[2013–14 Gib LR 55]

I. MICHAILIDIS v. CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK

SUPREME COURT (Dudley, C.J.): February 22nd, 2013

Banking—banker and customer—due diligence—failure to complete "know your customer" procedures adequately by not determining source of funds credited to customer's account not sufficient to put bank on notice of probable impropriety (e.g. earlier money laundering) if enquiries would disclose only that funds originate from client—bona fide purchaser for value without notice defence therefore not defeated

The claimant brought an action against the defendant bank to recover the proceeds of the sale (or a part thereof) by a third party of a furniture collection belonging to her.

Christo Michailidis—the claimant's son—died in 1999, leaving a valuable collection of art deco furniture at the house in London he shared with the art dealer Robin Symes. After his death, Christo's title to the collection passed to his parents, Alexandros and Irene (the claimant), not to Mr. Symes. When Alexandros died, his interest passed to the claimant.

In 2000, Mr. Symes sold the furniture collection through a dealer for $15m. At that time, his lawyer—a board member of Credit Agricole (Switzerland) SA—introduced Mr. Symes to the respondent bank (CACI), as Mr. Symes had expressed a wish to establish a back-to-back credit facility in respect of $10m. which he was to receive. Mr. Symes was introduced to the head of private banking at CACI London.

In spring 2000, Mr. Symes acquired a Liechtenstein foundation (Pataco), and incorporated a British Virgin Islands company (Lombardi). Lombardi opened an account at CACI Gibraltar.

From the proceeds of sale of the furniture collection, amounts of $10.4m. and $4.4m., less commission, were paid into the accounts of two Panamanian companies. The $10.4m. was subsequently withdrawn in cash and paid into the account of Pataco, $10.3m. of which would later be paid into Lombardi's CACI Gibraltar account.

CACI Gibraltar conducted "know your customer" (KYC) procedures in relation to Lombardi. As requested by CACI London, KYC forms were completed by the directors of Lombardi and sent to CACI Gibraltar's legal and compliance manager, Mr. Canepa. In those forms, Mr. Symes was identified as the beneficial owner of the company, his net worth as $50m., and his country of residence as the United Kingdom.

Another of Mr. Symes's companies, RSL, had a credit facility with Citibank. In order to repay this loan, RSL wanted to open a new facility with CACI London for $11.3m., which would be secured by Lombardi's deposit at CACI Gibraltar and a statue worth $6m. CACI's head office in Paris approved RSL's facility, though only for $10.3m. due to the risk involved in using art as security. Mr. Symes gave an unlimited personal guarantee in respect of RSL's debt.

RSL drew down $9.03m. of the new facility over the following few months, until, in April 2001, notice was given to CACI London of a freezing order made by the English High Court in proceedings between Christo's heirs and Mr. Symes, preventing Mr. Symes or RSL dealing with "relevant chattels" (the definition of which was not provided to CACI). Accordingly, no transactions were allowed to pass through the RSL account without approval. In August, the balance outstanding on the RSL account was repaid from the Lombardi account in Gibraltar, and the RSL account was closed. The remainder of the money in the Lombardi account was transferred to other of Mr. Symes's companies, and in April 2002, Lombardi was dissolved.

The claimant commenced the present proceedings to recover the proceeds of the sale of the furniture collection. She submitted that she had (a) a proprietary claim to the appropriated proceeds of the sale of the collection, being the amounts taken from the Lombardi account by the defendant to repay the London facility and the guarantee fee; (b) a claim to the whole deposit in the Lombardi account, on the basis that the defendant had dishonestly assisted Mr. Symes in a breach of the constructive trust under which he held the proceeds of the sale of the collection; and (c) a claim for the amount of the appropriated proceeds which it would be unconscionable for the bank to retain on the basis that it knowingly received them from Mr. Symes, in breach of trust by him.

The defendant submitted in reply that (a) as regards the proprietary claim, it was a *bona fide* purchaser for value without notice. It was not in issue that Irene was the owner of the collection, that the amount deposited in the Lombardi account was from the proceeds of the sale of the collection, that the defendant was a purchaser for value when it applied funds from the Lombardi account to repay the London facility or as fees for its services, or that the burden of establishing a lack of notice of the fact the funds were traceable to a breach of trust lay with the defendant. The claimant also conceded that the defendant did not have actual notice of her claim; (b) given the knowledge of the defendant at the time, its assistance had not been dishonest; and (c) its knowledge did not make it inequitable for it to retain the sums it had received.

