJSC Oil Company Yugraneft v. Abramovich & Ors [(111)] [2008] EWHC 2613 (Comm) at [177] to [223].*
- ...
- 14. *As to determining the place where the relevant conduct occurred, the correct test is to ‘... look at the sequence of events constituting the tort and ask: where in substance did this cause of action arise?’”*

1255. Mr Jafar submitted that neither Smellie CJ’s judgment nor the judgment of Christopher Clarke J in *Yugraneft* to which it referred was dealing with or deciding the proposition that a receipt-based claim was subject to the requirement of double actionability. In fact, Christopher Clarke J in *Yugraneft* held that double actionability applied to dishonest assistance (and not a receipt-based claim such as knowing receipt or unjust enrichment) at

[177]-[223] (namely the passages quoted by counsel in the submissions that had been extracted with approval in Smellie CJ's judgment).

1256. In their written closing submissions GP8 did not press their submission on this point and simply referred back to their written opening submissions. The GHF Parties did reiterate the submission made in their written opening submissions that Smellie CJ had expressly accepted the submission that the double actionability rule “*applies to equitable and restitutionary claims*” and therefore that Mr Jafar had to persuade this Court not to follow *AHAB-GC* and the conclusion reached in that case to the effect that the principle of double actionability applied to claims in unjust enrichment. They submitted that this Court, as a court of co-ordinate jurisdiction to that which decided the *AHAB-GC* case at first instance, must follow that decision (a decision of the former Chief Justice) as a matter of comity. However, it seems to me that Ms Tresman in her closing oral submissions adopted a more nuanced approach. Ms Tresman took the position that if Dr Ahnish was right that bad faith on the part of the recipient of the plaintiff's property (and funds) was an element of and could establish the cause of action in unjust enrichment without cause *then* as a matter of Cayman Islands private international law the claim would be characterised as a fault-based claim so that the double-actionability rule would then be engaged.
1257. In my view that more nuanced approach is the right one. I agree with and accept Mr Jafar's submission that Chief Justice Smellie is not to be taken as having decided that every claim in unjust enrichment (as characterised as a matter of Cayman Islands private international law) is without more to be treated as being subject to the double actionability rule. As he made clear at [10] of his judgment, double actionability applies to civil wrongs. Some claims in unjust enrichment involve and are based on civil wrongs and some are not. [12] of his judgment needs to be understood in light of that introductory remark and in my view is to be taken only as saying that the double actionability rule applies to unjust enrichment claims which, properly characterised, involve or are based on civil wrongs. He referred specifically to “*equitable and restitutionary claims (including claims for knowing receipt and dishonest assistance...)*” and claims for knowing receipt and dishonest assistance are capable of being characterised for private international law purposes as claims involving

or based on civil wrongs. There is, I think, a substantial body of academic and other literature on this issue and now is not the time to explore that. It is sufficient for current purposes to say that I am satisfied that Chief Justice Smellie did not decide that claims in unjust enrichment which are based only on receipt of the plaintiff's property (receipt-based claims) and which do not require the plaintiff to show and establish fault on the part of the defendant/recipient are subject to the double actionability rule.

1258. Accordingly, in each case it becomes necessary to consider the expert evidence regarding the foreign cause of action and its constituent elements. In my view, Ms Tresman was right to say that if the UAE cause of action in enrichment without cause could be established on the basis of the recipient's wrongful (bad faith) conduct and the claim in question relied on such conduct, then the double actionability rule would apply. However, for the reasons I give below, I have accepted her and the Fund Parties' submission that the evidence of Professor Mallat and Mr Edge on this issue is to be preferred to that of Dr Ahnish and that the UAE cause of action relied on by Mr Jafar is a receipt-based claim that cannot be established by finding that the recipient acted wrongfully and in bad faith. Mr Jafar's claim is therefore not subject to the double actionability rule.

The provisions in the LCT and the Explanatory Memorandum

1259. The relevant articles of the LCT are Articles 318 and 319(1) which provide:

"Article 318

No person may take the property of another without lawful/just cause, and if he takes it he must return it.

Article 319

- (1) Any person who acquires the property of another person without any disposition vesting ownership must return it if that property still exists, or its like or the value thereof if it no longer exists, unless the law otherwise provides.*

1260. The Explanatory Memorandum to Article 318 states as follows:

“The rule laid down by this article is derived from the hadith: “Let none of you take another’s goods, in earnest or in play”, and another hadith: “The hand that has taken remains bound until it restores”.

This rule lays down the basis of the rule of unjust enrichment. The principle is that the property of one person does not pass to another person save in two cases: by agreement between those two people, or if the law so dictates. If property is transferred outside either of those two cases, it must be restored to its owner. That is the rule of unjust enrichment [lit. enrichment without cause].

This is a basic and independent rule, standing on its own, but derived from others. It is one of the independent sources of obligation. It is directly linked to the rules of justice.

Compare Sanhoury, Al-Wasit, 2 nd ed., pp. 1266-1268

In order for this rule to apply, a person must have taken another’s property without having any lawful reason for so doing, because if there are lawful reasons such as sale, gift or inheritance, then there is an entitlement to take the other’s property. The obligatory rule in such a case is that the hand that has taken is bound to restore. If restoration is not possible, as where the goods have been destroyed or consumed, the general rule applies. See in relation to above the general theory at the beginning of this section.”

1261. Accordingly, relief is available where there is an absence of lawful cause and/or the acquisition of another’s property without consent. If there is a lawful reason for the “taking” of property, such as a sale, gift of inheritance, or transfer pursuant to a contract, then there is a relevant lawful cause. Similarly, if property has passed from the original transferor to the transferee then a subsequent transferee cannot be liable in unjust enrichment. As the Abu Dhabi Court of Cassation had held in Case 163 of 2017 “[t]he cause is the legal source for enrichment, which gives the enriched person the right to fulfil/collect what he [is] enriched with. This cause could be a contract as well as a provision from Islamic or statutory law. In both cases the establishment of this cause prevents [him] from claiming compensation to the enriched for unjust enrichment, because the enriched person has been enriched for a legal reason.”

Dr Ahnish’s evidence.

1262. Dr Ahnish’s evidence on this issue was summarised in Ahnish 2 as follows (my underlining):

“Whether UAE law precludes a claim for unjust enrichment if an enriched party can point to a valid legal reason for receiving funds

4.19. Mr. Edge makes a sweeping statement at paragraph 24 of his Report that “if a contract is not rescinded then there is no claim in unjust enrichment” and in the same paragraph that “Good faith or bad faith is irrelevant in the context of restitution of the property”. In a similar vein, Professor Mallat argues in paragraphs 30.1 – 30.3 of his Report that good faith is irrelevant in unjust enrichment. I beg to differ with both of them.

4.20. Although I am not aware of the merits of any UAE court judgment, which delves into this particular instance, I reproduce for ease of reference, an excerpt from a Federal Supreme Court judgment, which appears at paragraph 5.2 of my Expert Opinion dated 24 August 2023:

“...Deception is the usage by one of the contracting parties of fraudulent means that lead to the inducement of the other contracting party to enter into a transaction that he intended to create a legal effect which would render [the other contracting party’s] intention defective. Furthermore, the rule that (fraud invalidates acts) is – as customarily held by this court – a sound rule even if there exists no specific provisions for it in the law... It is based on the moral and social considerations for combating fraud, deceit and deviation from the path of good faith which must be followed in transactions and procedures in general in order to protect the interests of individuals and society...” (Judgment No. 524 of 2000, Judicial Year 20, dated 18.04.2000).

4.21. In my view, the above paragraph succinctly encapsulates the policy behind the application of a far reaching and pervasive concept of good faith across all transactions that fall under the UAE Civil Code. With this policy, I am of the view that good faith on the part of the enriched, once it is established, might preclude unjust enrichment against that party who received money in good faith. However, good faith will not be established by the mere contention that there was a contractual relationship or any other valid legal reason for receiving the money, if at the time of the transfer, the enriched person knew that the money was obtained through deception. Such knowledge would negate good faith; and therefore the so-called ‘valid legal reason’ ceases to apply. Under UAE Criminal Law, almost acts of deception constitutes, as will be seen in Paragraph 5 of this Report, a crime. A person who receives funds out of a crime if he knows that such funds were not owned by him or that he has no right to dispose thereof if such acts cause damage to a third party shall be found guilty of an embezzlement crime (Article 451 of the UAE Penal Code). A perpetrator of crime surely cannot be seen but acting in bad faith.

4.22. Paragraph 8.16 of my Expert Opinion of 24 August 2023 should be read within this context. Mr. Jafar will have to prove to a UAE court that he was a victim of

deception, which if he is successful in doing will mean that a UAE Court will be confined to adjudicating on Mr. Jafar's pleaded claims, whether under Article 282 (harmful act) or pursuant to unjust enrichment or appropriation. He does not have to procure a judgment declaring rescission of the loan agreements. By way of analogy the Dubai Court of Cassation in the sale and purchase of shares case quoted in paragraphs 4.7 – 4.10 above, overturned two lower Court judgments, which declared that the rights of the party to the contract who was subject to deception was limited to rescission and not entitled to claim compensation in tort. The Cassation Court held that such an approach would be "in conflict with the express requests of the appellant for monetary compensation by way of [topping up] the value of [selling] his shares" (Dubai Cassation Court, Appeal No. 20 of 2017). I cannot help but observe in this respect that the results of successful claims in unjust enrichment (being restitution) and rescission are all but identical, since under Article 274 of the UAE Civil Code the contract parties whose contract has been rescinded "shall be restored to the position they were in before the contract was made..."