Evidence was given by a number of CACI employees from various CACI branches. CACI Gibraltar was described as having an *ad hoc* approach to compliance procedures, and as being deferential to the offices in Geneva, Paris and London, often relying on their due diligence rather than carrying out their own. The letters of introduction written by the head of private banking at the London branch and by Mr. Symes's lawyer were

described as making the Gibraltar branch feel comfortable with proceeding with the transaction.

Witnesses described the London branch as also relying on the introduction by Mr. Symes's lawyer; he was introduced as a well-known and wealthy individual. London would not have been privy to the source of the Gibraltar funds, and it was suggested that the details of the purpose of the transaction were not looked into, because in 2000 such enquiries were not routine; nevertheless, a CACI memo from 1996 specified that explanations from clients as to the purpose of transaction such as "tax purposes" were not to be accepted at face value. It was not explained how this had been complied with in relation to Mr. Symes's account.

The three ends of the transaction (London, Gibraltar and Paris) were dealt with individually by the London and Gibraltar branches, and only in Paris was the overall structure scrutinized. While the Paris branch had been in charge of determining the credit risks, it was the evidence of a Paris witness that it would not have dealt with anti-money laundering, and that the introduction from Mr. Symes's lawyer was an indication that it would be good business. Though RSL was, at the time, generating fairly modest profits, Mr. Symes was understood to have larger interests, and $10.3m. was considered consistent with his wealth. While evidence was given that the Paris branch considered that back-to-back arrangements were usually for inheritance or tax planning, there was no documentary evidence that the bank enquired as to whether either was actually the case in this transaction.

The evidence from the expert witness for the claimant was that the suspicions which would have been raised by the unknown source of the funds and the lack of a clear commercial benefit could not have been sufficiently allayed by the defendant. He, and the expert witness for the defendant, agreed that although there was no actual dishonesty on the part of the defendant, its records were insufficient, and the introduction by Mr. Symes's lawyer had been of considerable, and perhaps undue, influence on the defendant. The expert witness for the defendant was, however, of the opinion that the defendant bank had made sufficient enquiry into the legality and commercial purpose of the transaction and the source of the funds, as measured against banking standards in 2000.

Held, dismissing the claims:

(1) The claim in dishonest assistance must fail. There was no evidence of actual dishonesty on the part of any CACI employee, or that any individual knew, but deliberately ignored that the scheme was dishonest. The elements of dishonest assistance were (i) the existence of a trust; (ii) breach of that trust; (iii) assistance by the defendant in that breach; and (iv) the dishonesty of that assistance. Mr. Symes had acted in breach of a constructive trust—in favour of the claimant—over the proceeds of sale of the furniture collection when he misapplied them for his own benefit, and that misappropriation had clearly been assisted by the defendant bank. Whether that assistance had been dishonest was the decisive element. The

test of dishonesty to be applied was objective—namely, whether what the defendant knew about the transaction rendered his assistance dishonest by normally acceptable standards. It was not necessary that the defendant be aware of those standards. The relevant knowledge—of the elements of that transaction which made the defendant's participation contrary to normal standards of honesty—had to be actual, or there had to be a clear suspicion and wilful blindness (paras. 7–8; para. 98).

(2) The claim in knowing receipt must also fail. The elements of knowing assistance were (i) property which was subject to a trust; (ii) that property was transferred in breach of that trust; (iii) received by the defendant; and (iv) the defendant had knowledge that made it unconscionable for him to retain the property for his own benefit. The defendant had properly relied on the introduction by Mr. Symes's lawyer, and, while it may have relied on that introduction too heavily, to the detriment of full inquiry as to the extent of Mr. Symes's wealth and the overall purpose and structure of the transactions. Although the bank might have fallen short of fully identifying a commercial rationale for the transaction, the staff of CACI London did not consider that there was anything improper about the arrangement, and such internal "guarantees" were standard. The defendant's failings were not, in the context of banking standards in 2000, sufficient to constitute behaviour rendering it unconscionable for the bank to keep the funds (para. 9; para. 98).

(3) The proprietary claim must also fail. The court having held that the defendant had acted *bona fide*, the issue therefore turned on whether it was on notice. Its biggest failing was not enquiring further as to the source of the funds (the means in which they were generated, as distinct from the identity of the person providing them). If such enquiries had been made, they would have been identified as coming from Pataco, to which they had been transferred by Mr. Symes. But if it was the case that the proceeds of sale had already been laundered at the time or before they were paid to Pataco, enquiries into their source would have revealed nothing which would have put the defendant on notice that the transaction was probably improper (para. 99).

Cases cited:

(1) *Abou-Rahmah* v. *Abacha*, [2007] 1 All E.R. (Comm) 827; [2007] Bus. L.R. 220; [2007] 1 Lloyd's Rep. 115; [2007] W.T.L.R. 1; (2006), 9 I.T.E.L.R. 401; [2006] EWCA Civ 1492, applied.

(2) *Agip (Africa) Ltd.* v. *Jackson*, [1990] Ch. 265; [1989] 3 W.L.R. 1367; [1992] 4 All E.R. 385; (1989), 86(3) L.S.G. 34, referred to.

(3) *Att. Gen. (Zambia)* v. *Meer Care & Desai (a firm)*, [2008] Lloyd's Rep. F.C. 587; [2008] EWCA Civ 1007, referred to.

(4) *Bank of Credit & Comm. Intl. (Overseas) Ltd.* v. *Akindele*, [2001] Ch. 437; [2000] 3 W.L.R. 1423; [2000] 4 All E.R. 221; [2000] Lloyd's Rep. Bank. 292; [2000] B.C.C. 968; [2000] W.T.L.R. 1049; (2000), 2 I.T.E.L.R. 788, considered.

(5) *Barlow Clowes Intl. Ltd.* v. *Eurotrust Intl. Ltd.*, [2006] 1 W.L.R. 1476; [2006] 1 All E.R. 333; [2006] 1 All E.R. (Comm) 478; [2006] 1 Lloyd's Rep. 225; [2005] W.T.L.R. 1453; [2005] UKPC 37, applied.
(6) *Dextra Bank & Trust Co. Ltd.* v. *Bank of Jamaica*, [2002] 1 All E.R. (Comm) 193, referred to.
(7) *El Ajou* v. *Dollar Land Holdings plc*, [1994] 2 All E.R. 685; [1994] B.C.C. 143; [1994] 1 B.C.L.C. 464, referred to.
(8) *Niru Battery Mfg. Co.* v. *Milestone Trading Ltd.*, [2002] 2 All E.R. (Comm) 705; [2002] EWHC 1425 (Comm), referred to.
(9) *Royal Brunei Airlines Sdn. Bhd.* v. *Tan*, [1995] 2 A.C. 378; [1995] 3 W.L.R. 64; [1995] 3 All E.R. 97; [1995] B.C.C. 899, referred to.
(10) *Sinclair Invs. (UK) Ltd.* v. *Versailles Trade Fin. Ltd.*, [2012] Ch. 453; [2011] 3 W.L.R. 1153; [2011] 4 All E.R. 335; [2011] Bus. L.R. 1126; [2011] 2 B.C.L.C. 501; [2011] W.T.L.R. 1043; [2011] EWCA Civ 347, applied.
(11) *Twinsectra Ltd.* v. *Yardley*, [2002] 2 A.C. 164; [2002] 2 W.L.R. 802; [2002] 2 All E.R. 377; [2002] P.N.L.R. 30; [2002] W.T.L.R. 423; [2002] UKHL 12, referred to.

S. Moverley Smith, Q.C. and *C. Simpson* for the claimant;
T. Mowschenson, Q.C. and *J. Restano* for the defendant.

1 **DUDLEY, C.J.:** This action concerns the alleged liability of the defendant bank ("CACI" or "the bank") to the claimant, Irene Michailidis, consequent upon its receipt and appropriation of part of the proceeds of sale of an Eileen Gray art deco furniture collection ("the collection"). The factual background underpinning the action is to be found in a judgment in respect of a trial of certain preliminary issues which I handed down on November 11th, 2011.

2 It is as well for me to set out the first three paragraphs of that judgment, which set out the essential background.

> "The Michailidis are a very wealthy Greek family which hails from Alexandria, where Alexandros Michailidis made his wealth in the marble business. The first claimant, Irene Michailidis, is the widow of Alexandros, who died in 1995, and both were the parents of Despina Papadimitriou and Christo Michailidis.
>
> On July 5th, 1999, Christo had an untimely death when he suffered a fall whilst staying in a villa in Terni, Umbria. Prior to his death and for very many years Christo shared a home and life with Robin Symes, and at their home in 3 Seymour Walk in London there was a collection of Eileen Gray Art Deco furniture.
>
> After Christo's death, it is said by the claimants that Symes sold the collection for \$15m. through Robert Vallois, an art deco dealer, with

> $4.4m. (less commission) being paid to a Panamanian company, Xoilan Trader Inc., and $10.4m. being paid to Tradesk Ltd., also a Panamanian company. Of the $10.4m., $10.3m. wended its way to the defendant bank through the conduit of the Pataco Foundation, a Liechtenstein foundation. The monies were deposited in the Gibraltar branch of CACI to the account of Lombardi Corp., a British Virgin Island company incorporated at Symes's request. With the deposit in Gibraltar serving as guarantee, CACI London gave another Symes's company, Robin Symes Ltd. ("RSL"), a facility for $10.3m. That facility was drawn down and thereafter repaid in full in the sum of $9,860,278.78 from the guarantee deposit held by Lombardi in Gibraltar."