4.23. *To attribute bad faith to the Third and Fourth defendants who might have had a contract or similar arrangement with AH and AIML to receive funds, if he wishes to request restitution on the basis of unjust appropriation, Mr. Jafar will have to establish that at the time of receiving the funds, the Third and Fourth defendants were acting in bad faith. This would require a claimant in the UAE courts to submit evidence, orally or in writing in the form of correspondence or documentation, which indicates that the funds received by them arrived pursuant to a prior deception to cover the insolvent position of the Abraaj Group, including the Funds, or to avoid an otherwise catastrophic financial result for the Funds with the approval and acceptance of these Funds."*

Mr Edge's evidence

1263. Mr Edge said in Edge 2 at [117] that "[i]n paragraph 8.6 of [Ahnish 1] [Dr Ahnish] states his view that a lawful cause will exist where there has been a repayment of a debt to a recipient and the recipient receives the funds in good faith. Conversely, [Dr Ahnish] says that where the recipient knowingly receives funds which are the proceeds of wrongdoing, there will be no good faith and no valid cause. I disagree for the reasons set out at paragraph 227 of my original Report. Good faith and bad faith are irrelevant to a claim in unjust enrichment. Indeed, I note that [Dr Ahnish] does not provide any support in [Ahnish 1] for his view with regard to the relevance of good faith or bad faith." At [226] and [227] of Edge 1, Mr Edge had said as follows (my underlining):

“226. Further, paragraphs 5 and 6 of the Plaintiff’s Schedule of UAE Law appended to the Re-Amended Statement of Claim provide:

“8. ...If a recipient receives monies in repayment of a debt, that may in principle amount to a valid cause for the enrichment, provided only that the recipient receives the monies in good faith. There will be no good faith, and therefore no valid cause, if the recipient knew, or ought reasonably to have known, by making appropriate enquiries, that the monies were derived from wrongdoing by the paying party.

9. In order to determine whether a recipient received monies in good faith in the respect set out in paragraph 8 above, the Court may apply the principles relevant to attribution and vicarious liability (as set out in paragraph 4 above) for the purpose of determining the state of knowledge of the recipient.”

227. I do not believe that those paragraphs are accurate statements of UAE law:

- (i) As I have explained above, a claim in unjust enrichment under UAE law requires there to be a transfer of property (under Article 318) or acquisition or possession of property (Article 319) in circumstances where there is no lawful basis for the transfer or acquisition/possession vis-à-vis the claimant such that the claimant retains ownership of the property in question.
- (ii) However, none of the articles in Part 4 of the LCT (including the unjust enrichment and unjustified expropriation articles) provide expressly or impliedly that a recipient of property who receives good title and/or in circumstances where there is a lawful basis for the impoverishment of the impoverished party (e.g., an extant contract that has not been cancelled) is somehow subject to a liability if it is not acting in bad faith.
- (iii) To the contrary, Articles 318 and 319 LCT only apply in the absence of a lawful basis. They do not provide that liability arises where either: (a) there is a lawful basis, or (b) the ultimate recipient has not received the property in good faith. If there is a lawful basis, then the good or bad faith of the recipient is irrelevant to a claim in unjust enrichment.
- (iv) To put it another way, neither good faith nor bad faith are relevant to a claim in unjust enrichment. If the preconditions set out in Articles 318 or 319 LCT are made out, then good faith offers no defence. Likewise, if the preconditions in Articles 318 or 319 LCT are not made out, a claim in unjust enrichment does not arise simply because a party acted in bad faith.

- (v) *The good or bad faith of a recipient may be relevant in other ways as is seen from the case of the Authority for Unified Legal Principles. Also, to take the circumstances posited in the Re-Amended Schedule of UAE law, if there was a deceit practised on the impoverished party then that recipient may be liable for a civil wrong depending on the extent of its participation in any misrepresentation.”*

1264. In Edge 1, Mr Edge considered the proper meaning and effect of Article 319 of the LCT as follows (my underlining):

- “218. Unlike Article 318, the language of Article 319 is not focused on the taking of another’s property but instead the acquisition or possession of the property of another. It therefore provides, among other things, for a rule by which those who have received property by the intervention of a third party from the impoverished party may come under an obligation to return the property or its value: this is sometimes called “indirect” enrichment. The distinction between direct and indirect is not expressly labelled in this way in the Articles, but it broadly accords with the language used by Sanhuri in discussing the various types of unjust enrichment. Sanhuri 139 refers to indirect enrichment in describing how the equivalent Articles 179 and 180 in the ECC apply:

“The enrichment will be indirect if an outsider is involved in transferring it from the asset of the impoverished person to the asset of the enriched person. The involvement of the outsider may occur by a material act, such as the master of the vessel jettisoning some of the load into the sea in order to save what remains from sinking, and like a firefighting team which destroys the property of another person to enable the extinguishing of the fire. Another example is a plunderer who builds something using the materials of another person on the plundered land. The involvement may also occur through a legal act. An example of this is that a person buys a vehicle from another and then sends it to a mechanic for repair and the contract for the sale of the vehicle is rescinded such that the mechanic will have recourse as the impoverished person for the costs of the repair to the seller, who is the enriched person. In this the purchaser will be the outsider who has intervened in a legal act in the transfer of the enrichment from the impoverished person to the enriched person...”

219. The example Sanhuri gives shows how indirect enrichment works in a tripartite situation. If A is the seller and B the purchaser of the car then the sale contract results in good title passing from A to B. B then sends the car to C (a mechanic) for repair. During the time it is validly in the possession of C the contract is rescinded. C is now the enriched party (as he holds the

car) but he has no legal relationship with the owner, A. Nonetheless, A is allowed to claim the return of the car from C. As regards the repair costs, the situation is reversed so that C is the impoverished party seeking restitution from A, the enriched party. As the work has been done, A must pay C the equivalent value which will be the repair bill. In both cases there was no direct transfer but an indirect transfer through the third-party purchaser.

220. *Thus, where A makes a valid loan to B who then uses the money to pay a debt to C (or even simply makes a gift) there is no room for the application of unjust enrichment as each contract and transfer has a valid cause. However, if the loan contract is rescinded, for say fraudulent misrepresentation, then this would nullify all the contracts based upon it and A would be able to reclaim from C the amount by which C was enriched or alternatively B would have a valid claim against C and A would have a valid claim against B.*

221. *A similar legal scenario has recently been considered by the apex courts of Abu Dhabi and Dubai where a father had during his lifetime gifted the bulk of his property empire to one of his sons to the detriment of his other children. During the father's lifetime the preferred son sold some of the properties to raise cash. On the decease of the father the other children challenged the gifts which were held to be beyond the father's capacity and null and void. The question arose as to whether, and if so how, such a decision affected the sales effected by the son to third parties. The standard rule (being that if the underlying contract is void then all subsequent contracts are also void) would lead to the invalidity of these sales which is what the Dubai Cassation court decided. The Abu Dhabi Cassation court, however, came to an opposite conclusion on the basis that the purchasers should be protected if they were good faith purchasers innocent of any wrongdoing. The Authority for Unified Legal Principles issued a decision in 2019 whereby it adopted the view of the Abu Dhabi court.....*

222. *This states the basic principles. The Authority for Unified Legal Principles then goes on to say:*

“Absolute nullity leads to disturbance of the stability of transactions

Adoption of the concept of absolute nullity in contracts and the extension of its effect to a third party leads to the instability of transactions and is in conflict with the principle that it is essential to protect someone who is assured by what appears to him as a correct disposal received from the owner of the right and who has believed in good faith its conformity to the apparent truth and dealt on that basis. This is because the nullification of contracts which have been entered into on the basis of this apparent

situation and elimination of the effects consequent upon these contracts from the time on which they were entered into will inevitably lead to the volatility and lack of stability of transactions. In addition justice and the requirements of trust in transactions and their protection requires protection of third parties of good faith from the consequence of contracts of their predecessors who have entered into a contract with them after they have become assured and believed the validity of these contracts. Also the public interest requires that they are granted this protection because it provides general assurance and acceptance of legitimate trust which people rely upon in their transactions. Furthermore this protection finds its basis in that nullity of the contract does not prevent its existence in reality. This is because a contract, in spite of its nullity, establishes a visible situation on the basis of which people presumed in good faith that it was a valid legal contract, as long as no fault or negligence has been attributed to them in this belief.”

223. And finally, the Authority for Unified Legal Principles places the new idea (which it says is not in the LCT) squarely on the basis of good faith:

“The theory of the protection of apparent circumstances - its basis?

The factual appearance contrary to the law in relation to a null and void contract must generate in relation to a third party of good faith the same effects as those which were generated by it if the components which created for it its valid legal existence came together adopting the theory of apparent circumstances which will justify [burdening?] the third person when he acquires ownership of the object which is the subject of the null and void transaction through his entering into a contract with the owner of the apparent situation contrary to the truth when he (the third person) is of good faith. Although the theory of apparent circumstances did not provide for this either explicitly or implicitly in the Law for Civil Transactions, it enabled its adoption based on the requirements of [public?] interest and justice. This is because in accordance with Article 1 of this law the principles of justice and [public?] Interest are a source of the legal principle following legislation, custom and the principles of Islamic law.