3 In that judgment I found that Alexandros and Irene had title to the collection when it was sold by Symes, and it is not in issue that upon Alexandros's death in 1995 his interest passed to Irene. Consequently, at the beginning of this trial of the remainder of the action, the parties by agreement (subject to issues touching upon costs) sought the removal of the second claimant, who was suing as sole administrator of the estate of Christo. I further went on to find that the $10.3m. transferred by Pataco to Lombardi's account at CACI Gibraltar was part of the proceeds of sale of the collection that Symes had misappropriated and sold in March 2000, and in respect of which he failed to account. I also accepted the claimants' evidence as to what was termed "the money trail." That evidence was, essentially, that (a) following the misappropriation of the collection, Symes sold it through Robert Vallois, a Parisian art deco dealer, for $15m.; (b) Tradesk Ltd., a company controlled by an Audina Treuhand AG, a Liechtenstein professional trust company which provided services to Symes, received by wire transfer $10.4m., being part of the proceeds of sale; (c) those moneys were withdrawn from Tradesk's account with LGT Bank and deposited in an account held by Pataco, also at LGT Bank, Pataco being a corporate vehicle acquired by Symes in the spring of 2000; and (d) on June 26th, 2000, on instructions from Audina, $10.3m. was transferred from Pataco's account to Lombardi's account at CACI Gibraltar, Lombardi being a newly incorporated BVI company beneficially owned by Symes.

The law

4 In her re-re-re-amended particulars of claim, Irene makes three alternative claims against CACI, which are succinctly set out in Mr. Moverley Smith's outline submissions:

> "(a) a proprietary claim to:
>
> (i) the appropriated proceeds, being that part of the proceeds held in Lombardi's account at [CACI] Gibraltar

which were appropriated by the bank on August 13th, 2001 when it applied them to repay the London facility . . .; and

(ii) the guarantee fee, being the sum of $51,500 charged by [CACI] Gibraltar and paid from the proceeds held in Lombardi's account on June 29th, 2000 . . .;

(b) a claim in the amount of the deposit on the ground that the bank dishonestly assisted Symes in his application in breach of trust of that sum;

(c) a claim for the appropriated proceeds by reason of the bank's knowing receipt of that sum which it would be unconscionable for the bank to retain . . ."

The proprietary claim

5 The proprietary claim advanced is premised upon my determination that the moneys transferred by Pataco to Lombardi's account in CACI Gibraltar were part of the proceeds of sale of the collection of which $9,931,778.78 was appropriated by the bank, and which Irene, as owner of the collection, seeks to trace and recover from the bank as constructive trustee. That sum is the aggregate of (a) $9,860,278.78, which was applied by the bank on August 13th, 2001 to repay the CACI London facility granted to RSL; and (b) the sum of $51,500, being the guarantee fee charged by CACI Gibraltar and paid from the proceeds held in Lombardi's account on June 29th, 2000.

6 The bank's defence to this claim is that it was a *bona fide* purchaser for value without notice. It is not in issue that the burden of establishing that defence is on the bank, nor is it in issue that by virtue of it having applied the moneys to discharge RSL's liability under the facility, the bank is a "purchaser for value." In the context of this claim, what falls for determination is whether the bank acted *bona fide* and whether it had notice. Evidently, those issues are closely intertwined in that if the bank was not on notice of impropriety, then in the absence of any countervailing evidence, the natural inference is that it acted *bona fide*. Mr. Moverley Smith concedes that in the present case there is no evidence of actual notice, but cogently submits that the test to be applied is that established in *Sinclair Invs. (UK) Ltd.* v. *Versailles Trade Fin. Ltd.* (10), where Lord Neuberger, M.R., dealing with constructive notice in a banking context, said ([2012] Ch. 453, at para. 100):

"... [T]he issue is to be determined by asking what the banks actually knew, and what further enquiries, if any, a reasonable person, with the knowledge and experience of the banks, would have

> made, and, in the light of that, whether it was, or should have been, obvious to the banks that the transaction was probably improper."

In the context of the proprietary claim, therefore, what falls to be ascertained is the knowledge available to the bank and what enquiries were made, or ought to have been made, and whether that would have made it obvious that there was a likelihood that the transaction undertaken with Symes was improper. That approach needs to be undertaken from the perspective of banking standards and practices at the time of the transaction and not importing more exacting standards which may apply now.

Dishonest assistance

7 Irene also advances her claim against the bank premised upon the equitable remedy available against an accessory who dishonestly assists in a breach of trust. Under this head, Irene seeks the sum of $10.3m., being the sum remitted to CACI Gibraltar for credit to Lombardi's account. For dishonest assistance against a defendant to be established, four elements need to be satisfied: (i) the existence of a trust; (ii) its breach by the trustee; (iii) that the defendant assisted in the breach; and (iv) that such assistance be dishonest. It is not in issue that Symes held the proceeds of sale of the collection as constructive trustee for Irene, and that in breach of trust he misapplied the moneys for his benefit, and I add that such misapplication of the proceeds was facilitated by the banking facilities provided to Symes by CACI. Framed in this manner, the fundamental issue in this case is whether the assistance afforded by the bank was dishonest.

8 It is common ground that following the decision of the English Court of Appeal in *Abou-Rahmah* v. *Abacha* (1), the test for dishonesty is that established by the Privy Council in *Barlow Clowes Intl. Ltd*. v. *Eurotrust Intl. Ltd*. (5), where Lord Hoffmann, accepting an element of ambiguity in the judgment of Lord Hutton in *Twinsectra Ltd.* v. *Yardley* (11) said ([2006] 1 W.L.R. 1476, at para. 15):

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

Essentially, it is not necessary for a claimant to establish subjective dishonesty on the part of a defendant, but rather whether the defendant knows of the elements of the transaction which make it dishonest in accordance with normally acceptable standards. In establishing dishonesty, a claimant must establish either actual knowledge or, alternatively, a clear suspicion accompanied by a Nelsonian blind eye (see *Att. Gen.*

(Zambia) v. *Meer Care & Desai (a firm)* (3) ([2008] EWCA Civ 1007, at para. 21)). However, a negligent or incompetent failure to realize that a transaction is unlawful is not enough (see *Royal Brunei Airlines Sdn. Bhd.* v. *Tan* (9)). Of particular relevance, given the expert evidence in this case, is the fact that a failure to comply with money laundering regulations does not necessarily give rise to an inference of dishonesty. In *Abou-Rahmah* v. *Abacha*, Rix, L.J. put it as follows ([2007] Bus L.R. 220, at para. 37):

> "It is one thing to be negligent in failing to spot a possible money-launderer, providing the negligence does not extend to shutting one's eyes to the truth. It is another thing, however, to have good grounds for suspecting money-laundering and then to proceed as though one did not."

He then quoted with approval (*ibid.*, at para. 38) the observations of Millett, J. in *Agip (Africa) Ltd.* v. *Jackson* (2) ([1990] Ch. at 295):

> ". . . [I]t is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that it was 'only' a breach of exchange control or 'only' a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party, takes the risk that they are part of a fraud practised on that party."

Knowing receipt

9 The third way in which Irene's claim is advanced is under the principle of knowing receipt. Fundamentally, knowing receipt requires that property subject to a trust (in the present case, a constructive trust) be transferred in breach of that trust, and that it be received by the defendant for his own benefit, hence the claim under this head is limited to the moneys used to pay the facility in favour of RSL. The requirement of knowing receipt which is of relevance in this case is that of knowledge on the part of the bank that the asset received is traceable to a breach of fiduciary duty (see *El Ajou* v. *Dollar Land Holdings plc* (7)). In *Bank of Credit & Comm. Intl. (Overseas) Ltd.* v. *Akindele* (4), the English Court of Appeal held that dishonesty was not an essential ingredient of a claim for knowing receipt, and that the test for knowledge was whether the defendant's knowledge made it unconscionable for him to retain the benefit of the receipt and, as put in judgment of Nourse, L.J. ([2001] Ch. at 455):

> ". . . [I]t should better enable the courts to give commonsense decisions in the commercial context in which claims in knowing receipt are now frequently made, paying equal regard to the wisdom of Lindley, L.J. [the need to avoid the mischief of paralyzing trade] on the one hand and of Richardson, J. [that there were cases in which

> a commercial man should not be allowed to shelter behind the exigencies of commercial life] on the other."

In this context, an absence of good faith includes "a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself" (*Niru Battery Mfg. Co*. v. *Milestone Trading Ltd*. (8) ([2002] EWHC 1425 (Comm), at para. 135)). It does not, however, extend to negligence or relative fault as between claimant and defendant (see *Dextra Bank & Trust Co. Ltd*. v. *Bank of Jamaica* (6)). If the defendant is a *bona fide* purchaser for value, that evidently negatives knowledge.

The transactional history

10 Albeit at the risk of repetition of some matters previously set out, it is useful to set out chronologically certain findings in my earlier judgment and the undisputed documented facts relating to the transaction between Symes and CACI.