The criterion of good faith and its effect?

Good faith is deemed to exist if the third party is unable to arrive at knowledge of the true position contrary to the apparent position even if this third person has exerted the care of an ordinary person and has not been negligent in studying the reality of the matter and carefully investigated what was contrary to what was apparent. So if the third person was negligent in this, he loses the presumption of good faith and loses the protection prescribed by the apparent situation.

The consequence of this is that the transaction entered into between the person with the apparent situation and the third party of good faith is deemed to be in force against the person with the right in the appearance of its owner and this leads the third person of good faith to enter into a contract with him because of the evidence surrounding this position which was such that it generated the preponderant belief among everyone that this appearance conformed to the truth without this third person committing a fault or negligence in investigating the truth and studying it. The trial court, with its authority to assess the evidence and understand the facts in the claim, may deduce this evidence and extent of participation of the person with the right in its existence and the effort made by the party to the contract with the person with the apparent position in investigating the truth of this apparent situation.”

224. The upshot of all that is that in the tripartite example posited above, the normal rules would hold that once the loan contract between A and B was rescinded then all subsequent transfers by way of contract or otherwise would also be void, possibly giving rise to an unjust enrichment claim. But following the Authority for Unified Legal Principles’ decision, it is possible that the rescission of the initial loan contract would not affect the subsequent contract/transfer between B and C but only if C dealt with B in good faith and did not know or could not know of the existence of any fraud or deceit. Of course, this is predicated upon the rescission of the initial contract between A and B; so that where there is no rescission and in fact A has approved and affirmed the contract with B then the above analyses have no application whatsoever.
225. Beyond that, however, the requirements for a claim under Article 319(1) LCT are similar to those under Article 318 LCT:
- (i) There needs to be an acquisition of the property of another person (namely the property of the claimant). Again, a claimant can only recover in respect of his property – not that of another (e.g., a third party).
 - (ii) That acquisition must have occurred without any disposition vesting ownership. Once again, a contract may well be the basis on which ownership was vested in another. As explained above, even where a fraudulent misrepresentation/deception is made in the context of a contract under which property is to pass, that does not prevent ownership from being transferred. The party who was deceived may have the option to cancel the contract and, if he does so, then the contract is no longer valid and the transfer of property is retrospectively voided, with there being no lawful basis for the recipient’s acquisition of the property.

- (iii). *The principles addressed above in the two-party context under Article 318 concerning the effect of contracts, passing of property and cancellation (or not) apply under Article 319.*
- (iv). *To reiterate the example of a three-party situation, assume A is induced to enter into a contract of loan with B by reason of a misrepresentation made by B. The contract of loan was valid and has not been rescinded and remains extant. B then pays over the funds received to C for a valid cause. A cannot claim in unjust enrichment against C because C did not receive A's property – property in the funds passed to B who then transferred to C. Further, there was and remains a lawful cause for the transfer of property from A – the contract with B as well as a valid cause for the transfer between B and C. There is no basis as a matter of UAE law for A's claim against C in unjust enrichment.*
- (v). *In this context, I understand from the Plaintiff's Schedule of UAE Law that the Plaintiff's case is that:*

“6. Due to the doctrine of privity of contract, where the party that has been impoverished (the Plaintiff) does not have a contract with the person ultimately enriched, there is ordinarily no valid cause for the enrichment (Article 250 of the UAE Civil Code, read with Articles 318 and 319).”

In answer to this I would say that in our example above, it is certainly true that there is no contract between A and C, but a claim for unjust enrichment under Article 318 LCT could be made for each separate transfer and so between A and B and between B and C. A claim between A and C under Article 319 LCT would only be possible if B were considered an outsider, but only if the transfers were without justification. If the contract between A and B was rescinded then this would trigger the provision and A would then have a possible claim against C...

Professor Mallat's evidence

1265. Professor Mallat's evidence was summarised in Mallat 2 as follows:

- “72. *Enrichment without cause arises between two parties, where one is enriched without a valid cause, and the other is correspondingly impoverished without a valid cause (Mallat 1, §25.10, and CM-112).*

73. *Enrichment without cause applies only if the defendant has acquired the plaintiff's property (Article 319.1) without a lawful cause (Article 318).*
74. *I disagree with Dr Ahnish on his conclusion in §8.8 of Ahnish 1 about enrichment without cause. Dr Ahnish in his conclusion mixes up deceit with unjust enrichment. If the Second and Third Defendants were to be found participants in deceit with Mr Naqvi, then the UAE courts will apportion compensation between the tortfeasors, and in this case unjust enrichment would be irrelevant.*
75. *Alternatively, if the UAE court were to find that the Second and Third Defendants did not commit any act of deceit, it will then consider unjust enrichment on the basis that the loans were made to AH/AIML, then from these loans AH/AIML transferred amounts of money to the Second and Third Defendants. In this series of events, my opinion is that the UAE court may find that there are two valid and lawful causes for the transfer of the property: first in the transactions between AH/AIML and Mr Jafar (which he does not seek to rescind), and second in the arrangements between AH/AIML and the Second and Third Defendants, bearing in mind also that the money transferred to the Second and Third Defendants was the property of AH/AIML (not Mr Jafar) under Art. 711 CTC (see Mallat 1 §27.5).*
76. *If the Second and Third Defendants did not acquire the property of Mr Jafar, and they received the money with a lawful cause, a claim for unjust enrichment fails."*

Mr Jafar's submissions

1266. Mr Jafar submitted that Dr Ahnish's evidence was to be preferred although as Lord Falconer remarked in his oral closing submissions it was common ground between all the experts that there was little case law on the application of Articles 318 and 319 of the LCT. He submitted that in light of this the Court should be guided on the interpretation of these Articles by someone with actual expertise in UAE law and experience in the application of the law by the UAE courts, which was obviously Dr Ahnish.
1267. Lord Falconer in his oral closing submissions said that the starting point was to note that this cause of action was linked to general rules of justice. The Explanatory Memorandum stated that "[i]t is directly linked to the rules of justice."

1268. He also said that there were six main issues in dispute. First, whether a claim in enrichment without cause is available in indirect cases where A transfers money to B who then transfers money to C. Secondly, is bad faith relevant? Thirdly, what is the effect of the contract for Loans still subsisting? Fourthly, does GP8 have a valid defence based upon what it described as the partial discharge of the intercompany receivable between it and AH and AIML (because of the repayment of \$73 million to AIML). Fifthly, there were a number of disputes as to the extent and quantum of Mr Jafar's claim (the Fund Parties had relied on the 1 July 2019 agreement between BOS and Mr Jafar to say that 15% of the total enrichment was at BOS's expense). Since these are quantum issues, I will deal with them, to the extent they need to be dealt with, in the quantum judgment. Sixthly, there were pleading points.
1269. As regards the first issue, Lord Falconer submitted that a claim in enrichment without cause was available in indirect cases. Mr Jafar noted that in *Mallat 1* at [25.6] Professor Mallat and in *Edge 1* at [218] Mr Edge had referred to the commentary from Mr Sanhuri on the equivalent articles 179 and 180 in the Egyptian Civil Code which recognised the fact that a claim in unjust enrichment was available (at least under the equivalent Egyptian provisions) in a case of indirect enrichment. In that commentary Mr Sanhuri gave the example a person ('B') who buys a car and then sends it to a mechanic ('C') for repair. When the contract for sale is later rescinded and the now-repaired car is returned to its original owner ('A'), Mr Sanhuri explains that the mechanic would have recourse against the original owner because the owner has been enriched at the expense of the mechanic by obtaining a repaired car. Importantly in this example Mr Sanhuri had suggested that C would have recourse against A even though there would have been an intervening lawful cause for C to carry out the repair work (and therefore for C's impoverishment), namely the contract of repair between B and C. Furthermore, there was no suggestion, either in the Court of Cassation case or in Mr Sanhuri's commentary that in order to restore the relevant enrichment, the impoverished person must claim against the direct beneficiary (and then rely on that direct beneficiary to recover against the indirect beneficiary).

1270. Mr Jafar also noted that in Edge 1 Mr Edge had referred to case DCC 44/2020 in which the Dubai Court of Cassation made clear that Article 318 also applied to indirect claims. In that case a bank had provided a letter of guarantee but the defendant (D1) had failed to fortify it by paying cash into his bank account. In the event D1 called on the letter of guarantee and the proceeds were attached by defendants 2 to 4 who knew that the letter of guarantee had not been properly fortified. The letter of guarantee was later rescinded and the court held that the bank could recover the proceeds in the hands of defendants 2 to 4 under Article 318 of the LCT.
1271. As regards the second issue, Lord Falconer submitted that UAE law provided a far-reaching and pervasive concept of good faith. This was clear from the Federal Supreme Court case 524 of 2000 where the court said that: "*The path of good faith which must be followed in transactions and procedures in general in order to protect the interests of individuals and society.*" This was a clear statement of principle. Further, this concept of good faith applied specifically to aspects of claims for enrichment without cause. This was clear from the 2020 decision of the Authority for Unified Legal Principles which had been discussed by the experts. In this case a father during his lifetime had gifted certain assets to one of his children which assets had in some cases then been sold to third parties. On the father's death, his other children challenged the gift which was held to be beyond his capacity because he was not of sound mind and therefore null and void. Ordinarily the subsequent sale of those assets would be null and void however the Authority for Unified Legal Principles decided that under the theory of the protection of apparent circumstances title to the assets passed to the purchasers and such transfer remained valid unless the purchasers had acted in bad faith. This meant that the sale contracts concluded between the son who had got the goods in the first place and the purchasers were enforceable against the other children – they constituted a lawful cause unless the purchaser had acted in bad faith.
1272. Lord Falconer said that the Fund Parties were wrong to say that Dr Ahnish's position was not supported by the text of the LCT or the Explanatory Memorandum or any of the cases identified by the experts. He submitted that the case law he had referred to put beyond

doubt that UAE law required individuals involved in commercial transactions to "*follow the path of good faith*." This applied specifically in the context of enrichment without cause. However, importantly, this was not a necessary precondition for the cause of action. A claimant did not have to establish bad faith in the receipt of the money by the person against whom the claim was made but if that person had received the money in bad faith, that will negative defences they may have, for example, the sort of defence identified in the Unified Authority's decision. Lord Falconer submitted that Dr Ahnish's position, understood in the context of all his evidence was that bad faith was not a necessary precondition to a claim because the relevant test was whether there was a lawful cause, but that was not the same as saying that where there was no lawful cause, for example because of bad faith, bad faith was irrelevant.

1273. As regards the third issue, Lord Falconer said that Mr Jafar relied on [4.22] of Ahnish 2 to rebut the argument made by the Fund Parties that that there was no evidence that a claim under Articles 318 or 319 of the LCT can be maintained in respect of enrichment conferred under contracts which had not been rescinded but on the contrary had been affirmed. Lord Falconer said that it was common ground that a party could bring a claim where another party has been enriched at his expense and that enrichment did not have a lawful cause; there was no debate that a contract could constitute a lawful cause for enrichment. But where there had been a transfer of money from A to B pursuant to a contract procured by deceit and then by B to C the transfer of the money to C is not based on or constitute lawful cause because there is a deceit. The Abu Dhabi Court of Cassation case 163 of 2017 did not concern a contract that had been procured by deceit. In fact, none of the cases referred to by the Fund Parties' experts dealt with, let alone supported the proposition that, a contract procured by deceit constituted a lawful cause for enrichment for the purposes of Articles 318 and 319 of the LCT.

1274. Lord Falconer submitted that this Court had to decide whether a UAE court applying UAE law would consider that a contract procured by deceit to the knowledge of the enriched party, which remained on foot solely as a means for the impoverished party (Mr Jafar) to obtain redress in the liquidation of one of the loan-recipients nonetheless constituted a

lawful cause for the purposes of Articles 318 and 319 of the LCT. He submitted that the UAE court would not regard this as a case involving a lawful cause. Dr Ahnish was the only UAE practitioner who had given evidence and had explained clearly in response to a question from me (Day 22, page 124) that where money passed from A to B under a contract obtained by deceit and B passed that money on to C (as occurred in this case) A was entitled to obtain relief from C under enrichment without cause irrespective of whether the contract remained on foot between A and B. Accordingly, in this case the extant Loan agreements did not preclude a claim in enrichment without cause. This, Lord Falconer argued, followed from the way that the UAE courts regard deception and the way they approach Article 318 and from the principles which underlie the LCT. In Case 524 of 2000 the Federal Supreme Court had made clear that "*fraud invalidates act*", a rule which the court described as a sound rule, even if there exists no provision for it in the law. Lord Falconer noted that Mr Jafar also relied on the codified principles of equity in the introductory book of the LCT and on the rules of justice which are the basis for cause of action in enrichment without cause and the far reaching and pervasive concept of good faith in UAE law." As Dr Ahnish had said under UAE law deception was looked upon as a hideous demonstration of bad faith which gave rise not only to civil liability but can also render the perpetrator guilty of a crime.

1275. With regard to the fourth issue, Lord Falconer noted that GP8 contended that of the approximately US\$124 million received by it from Mr Jafar (as the proceeds of the Loan advances), it had quickly paid approximately US\$73 million to AIML, of which US \$50 million was subsequently paid to Mr Jafar in repayment of the Third Loan. Lord Falconer confirmed that Mr Jafar accepted that under enrichment without cause he did not have a claim in respect of that US\$50 million that was repaid to him quickly. However, he did not accept that the US\$23 million balance of the approximately US\$74 million constituted a relevant disenrichment for these purposes. The fact that GP8 transferred part of the enrichment to a third party as opposed to back to Mr Jafar in relation to the US \$50 million did not absolve it from responsibility to return these funds.

1276. As regards the pleading points, Lord Falconer noted that GP8 had argued that Mr Jafar had not pleaded that GP8's directors' participation gave rise to liability under Article 282 of the LCT or criminal liability and therefore that Dr Ahnish's evidence that GP8 received the proceeds of the loans in bad faith went beyond Mr Jafar's pleaded case. Lord Falconer submitted this was incorrect. It was plainly legitimate for Dr Ahnish in setting out the principles of enrichment without cause to indicate whether or not for example criminality had an effect on whether there was lawful cause under UAE law. In any event, the knowledge and participation of GP8's directors was more than adequately pleaded in the RRASOC where it had been averred that they were not acting in accordance with the law.

The Fund Parties' submissions

1277. The Fund Parties' submissions on this claim were set out in their written closing submissions and comprehensively summarised by Ms Tresman in her oral closing submissions.

1278. Ms Tresman submitted that there were three reasons why Mr Jafar's claim in enrichment without cause failed. First, it was parasitic on the deceit claim as pleaded in the RRASOC so if that claim failed, so too did the UAE law claim in enrichment without cause. Secondly, the claim was based on the Fund Parties alleged bad faith receipt of the proceeds of the Loan advances but under the applicable UAE law, as the Fund Parties' UAE law experts had said, bad faith was irrelevant and could not justify or ground a claim in enrichment without cause against an indirect recipient. Thirdly, there could be no claim where the Loans had not been rescinded.

1279. Ms Tresman submitted that the expert evidence established that there were seven core principles applicable to a claim in enrichment without cause under Articles 318 and 319 of the LCT. First, the claim is based on and must satisfy the requirements of Article 318, 319(1) and 319(2). Secondly, these provisions are based on a cause of action between two parties and require that one party is enriched without a valid cause and that the other party is correspondingly impoverished by that enrichment without a valid cause. Thirdly,

enrichment without cause had three pillars: enrichment; impoverishment resulting from that enrichment; and the absence of lawful cause justifying enrichment. Fourthly, what must pass from A to B must be A's property. This principle is based on the hadith that no one may take another's property in earnest or in jest and the hand must return what it has unlawfully taken. Fifthly, as to lawful cause, the commentary in the Explanatory Memorandum defined lawful cause as covering an agreement and a loan was the paradigm example of such an agreement. Sixthly, a valid and enforceable contract therefore prevented the application of enrichment without cause because there was no absence of lawful cause. Seventhly, bad faith and indeed good faith were totally irrelevant.

1280. As regards the second point, Ms Tresman submitted that the evidence of both Professor Mallat (see [30.1] and [30.2] of Mallat 1) and Mr Edge (see [60] of the Joint Memorandum) was clear and was that a recipient's good faith or bad faith was irrelevant to the cause of action. This was the unequivocal evidence of Professor Mallat in cross-examination (see Day 23, page 174-176). The following exchange took place with Lord Falconer (my underlining):

“Q. The point I'm making is that just as in our case, good faith may have a relevance to play in relation to defences. You don't need good faith in a claim under 318 for the reasons I have indicated. But if you are a defendant, let's call it the enriched party, relying upon the existence of a pre-existing debt, you have got to be, have you not, acting in good faith in order to rely on that pre-existing debt?”

A. Under 318, whether you are acting in good or bad faith doesn't matter, you have to return the money.

Q. It doesn't matter for purposes of the cause of action under 318 but if you are saying the money was to pay a pre-existing debt and you knew it was the product of fraud, you wouldn't be acting in good faith, would you?

A. That's correct.

Q. Therefore you couldn't rely on that defence?

A. Yes, but I think generally the lack of need for good faith and bad faith in enrichment without cause should be a significant advantage to the argument that you are posing because the enriched person, [assuming the other conditions for relief are satisfied – my addition] whether she has good faith

or bad faiths, must return in the money. In a sense what you are suggesting now is redundant because even if it is in bad faith she has to return the money and even if it is in good faith, she has to return the money.

Q. No, the question of whether or not you have to return the money, I think we both agree on this, will depend on whether or not there was a pre-existing debt. Assuming the position is that the money is the proceeds of fraud and there is no pre-existing debt pursuant to which the money is transferred to the defendant, then the defendant would have to return it. Isn't that correct?

A. Yes.

Q. If however the defendant receives the money pursuant to a pre-existing debt then that can constitute a reason why the recipient of the money, the person enriched, does not have to return it; correct?