11 In March 2000, Symes misappropriated the collection and sold it for $15m. Also in March 2000, Mr. Tavernier, a Swiss lawyer who at the time was, and still is, a non-executive board member of Credit Agricole (Switzerland) SA (a distinct legal entity from CACI), introduced Symes to CACI. According to Mr. Tavernier's witness statement, tendered pursuant to a hearsay notice, he made the introduction *qua* Symes's lawyer, as Symes had informed him that he wished to set up a back-to-back facility in respect of $10m. which Symes was to receive.

12 On March 10th, 2000, Despina agreed to temporarily increase by $3m. (until June 30th, 2000) her guarantee of RSL indebtedness to Citibank on top of the $14m. and $1m. guarantee she had already given.

13 At about that time, Mr. Tavernier introduced Symes to the then head of private banking of CACI London, Guillaume de la Borde Caumont. A letter from Symes to Mr. de la Borde Caumont, dated April 25th, 2000, shows that they met on that day and that Symes sent him an RSL catalogue for an exhibition held in New York.

14 On May 3rd, 2000, Lombardi was incorporated with Mr. Johann Jakob and Ms. Nina Frittita—both of Audina—appointed as directors and with Audina as shareholder.

15 On May 4th, 2000, $10.4m. of the proceeds of sale of the collection was paid into an account in the name of Tradesk at LGT bank Liechtenstein. On May 8th, 2000, the entire $10.4 was withdrawn in cash and paid into an account in the name of Pataco, a Liechtenstein foundation acquired by Symes that spring.

16 On June 6th, 2000, CACI Gibraltar began completing its "know your client" ("KYC") procedures in relation to Lombardi, and on June 7th, Ms. Alix de Monspey, an account manager at CACI London, sent Ms. Frittita account opening forms for Lombardi requesting that they be returned to Mr. James Canepa at CACI Gibraltar who amongst other functions was the Legal and Compliance Manager at that branch. These were returned by fax on the same day and hard copies followed by courier. Copies of the passports of the two directors were also supplied, together with a confirmation dated June 7th, 2000, that Symes was the beneficial owner of the funds held by Lombardi. Lombardi's KYC form, which shows Symes as its beneficial owner and giving the United Kingdom as his country of origin and residence and reflecting his total net worth as $50m., was finally approved by Mr. Canepa on August 29th, 2000.

17 On June 8th, 2000, CACI London prepared a credit analysis in respect of a facility of $11.3m. in favour of RSL, for the purposes of repaying an existing facility with Citibank. The collateral is described as a guarantee of $10.3m. given by CACI Gibraltar and charge over antiques valued at $6m. The documentation stated to be required includes "Guarantee from CAI Gibraltar" and the recommendation "approval is recommended" was endorsed by Christopher Leonard, a credit manager at CACI London. The form also contains the comment: ". . . [I]t is envisaged that within a year, the reliance on the antiques will be reduced to nil and we will have a fully guaranteed facility, within standard guidelines."

18 By fax dated June 9th, 2000, Mr. Tavernier provided Mr. de la Borde Caumont with a list of assets said to be worth $12m., capable of being pledged as collateral for the facility to be granted to RSL, including an "over life-size bronze figure" stated to be worth $6m.

19 Of some significance are two further documents generated for the purposes of the facility. Namely, a credit application entitled "Credit Application No. 87 2. Data Input Request Branch London Code" signed by Ms. de Monspey as account manager; Mr. Leonard for the Credit Division; Mr. de la Borde Caumont *qua* local management and signed and dated June 13th by Andrew Trypanis, the Risk Senior Manager at CACI London and endorsed by him "see comments." The second document is the accompanying typed document in which Mr. Trypanis's manuscript comments are to be found. The credit application shows RSL as the applicant, with Robin Symes stated to be the shareholder, and with residence and nationality stated to be the United Kingdom, which given the layout of the form appears to be a reference to Symes. It is noteworthy that in contrast to unsigned drafts of the credit application—where the net worth of Symes is stated to be over $100m.—in the signed form, that entry is crossed out. The loan is stated to be for $11.3m., for the purpose of reducing an existing loan with Citibank, and the security to be provided is stated to be:

"Guarantee by CAI Gibraltar for $10.3m. (to remain silent);

Charge over antiques; and

Unlimited guarantee from Robin Symes."

Flesh is then put to the bone in the detailed description of the proposal attached:

"**Introduction**

Robin Symes commenced as an art dealer in 1960, and has specialized in Ancient Art from 1967 on. His most notable clients have included J. Paul Getty, Norton Simon and Maurice Tempelsman. He has formed private collections—often in their entirety—and supplied most major museums with important acquisitions, many of which are now world famous. Robert Symes Ltd. is one of the top three European galleries. Amongst recent publications, the Ortiz, Leon Levy and Fleischman catalogues all contain material from the gallery in St. James's, as do many major institutional exhibitions.