A. Yes.

Q. The reason for that is that the unjust enrichment comes from the fact that the money has been paid in effect for no purpose, there is no debt?

A. That's right.

Q. If however the person receiving the money knows it is the proceeds of fraud, there is no good faith on the part of the person receiving the money; that's right, isn't it?

A. Yes.

Q. Therefore they can't rely on the pre-existing debt?

A. I think you are misreading the enrichment without cause because that's irrelevant. The principle is that whether it's good faith or bad faith, it doesn't matter. You are saying that if it is good faith it changes the situation. They have to return the money, whether it is good or bad faith.

1281. Ms Tresman submitted that Professor Mallat was consistent and clear in his evidence. If there is lawful cause, a recipient's bad faith does not matter. If there is no lawful cause, the recipient's good faith does not matter. Dr Ahnish disagreed but when he had set out his view at [78.6] and [78.7] of Ahnish 1 he had cited no case or other authority to support his view. Ms Tresman submitted that Dr Ahnish repeatedly relied on various legal maxims set out in the introductory book of the LCT in particular Article 33, Article 42, Article 54, and Article 56. But none of those articles said anything about good faith and unjust enrichment.

Article 42 in fact enshrined a totally different hadith to the hadith that enrichment without cause was premised upon. The heart of Dr Ahnish's analysis was set out in [3.5] - [3.7] of Ahnish 2. In those paragraphs he had cited Article 246 of the LCT which he said spoke explicitly to the requirement for contracting parties to uphold good faith (without any reference to Case 22 of 2000) but this Article applied to contracting parties and here Mr Jafar was not relying on a contractual cause of action. In [3.6] Dr Ahnish said that he took the view that "*the principle of good faith under UAE law is not confined in its application to contracts*" but at [3.5] he had said and accepted that there were no equivalent provisions on good faith which governed harmful acts, namely torts or unjust enrichment. Dr Ahnish had then relied on the Dubai Court of Cassation decision in Appeal No 310 of 2006 but this decision concerned Articles 104 and 106 of the LCT which were to be found in a different part of the introductory book. They were not fundamental maxims – they are not what the LCT describes as jurisprudential maxims. As Dr Ahnish had accepted in cross-examination, those Articles concerned the position where there was an averment that a particular right has been exercised unlawfully. Article 106 stipulated the circumstances in which a right may be said to have been exercised unlawfully. Ms Tresman submitted that in case where there was no averment that a right has been exercised unlawfully Articles 104 and 106 had no relevance (as she said Dr Ahnish had accepted in cross-examination). Ms Tresman noted that Mr Jafar had relied on the Federal Supreme Court case of 524 of 2000. However, she submitted that this case did not assist him for three reasons. First, Dr Ahnish did not rely on it in Ahnish 1 in support of his view that good faith applied to unjust enrichment at all. Secondly, this case was a contract case and contracting parties, by reason of Article 246 of the LCT, are obliged to act with good faith when interacting with one another. Good faith may therefore be a reason why a contracting party could make a complaint, but it had no wider application than that. Ms Tresman submitted that, the wording of Articles 318 and 319 of the LCT did not refer to good faith and there was nothing in the Explanatory Memorandum that imposed an obligation or requirement of good faith in relation to the enrichment without cause claim. There was also nothing in Shari'a law that speaks to good faith in enrichment without cause and there was no case which had been cited that spoke to the application or established the applicability of Dr

Ahnish's asserted overarching all-pervading principle of good faith in a cause of action in enrichment without cause.

1282. Ms Tresman's third submission was that the enrichment without cause claim failed because the Loans had not been rescinded. There were two points.

1283. First, AH and AIML had received the property of Mr Jafar. The funds advanced became their property pursuant to the Loan agreements. The significance of non-rescission was set out in [672] of the GHF Parties written closing submissions:

"Mr Jafar's pleaded case has always been that the law governing the unjust enrichment claim is UAE law. The reason Mr Jafar argues for the application of UAE law is because he perceives it to be more favourable to him (than Cayman Islands law) where (he says) his property has been received indirectly by the Fund Parties. However, in substance UAE law presents Mr Jafar with the exact same, insurmountable, problem:

- (1) First, Professor Mallat's evidence is that: "[i]f A transfers property to B (i.e., pursuant to loan agreements) and that property becomes B's property because of the transfer, and B then transfers the property on to C, A cannot bring a claim in unjust enrichment for that property, because the property that B transferred to C belonged to B when B transferred it" (emphasis added).*
- (2) Secondly, Dr Ahnish's responsive evidence is that: "[t]his would be correct by virtue of Article 711 of the CTC, only if the loan agreement between A and B is valid and enforceable under UAE law" (emphasis added).*
- (3) Thirdly, Dr Ahnish accepts that deceit does not render a contract void ab initio. It may be cancelled, or it may be affirmed.*
- (4) Fourthly, Dr Ahnish accepts that once a contract has been affirmed, it will be considered binding, and he accepts that binding means "valid and enforceable."*
- (5) Fifthly, on Mr Jafar's pleaded case, this Court is proceeding on the basis that the Loans have been affirmed by Mr Jafar."*

1284. Ms Tresman submitted that for these reasons non-rescission of the Loan agreements meant that there were valid and enforceable contract as between Mr Jafar, AH and AIML so that

the Fund Parties to the extent that they received money from AH and AIML only received the property of AH and AIML. They did not receive, as is required for the enrichment without cause claim, the property of Mr Jafar. In addition, there was lawful cause for the transfer as between Mr Jafar and AH and AIML. Ms Tresman noted that Dr Ahnish had relied on Article 320 of the LCT but this was a tacit recognition that under Articles 318 and 319 of the LCT rescission was fatal. Dr Ahnish had attempted to argue that it was sufficient if the contract *was liable to be rescinded* because that then gave rise to a cause of action in unjustified appropriation under Articles 320 to 324 of the LCT. However, Mr Jafar did not have permission to run that argument in view of [19] of my ruling of 9 October 2023 where I refused permission to Mr Jafar to amend his statement of claim to add a UAE law claim for unjustified appropriation on the basis that it would cut across [49] of the RRASOC and Mr Jafar's stated position on rescission. Ms Tresman submitted that in these circumstances Mr Jafar was unable to rely on any argument that turned or was based on an averment that the Loan agreements were liable to be rescinded.

1285. Secondly, Ms Tresman submitted that in any event, Dr Ahnish had misunderstood the operation and effect of Articles 320 to 324 of the LCT. It did not suffice that a contract was liable to be rescinded. The contract must be rescinded.
1286. Ms Tresman submitted that there was no injustice in this position and result. Insofar as Mr Jafar had chosen not to rescind the Loan contracts that had been his decision and choice and he must accept the consequences.
1287. As regards indirect claims, Professor Mallat's evidence was that indirect claims could not be brought under Article 318 of the LCT. This had two implications. First, if there was lawful cause as between either A and B or B and C in a tripartite situation the claim must fail. Secondly, where property passed as between A and B and the A-B contract was not rescinded, the property C received was the property of B. The possibility of a claim as between A and C under Article 319(2) of the LCT had been suggested by Mr Jafar but this did not assist him where the Loan contracts have not been rescinded. C must still receive A's property. Reference was made in the UAE materials to the example of the car being

sold by A to B and taken to the mechanic for repair so that the mechanic is party C in this case. Under Article 319(2) if the contract between A and B is rescinded, A may proceed against C. Because of the rescission C has A's property. In that case there was an obligation to give credit for the value of the work done and then A may take possession of the vehicle back. However, this was not Mr Jafar's case or position. Accordingly, Article 319(2) had no application or relevance. Professor Mallat had provided an in-depth analysis of Article 319(2) and discussed the Hanbali jurisprudence and had given further reasons (in [25.7] of Mallat 1) why Article 319.2 was not engaged here. Mr Edge's evidence was also clear on this (see [220] of Edge 1) and he had been clear in cross-examination at (see Day 24, page 74).

1288. Ms Tresman submitted that insofar as Lord Falconer had relied on and sought to have recourse to the rules of justice underlying Article 318 of the LCT, those rules did not qualify and undermine the clear effect of the wording of these Articles so as to enable Mr Jafar to bring an indirect claim. Professor Mallat was extremely clear in his evidence that the hadith on which Article 318 of the LCT was based was different from the hadith rule enshrined in Articles 42 and 282 of the LCT. As Professor Mallat explained in cross-examination (Day 23, page 166): "*Q. If you go to [Mallat 1] ..look at 25.5, ""The rule prescribed by this article is based on the hadiths "Let no one take another's property in earnest or in jest" and "the hand must return what it has [unlawfully] taken" ..."" It is based on very basic principle. At the moment, if it is based on that overarching principle, why should UAE law make the restriction that it has only got to be between two parties? A. Well, this is not unlike the very general principle that you can find also in Article 42, which is that you can't do harm. Here you have a situation where it says you can't have - don't eat, as the Quran says, monies improperly. It is a very general dimension, which obviously is going to be the reason for quite a lot of elaboration in a complex life."* Ms Tresman submitted that the point that Professor Mallat made was that the hadith on which Article 318 of the LCT was based was completely different from the hadith on which Articles 42 and 282 of the LCT were based and the rules of justice did not mean that the Court could ignore the core requirements of the cause of action as set out in the LCT as interpreted by

the relevant case law and jurisprudence. Dr Ahnish was improperly seeking to elevate principles of justice underlying the LCT beyond their proper status and role.

1289. Ms Tresman submitted that Mr Jafar had not been impoverished, and the Fund Parties had not been enriched. GHF had received sums acting as agent of the AGHF and the Parallel Funds and as such was not enriched by receipt of monies derived from the proceeds of the First Loan and the Second Loan. Precisely the same point could be made about the AGHF's and Parallel Fund B's receipt of the proceeds of the payments that were immediately paid by them to their investors. Dr Ahnish had agreed in cross-examination by Mr Ayres that the issue of a defendant's enrichment would be looked at in the round. The Fund Parties' position was that BOS was the true lender in respect of US\$45 million of the First Loan so that Mr Jafar would not have been impoverished by the AGHF's or alternatively GHF's receipt of US\$45 million of the proceeds of the First Loan. Moreover, as a matter of Cayman Islands law, the enrichment of the AGHF could not have been at the expense of Mr Jafar in the sum of US\$45 million.

Contributory negligence

1290. In the GHF Parties' Defence at [73(9)] ([73] deals with the GHF Parties' defence in relation to Mr Jafar's UAE law-based claims) the GHF Parties stated as follows:

"Further, Mr Jafar, "participated by his own act in bringing about or aggravating the harm." In the premises, under Article 290 of the UAE Civil Code, a UAE Judge has a discretion to reduce the damages payable to Mr Jafar and it is averred that a UAE Judge would exercise their discretion to reduce the damages payable to Mr Jafar."

1291. GP8 made the relevant albeit brief and unparticularised pleas at [58.1(e)] and [68] of their Re-Re-Amended Defence.
1292. The GHF Parties submitted that they had adequately pleaded a case based on contributory negligence in reliance on Article 290 of the LCT. They accepted that they had not provided

particulars of the matters but there was, they argued, no requirement for them to do so and Mr Jafar had not asked them to provide particulars. Having failed to do so, he was unable to complain now.

1293. Ms Tresman set out the GHF Parties' detailed case (only) in her oral closing submissions. The point had been dealt with perfunctorily in the GHF Parties' closing written submissions as follows:

“90. *Article 290 reads as follows:*

“The judge may reduce the amount of compensation or may not decide a compensation, if the harmed party participated in the damage or increased it.”

91. *The UAE Law Experts are agreed that Article 290 permits the trial court to reduce the level of indemnity or not to order indemnity if the person suffering harm: (1) participated by his own act in bringing about the harm; or (2) aggravated it.”*

1294. Ms Tresman said that the Fund Parties relied on the totality of Mr Jafar's conduct. She said that there were fifteen circumstances and reasons in particular. First, there had been no adequate questions posed by Mr Jafar to Mr Naqvi (this failure had been put to Mr Jafar during his cross-examination on many occasions). Secondly, there was no effort made to take security over the monies that Mr Jafar said were held in the Abraaj treasury (this failure had also been put to Mr Jafar in cross-examination). Thirdly, there was no suggestion of breaking early the temporary investments said to be held in treasury. Fourthly, Mr Naqvi did not explain the degree of illiquidity being faced but no questions were raised about that. Fifthly, there had been no due diligence carried out whatsoever by Mr Jafar. Sixthly, there was no proper interrogation by Mr Jafar or Mr Nerguizian of Badr in his capacity as an AH non-executive director. Nor was there any suggestion that Badr was asked to make inquiries of the other directors or anybody else. Seventhly, there was a failure to make inquiries of representatives of the AGHF. Eighthly, no security had been taken for the First Loan. There could have been an agreement as to security with the necessary papering to take place later. Ninthly, the security for the Second Loan was a share pledge but nothing

more. The ENBD term sheet made clear that there was plainly security available. Tenthly, Mr Jafar's evidence was that he asked Mr Naqvi how he was going to be repaid and Mr Naqvi listed potential sources of repayment but there was no attempt to secure rights or interests in respect of those assets. Eleventhly, there was a complete failure to appreciate or understand on his own case that the putative borrower, at that stage Abraaj or AH, was insolvent in circumstances where the requests went from US\$90 million to US\$100 million in a matter of hours and where it was part of an overall borrowing package of US\$300 million. There was a complete failure to make inquiries and to investigate and consider the risks. Twelfthly, there had been a failure to make any inquiries about the use of Healthcare Investor monies for general business purposes. Thirteenthly, there was an inexplicably simple reliance on Mr Naqvi and Abraaj's reputation. Fourteenthly, there had been a failure to take proper steps to sell and manage the value of the settlement assets. Finally, there had been a failure to take control of apparently all available assets, including the Oman property and properties in London. These were fifteen reasons as to why Mr Jafar did participate by his own acts in bringing about or aggravating the harm.

1295. Mr Jafar objected to the Fund Parties only providing these particulars at such a late stage. I had, after Ms Tresman had set out her fifteen reasons, indicated that I considered that the Fund Parties should at least set out revised written closing submissions on these points so that Mr Jafar had their submissions in writing. This had been done overnight before the final day of closing submissions (the GHF Parties had provided an elaboration of [660] of their written closing submissions only at 8.58 pm and GP8 had written at 9.02 pm saying they supported these submissions). Lord Falconer submitted that Mr Jafar suffered real prejudice from the Fund Parties' approach. Lord Falconer put forward four reasons. First, Mr Jafar's legal team had been required to respond to the case as recently put in a huge hurry (and had had to file a rapidly prepared further written note by way of response to the Fund Parties' submissions). Secondly, if particulars of contributory negligence had been provided on a timely basis the Jafar team would have been able to consider without being forced to rush whether there were documents that they might wish to identify and rely on. Thirdly, they would have been able to consider whether they wished to call or rely on evidence on causation (an obvious example was Mr Farnum who might have been asked

to give evidence to respond to the claim that Mr Jafar should have contacted him and that had he done so his position may have been improved). That was now not possible. Fourthly, Lord Falconer submitted, the manner in which the case on contributory negligence had been presented had prevented there being a proper analysis of and a proper response from Mr Jafar on the applicable UAE law on the topic. Lord Falconer had noted that I had asked as to what was submitted as to the test for establishing contributory negligence. Lord Falconer said that Ms Tresman's position had appeared to be that there was agreement as to this and that under UAE law what needed to be shown was unreasonableness or fault on the part of Mr Jafar. But there was no such agreement as an intervention from Mr Ayres had made plain. Accordingly, he submitted that the Court should not allow fifteen particulars of contributory negligence to be admitted at such a very late stage in the course of the trial.

Discussion and decisions on UAE law issues

General comments on my assessment of the expert evidence

1296. As my summary above of the written evidence and cross-examination of the three UAE law experts makes clear, there were substantial and fundamental differences of view and approach as to the content and interpretation of the applicable UAE law. The main differences were between Dr Ahnish on the one hand and Professor Mallat and Mr Edge on the other. The differences on many topics were stark in part because Dr Ahnish adopted a fundamentally different approach to the analysis of the applicable law from that of Professor Mallat and Mr Edge. It was also because a number of the key issues are novel and have not been the subject of detailed or clear discussion in the UAE jurisprudence so as to establish a consensus or settled view. Indeed, the cross examination of the experts often only served to establish that the UAE law on many topics was unsettled and disputed and therefore unclear. I have to say that I did not find much of the cross-examination to be illuminating or determinative. It frequently involved resort to hypotheticals and variations of hypotheticals which ended up in a dead-end of indeterminacy.

1297. The difficulty in determining the applicable propositions of UAE law is enhanced because the UAE is not a precedent-based system so that there is not a recognised body of case law and judgments written with a view to setting out in detail the principles decided or applied and to be used in future cases. The experts cited and discussed a number of apex level judgments but none of them seemed to be directly on point or to settle the dispute between the experts (and often I found the translations to be obscure and confusing).
1298. In these circumstances I have sought to apply the principles set out in *Perry v Lopag* and consider the evidence of each of the experts on each issue in light of their written and oral evidence. I have not treated numerosity as a decisive factor. I have regarded the fact that both Professor Mallat and Mr Edge agreed on the law on a particular topic as of some but not decisive weight. They are clearly together on one side of the dispute and Dr Ahnish is on the other side. I can see the force of and have taken into account Mr Jafar's argument that since Dr Ahnish has more hands-on local court experience, he should be taken to be a better predictor of how a UAE court will determine the applicable law and decide cases. But this additional experience is only of limited significance. The Court's task is to assess what the relevant apex court will decide and how it will formulate the applicable law, interpret the relevant code provisions and applicable Shari'a principles. In that context the learning and expertise demonstrated by Professor Mallat and Mr Edge regarding the UAE legal system and Shari'a principles are particularly relevant and important.
1299. I have noted and given weight to the statutory provisions in the LCT relating to the proper approach to be adopted by the court in interpreting and applying the code. The experts agreed that consistent with Article 1 of the LCT the legislative provisions of the LCT were to apply both in their letter and spirit/intention and that a judge was not to exercise *ijtihad* in relation to provisions of definitive import (*ijtihad*, as I have noted, is a process involving the use of innovative reasoning to reinterpret or develop Shari'a in light of changing circumstances by, for example, changing or extending recognised principles). In the UAE, applying this Article, the courts do not have a general power or discretion to innovate, change or expand on the basis of *ijtihad*. Rather the courts must apply the law according to the hierarchy of sources listed in Article 1 and, where the relevant legal provision is of

definitive import, give effect to that provision. I have also noted and applied the rule that if the judge finds no provision in the LCT which addresses a particular legal issue, then he must refer to the Shari'a so that Shari'a is a residual source of law to address gaps in the LCT, where there is no provision and that the Shari'a is also a resource for the interpretation, explanation and application of the LCT.