The premises from which the firm has operated since 1971 consists of an entire building of three floors in St. James's (Duke of York Street), which was originally founded in 1820. It retains much of its period charm, and functions both as a show room and office for the firm.

The client has been introduced by Maitre Tavernier (who is on the board of CAI Geneva) and we are in the process of opening the account. An account in the name of Lombardier [*sic*] Corp. (BVI company of which Robert Symes is ultimately the beneficial owner) is being opened in CAI Gibraltar and we are to receive a silent guarantee for $10.3m. to support this application. The other $1m. will be secured by various antiques, details of which will follow including valuations, proof of ownership and insurance. It is envisaged that they will be held in New York and be under the control of the bank (or an agent). The legal department have requested assistance/advice from NY lawyers in respect of the taking of the pledge/charge and the findings will be discussed once details are available.

Requirements

Mr. Symes is requiring a loan of $11.3m. to reduce an existing loan at Citibank. All that will remain at Citibank will be a loan of approximately $5m., which will be secured by a cash deposit of a similar amount and other assets in Geneva. From the 1998 accounts it appears that there other bank facilities totalling over £10m. (see attached). As security for these facilities, various charges—including

debentures and chattel mortgages—have been given. The charges register has revealed several charges in favour of Citibank NA, Hill Samuel Bank and Field Fisher Waterhouse, and these must be fully satisfied prior to drawing of any funds. Confirmation that the antiques being offered to support this application are unencumbered and that they are the personal property of the client will be required.

Repayment

Interests and capital will be repaid by the trading of his stock of antiques.

Repayment: Capital reduction will take place once assets are sold through normal trading (these assets to be separate from those pledged to us). A repayment schedule of $2m. per year will appear in the legal documentation, although it is suggested that the loan will be repaid prior to the final maturity date.

Security

Guarantee by CAI Gibraltar for $10.3m. (to remain silent).

Various scheduled items from his collection (see attached schedule).

Personal guarantee of Robin Symes to be supported by one antique (the first item on the schedule) to be under the control of the bank (value $6m.) and not to be released until loan has been fully repaid.

Fees

Our margin would be 1.5% over LIBOR.

Arrangement fees: $20.000.

Five years, fixed for period of three months, although it is envisaged that the repayment will occur before the end of the term.

Recommendation

The facility is recommended, given the security and the very interesting return overall on the relationship for both CAI London and CAI Gibraltar. This is a well-known client who has been a longstanding private banking client of Citibank, and will be a good source of introduction to potential clients for PBK. Once the loan has been repaid, the cash deposit will remain in CAI Gibraltar.

[In manuscript:] Recommendation is based on documentation being satisfactory to our legal department, and furthermore the credit department must be satisfied on the control that we have over the statue, the valuation and the quality of the valuer. The insurance

policy on the statue must be for an amount of not less than $6m. Finally, we must be satisfied on the provenance of the statue.

[Signed] Andrew Trypanis, 13/6/2000"

20 On June 15th, 2000, approval was obtained from the credit committee in Paris subject to "DGCR conditions, and presentation and approval of audit for the Gibraltar side of the transaction." The person with responsibility for DGCR endorsed the relevant document on June 19th, from which it may be readily inferred that such approval was given and confirmation of this conveyed to Mr. de la Borde Caumont and Mr. Leonard in CACI London, whilst a post-it attached to the fax marked "FAO James Canepa" evidences that the approval was forwarded to Mr. Canepa at CACI Gibraltar.

21 CACI London was provided with corporate documentation, resolutions, register of charges and accounts of RSL. It is not in dispute that RSL's financial position, as reflected in those accounts as at December 31st, 1998, are as pleaded, and showed—

"(a) A profit for the year of £132,130 (as against a prior year loss of £941,545);

(b) net assets of just £517,706;

(c) amounts falling due to creditors within the year of £10.2m.; and

(d) stock of £9.4m."

22 It is not in issue that the £10.2m. due to creditors included the loan from Citibank, which amounted to £9.4m. and which would, in the normal course of events, have been rolled over.

23 For the purposes of Lombardi opening its account with CACI Gibraltar, Mr. de la Borde Caumont provided a duly completed standard "letter of introduction" dated June 26th, 2000, in which he states that he has known Symes for three months, which is defined as "the Term." The relevant passages of the letter then state:

"I/We certify that the customer, who informs me/us that he wishes to open an account and commence a business relationship with you, has been known to me/us for the Term. I/We also confirm that the above is his true name and address which correspond to his identity as verified by us. I am/We are in possession of full details regarding the customer's background and business operations. I/We confirm that the customer has throughout the Term been honest, respectable and trustworthy in his business dealings with me/us.