1300. Ultimately, I reviewed the experts' evidence to assess whose opinion appears to fit best the UAE statutory materials and related jurisprudence and appears to be most cogently argued. In view of the fact, as all parties accepted, that the UAE law on many of the issues in dispute is unclear and not settled I have followed the opinion which appears to me to most closely follow the language and structure of the relevant statutory provisions and where applicable clearly established principles of Shari'a law. As will be apparent from the discussion below of my conclusions this has resulted in my preferring on each of the main issues in dispute the evidence of Professor Mallat and Mr Edge. Their opinions, which were cogently reasoned and coherent, were in my view based on and linked to the language and structure of the relevant statutory provisions and where applicable clearly established principles of Shari'a law. While they were forced in cross-examination to adjust their position on some topics in my view, they defended their opinions well and convincingly and even though on a number of issues they accepted that there was room for argument I found their explanations of their positions to be generally convincing.
1301. As I have already noted, by contrast I found Dr Ahnish's explanations and arguments to be less well argued and convincing. He often resorted to a merits-based analysis (not of itself a bad thing but a weakness if not supported by a cogent analysis of the statutory and other materials) and to assertion. I often found his evidence in cross-examination to be unclear. He also frequently offered an interpretation that resorted to general principles of Shari'a law that ignored or required the overriding of the clear statutory language and structure. Part of his difficulty, which reflected Mr Jafar's fundamental problem that I have already referred to above, was derived from the manner in which Mr Jafar has chosen to exercise his rights and remedies and conduct this litigation. By deciding not to exercise his right to rescind the Loan agreements and to drop his claims directly based on accessory liability or

participation in Mr Naqvi's fraud, he has been forced to rely on unconventional and novel legal arguments to support his claims against the Fund Parties as indirect recipients of the Loan advances and to seek to stretch the law relating to causes of action based on deceit and unjust enrichment. As a result, Dr Ahnish's views on the applicable UAE law had to be based on similarly novel arguments in which he sought to squeeze and fit the claims made while the Loan agreements were in place and against indirect recipients into the normal framework of the causes of action in deceit and enrichment without cause. This is another reason for adopting a cautious approach to assessing Dr Ahnish' evidence, particularly in a case where the burden of proof is on Mr Jafar to establish that his view of the applicable UAE law is to be preferred.

1302. When assessing Dr Ahnish's evidence I have also sought to resist the temptation to give greater weight to interpretations of UAE law which are more readily recognisable and more familiar to a non-Islamic law from a common law legal system and the associated risk of bias towards the familiar.

1303. I set out below my findings and decisions on the core UAE law issues in dispute. I have only addressed these issues and not every point of UAE law that was raised (although I have sought to provide a comprehensive summary of the expert evidence above). I then go on to consider the application of UAE law in light of the findings of fact I have made and set out above.

Deceit - did Mr Jafar's failure to rescind the contracts to lend the Loans prevent him from bringing a claim in tort for compensation against the Fund Parties for Mr Naqvi's deceit?

1304. I prefer Professor Mallat's evidence on this issue, which is a modified version of Dr Ahnish's view (which I have set out above in extracts from Mallat 1, particularly [6.2] and Mallat 2, particularly [29] and [50]). Professor Mallat, in what he regarded as an unusual fact pattern, agreed with Dr Ahnish that in a case where a third party (C) who was not a party to the contract (between A and B) *had with the requisite intention deceived the innocent contracting party (A) and induced him to enter into the contract*, so that the conditions for liability in deceit were independently satisfied in relation to C, A would have

a claim in deceit against C even if A had not exercised his right to rescind the A-B contract. He did not agree with Mr Edge's view that A's right to claim against C for compensation for the harm caused by C flowing from his own deceit which induced A to enter into the contract was limited to a claim based on facts unrelated to the entering into of the contract. However, he took the view that even though the claim in deceit was not barred the UAE court would find that A had suffered no harm (because he had received what he bargained for namely his rights under the contract). C of course would be treated as liable in deceit where the actions, intentions and knowledge of its agent or relevant corporate officer were to be attributed to him. This analysis seems to me to represent the best fit with the provisions in the LCT and the related jurisprudence. It seems to me that Mr Edge's view is not supported by those provisions or the jurisprudence. Mr Edge did not in my view establish a sufficient basis for concluding that a deceit claim against a person who had made fraudulent misrepresentations that had induced A to enter into the contract could only be made if the contract was rescinded. But it seems to me to be right that the failure to rescind is relevant to and should be taken into account when assessing the extent and nature of the harm suffered by A. Of course, in this type of case, where B and C both made fraudulent misrepresentations giving rise to the same harm, then the UAE rules governing the allocation of liability between those who have directly and indirectly caused the harm and the apportionment of liability between joint tortfeasors come into play.

1305. I accept that the position would be different if the claim in deceit against C was only based on C's receipt of benefits from the A-B contract. In such a case, as Mr Edge said, there could be no claim in deceit against C. As Mr Edge said, Article 274 of the LCT deals only with the liability as between the contracting parties: it does not involve a contracting party being able to claim directly from third parties who had benefitted from the contract. The contracting party who cannot make restitution must pay compensation from his contractual counterparty.

Deceit - did Mr Naqvi's silence as to the true financial position of AIML, AH and the Abraaj entities and of the existence of a Ponzi scheme give rise to a claim in deceit?

1306. I prefer and accept Professor Mallat's and Mr Edge's evidence on this issue. They were both of the opinion that deliberate silence applied only to contractual deceit under Article 186 since deliberate silence was not mentioned in Article 285 of the LCT. Dr Ahnish's evidence that deliberate silence may constitute the relevant fraudulent means was premised on Article 282 of the LCT however, actions in the tort of deceit are brought under Article 285 and not under Article 282 of the LCT. Dr Ahnish had given a series of examples of where UAE law equated silence as being equivalent to speech but all of those examples concerned contractual liability. There was no equivalent provision equating silence to speech for the tort of deceit. This analysis seems to me to be in accordance with and to represent the best fit with the relevant provisions of the LCT and the applicable jurisprudence and was not clearly contradicted, undermined, or qualified by *dicta* in the case law.

Deceit - attribution in relation to directors and managers

1307. It seems to me that Mr Jafar was right to submit that Articles 161 to 163 of the CCL permit the acts of both directors and managers to be attributed to joint stock companies and LLCs where the directors or managers were authorised so to act. However, I accept the Fund Parties' submission that reliance on Article 162, which referred to managers, had not been pleaded by Mr Jafar so that he was not entitled to rely on it. [4C] of the Schedule of UAE law only asserted and relied on attribution for the acts of directors. However, I do not accept the Fund Parties' submission that Article 162 does not provide for attribution of acts to a company for acts of the executive management. On the face of the Article, it does. Article 162 states that "*The members of the Board of Directors and the Executive Management are responsible towards the Company, the shareholders and third parties for all acts of fraud and abuse of authority, and for every violation of the law and the Company's Articles of Association, and any condition to the contrary shall be nullified; the Executive Management is each of the General Manager or the Executive Director or the CEO of the Company and their deputies, and all those at the level of senior executive positions, and officers of the Executive Management who have been personally appointed to their positions by the Board of Directors.*" I accept Mr Jafar's submission that there can be attribution in respect of unlawful acts.

1308. I also accept Mr Jafar's submission that Professor Mallat had accepted that under UAE law the acts, knowledge and intention of Mr Naqvi could, depending on the facts, be attributed to the Funds' general partners (so as to give rise to a liability payable out of the assets of the Funds) by reason of his having acted as a director of AIML for the purpose of exercising AIML's powers as the manager of the Funds.

Deceit - attribution – agency

1309. There was no substantial dispute between the experts as to the effect and meaning of the provisions in the LCT (Part 3) governing contracts of agency. There was no dispute that if an agent/proxy acted within his authority his acts would be binding on the principal and the principal will be liable for a tort.

1310. On the disputed issue of whether Article 930 of the LCT applied only where there was a prior written contract of agency, I prefer the view of Dr Ahnish that no such contract is required. This view appears to reflect the wording of Article 930 as explained by the Explanatory Memorandum which clearly states that "subsequent approval is tantamount to an earlier grant of agency."

Deceit - attribution - ostensible authority

1311. It seems to me that Dr Ahnish is right to say that there is not always a requirement for a third party relying on ostensible authority to have verified the putative agent's authority. The position, as Dr Ahnish argued, was made clear in the judgment in Case 317/1996, (annexed to Ahnish 1 as exhibit 14) which confirmed that while generally there was a requirement for a third party to ascertain the status of the agent who purported to act on behalf of the principal when conducting the transaction, this requirement was dispensed with if there was a proper holding out to the third party ("*if the principal's actions indicate his will to delegate to others to act in his name, such as an external appearance attributable to him that...makes the third party justifiably believe that a principal-agent relationship exists. In such case, the third party may have the right to rely on these attributable*

circumstances to argue that an agency exists on the basis of an ostensible agency and not on the basis of an actual agency which does not exist”). But there does need to a holding out to the third party, in this case Mr Jafar.

Deceit - attribution – voluntary agency

1312. I accept Dr Ahnish’s evidence that the liquidity crisis that Mr Naqvi was dealing with when he sought the Loans from Mr Jafar could be treated as satisfying the requirements for urgency and compelling need under Article 325 of the LCT so that if Mr Naqvi was acting on behalf of the Funds’ general partners or AIML in its capacity as manager of the Funds when negotiating the Loans and if there was a subsequent ratification by and on behalf of those parties, Mr Naqvi could be treated as their voluntary agent.

Deceit - if Mr Naqvi’s deceit could be attributed to the Fund Parties (the Funds’ general partners) or if they were vicariously liable therefor, had Mr Jafar as regards the Fund Parties only suffered indirect harm and if so was he thereby prevented from bringing a claim in tort for deceit against them?

1313. Once again, I prefer Professor Mallat’s view on this issue, which seems to me to be closely based on the language and structure of the relevant provisions in the LCT (in particular Article 283) as applied in a case where the harm suffered by the victim of the deceit arises by reason of the non-payment of loans under loan agreements which subsist and have not been rescinded. I accept Professor Mallat’s opinion that AIML (and AH) are to be treated as the direct author(s) of the harm suffered by Mr Jafar as the borrower(s) under the Loans who did not repay the advances (save for the Third Loan in respect of which there was no claim for damages). The Fund Parties at most would be the indirect authors of the harm if and to the extent that they were to be treated as having made the fraudulent misrepresentations inducing Mr Jafar to enter into the agreements relating to the Loans. Entry into and non-payment of the Loans were to be treated as intervening acts which were the direct cause of the harm suffered by Mr Jafar.

Deceit – joint tortfeasors - and apportionment of compensation

1314. There was no disagreement that where a number of parties are held to be responsible for the same harm the Court has a very wide discretion under Article 291 of the LCT to determine their respective shares of the liability. The Article states that the Court may make each of those parties responsible “*in proportion to his share in it and the judge may make an order against them in equal shares or by way of joint or several liability as between them.*”
1315. It seems to me that, based on the expert evidence, as I said to Ms Tresman during her oral closing submissions, the Court is required to apply a rationality test. It must be that the Court should have regard to relevant factors relating to each party’s share in and responsibility for the harm caused in light of all facts and circumstances. Such factors must include the relative responsibility for the harm as between the joint tortfeasors and the relationship between them with a view to establishing a fair apportionment. The Court has to decide what apportionment should be applied and there must be a rational relationship between the decision as to apportionment and the relevant facts.

Deceit – contributory negligence - reduction of indemnity liability under Article 290

1316. Article 290 of the LCT was only dealt with briefly by the experts. Professor Mallat at [21.4] of Mallat 1 cited a helpful statement by the Dubai Court of Cassation of the approach to be applied by the Court (confirming that the burden of proof lies on the person claiming the contribution) and at [21.5] of Mallat 1 by the Federal Supreme Court as to the scope of the Court’s discretion. The Federal Supreme Court judgment referred to the need for the Court to assess all the evidence including expert reports as to the extent of the participation of the injured person in causing the harm they suffered.

Enrichment without cause

1317. I prefer the evidence of Professor Mallat and Mr Edge in relation to the issues in dispute regarding what needed to be established in order to succeed in a claim for enrichment without cause. I found their opinions to be closely reasoned and compelling and directly

based on the language of the relevant Articles in the LCT. In my view, their evidence gave effect to and was consistent with Articles 318 and 319 of the LCT. I have set out the expert's evidence and the parties' submissions in some detail above. I accept Ms Tresman's submissions on the key points.

1318. In particular, Mr Jafar is unable to show that the Fund Parties received his property without just cause. Since the Loan Agreements continue to subsist and have not been rescinded (and Mr Jafar was not permitted to assert a positive case that they had been) the Loan Advances received by AIML (and AH) became and remain their property and the payments made by AIML (and AH) to the Fund Parties were made with AIML's (and AH's) property. Furthermore, the Loan advances were received by AIML (and AH) pursuant to a lawful cause pursuant to the Loan agreements which meant that Mr Jafar could not show that the Fund Parties when paid by AIML (and AH) had as against him been paid without a just cause. As Mr Edge had said, summing up the point succinctly *"The contract of loan was valid and has not been rescinded and remains extant. B then pays over the funds received to C for a valid cause. A cannot claim in unjust enrichment against C because C did not receive A's property – property in the funds passed to B who then transferred to C. Further, there was and remains a lawful cause for the transfer of property from A – the contract with B as well as a valid cause for the transfer between B and C. There is no basis as a matter of UAE law for A's claim against C in unjust enrichment."*

1319. I do not accept Dr Ahnish's evidence that UAE law allows a contracting party who has an unexercised right to rescind a loan contract (and in this case a contracting party who has lost the right to rescind by affirming and taking the benefit of the loan contract for at least some purposes) to say that a party who received an on-payment from the borrower out of the funds advanced to *claim in enrichment without cause under Article 318 and 319 of the LCT*. To do so, as Professor Mallat and Mr Edge explained, would be inconsistent with the wording of those Articles, and Article 319 in particular. The fact that the party who received the on-payment did so with knowledge of the deceit and therefore in bad faith may give rise to other causes of action and liability but (absent rescission of the loan contract) not liability in enrichment without cause as defined by those Articles. It seems to

me that Dr Ahnish's attempt to gloss (and supplement) the wording of those Articles in reliance on the general principles in UAE and Shari'a law relating to deceit and add to an unjust enrichment cause of action a claim based on the indirect recipient's fault and wrongful conduct was both novel and impermissible and not supported by the materials on which he relied.

1320. I understand the rhetorical reasons for Lord Falconer's invitation to adopt a broad brush approach and conclude that a UAE court would be so affronted by Mr Naqvi's defrauding of Mr Jafar that it would be prepared to treat a contracting party under an un-rescinded contract that had been induced by fraud as being in the same position for the purposes of a claim in enrichment without cause as a contracting party who had exercised their right to rescind. But it seems to me that Dr Ahnish has not produced an adequate justification for taking such a view of UAE law. Furthermore, the merits-based element of this line of argument loses much of its force when it is recognised that the difficulties faced by Mr Jafar are the result of his own decision not to rescind and indeed to take the benefit of the Loan agreements for other purposes.

Application of UAE law to Mr Jafar's UAE law claims and conclusions

1321. Accordingly, Mr Jafar's argument that he was able to satisfy the double actionability rule for the purpose of maintaining his Cayman law deceit claim and Mr Jafar's separate UAE law claim based on enrichment without cause both fail and must be dismissed because they are not supported by and are inconsistent with applicable UAE law.
1322. As regards Mr Jafar's UAE law deceit claim, even if I had concluded on the facts that Mr Naqvi had made the Reinvestment Representation and given the Overarching Message and that his actions, intention and knowledge were under UAE law to be attributed to the Fund Parties, the UAE law claim in deceit against the Fund Parties would fail because even though it was not formally barred Mr Jafar was unable to establish the requisite harm because the Loan agreements continued (or were to be treated as continuing) in force and to subsist.

1323. As regards Mr Jafar's separate UAE law claim against the Fund Parties in enrichment without cause, this falls to be dismissed because Mr Jafar is unable to establish the requisite elements of a claim under Articles 318 and 319 of the LCT. He has been unable to show that the Fund Parties received his property without lawful cause or that they had received his property without a disposition vesting ownership of that property in them.
1324. On the facts as I have found them, Mr Jafar is also unable to make out his UAE law claim in deceit because he has failed to prove that he was induced to make and relied for the purpose of making the Loans on the representations that he claimed Mr Navi. He would also be unable to make out his UAE law claim in deceit against the Fund Parties because I have found that when negotiating the Loans and making representations to Mr Jafar, Mr Naqvi was not acting in his capacity as an AIML director exercising AIML's rights as manager of the Funds or as a party authorised by the de jure directors of the Funds' general partners to borrow monies for the purpose of the Funds' activities and businesses.
1325. In my view the Fund Parties were right to submit that Mr Jafar had failed to show that he could rely on Mr Naqvi having ostensible authority to act for the Fund Parties because there had been no holding out by the Fund Parties to him.
1326. I accept Mr Jafar's submission (as summarised above) that it would be unfair and prejudicial to him in the circumstances to allow the Fund Parties to rely on the particulars of contributory negligence which were only set out during Ms Tresman's closing submissions.

1327. Had I found that Mr Jafar had suffered relevant harm even though the Loan agreements had not been rescinded and that Mr Naqvi had made the Reinvestment Representation and given the Overarching Message on behalf of (or that those misrepresentations and his intentions and knowledge were to be attributed to) the Fund Parties, so that they, Mr Naqvi, AH and AIML were to be treated as together having caused the harm suffered I would have limited the Fund Parties' liability to the net amount received by each of them out of the Loan advances received by AIML and AH.



The Hon. Justice Segal
Judge of the Grand Court
25 July 2025