I/We further certify to you that I/We are satisfied of the legitimacy of the funds to be held or dealt with by you for the customer. I/We can confirm that no information is in our possession relating to the

source of those funds that would result in me/us making any report under internationally recognized money laundering measures . . .”

24 On or about June 28th, 2000, $10,299,985 was remitted by LGT Bank in Liechtenstein to CACI Gibraltar, via Bankers Trust Co., New York, endorsed as being sent by “one of our clients.”

25 Notwithstanding the request for $11.3m. in the event, as documented in the facility letter dated June 30th, 2000, and signed for RSL on July 13th, 2000, the facility given was for $10.3m. From email exchanges between Mr. Leonard and Mr. Trypanis, one can surmise that the difficulties in obtaining a “good charge” over a statue led Symes to request the reduction in the facility to $10.3m. in respect of which sum CACI London was fully secured by virtue of the CACI Gibraltar “guarantee.” Also on June 30th, 2000, a board meeting of RSL resolved to open an account with CACI for the purposes of a loan facility for the maximum of $10.3m.; RSL executed a security agreement in favour of CACI London, granting a security interest over works of art owned or to be acquired by it, and executed a deposit agreement as well as a chattel mortgage over certain antiquities. Although dated June 30th, 2000 in the heading, Symes gave a personal guarantee in respect of RSL’s indebtedness to CACI on the July 13th, 2000. The chattel mortgage was subsequently discharged in December 2000, when it emerged that RSL had a similar earlier and subsisting charge in favour of Citibank.

26 Albeit undated, by virtue of the fax transmission date on the document it appears that, also on June 30th, Lombardi executed a charge over securities and cash in favour of CACI Gibraltar, having executed the previous day a letter of counter indemnity in favour of CACI Gibraltar in the sum of $10.3m.

27 Evidently, consequent upon completion of the transaction, $3m. was on June 30th paid by CACI London to RSL’s account with Citibank. It was however not until July 6th that a shareholders’ meeting and thereafter a board meeting of Lombardi was held in which it was resolved to approve the transaction documents affording CACI Gibraltar a counter-indemnity for it to give the “guarantee,” with the directors recording that they had been so instructed by the shareholders and that the same shareholders held shares in both RSL and Lombardi, and thereafter resolving that it was in the “commercial interests” of Lombardi for the purposes of its business and within the express objects of the memorandum of association.

Subsequent events

28 Between June 30th, 2000 and the end of January 2001, RSL used the facility with CACI London drawing the total sum of $9.03m.

29 On April 2nd, 2001, English solicitors Lane & Partners wrote to CACI London enclosing an order made by the English High Court dated March 30th, 2001, in proceedings brought by the joint administrators of Christo's estate and Christo's sister, Despina, against Symes and RLS. The letter drew attention to para. 1 of the order which prohibited Symes or RSL from selling, transferring, disposing or dealing with any "relevant chattels" or their proceeds of sale. "Relevant chattels" had been defined in an earlier order which was not provided to CACI London. The guidance notes to the order, as usual in orders of this nature, allowed for banks to exercise a right of set-off in respect of a facility given to the respondent before notification of the order. The order was also stated not to have effect outside England and Wales, unless—

> ". . . a person who is subject to the jurisdiction of this court and (a) has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and (b) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order."

30 By email dated April 11th, 2001, Mr. Leonard gave instructions to Ms. de Monspey that no credit or debit transactions were to pass through the RSL account without prior approval. By fax dated May 22nd, 2001, Ms. de Monspey confirmed to Lovells that (i) RSL held an account with CACI London; (ii) it had an agreed overdraft of $9,647,698; and (iii) that Symes did not have other accounts or assets in his name in CACI London.

31 In late June, Mr. Jakob asked on behalf of Lombardi that CACI Gibraltar increase the guarantee to the maximum previously agreed of $10.3m. CACI London's concerns are evident in an email dated July 4th 2001 from Mr. Leonard to Mr. de la Borde Caumont:

> "Current drawing is $9,740,717, secured by a first demand guarantee from CAI Gibraltar expiring on June 8th, 2005.
>
> The loan facility of $10.3m. was granted in June 2000 for a period of five years, with a condition that $2m. be repaid every year. The purpose of the facility was to repay existing borrowings at Citibank.
>
> As we know, the repayment has not occurred and the client is technically in default. This, along with the non-payment of interest and the ongoing *Mareva* injunction against the company, suggests we need to make a decision concerning the ongoing relationship.
>
> Although the assets securing the Gibraltar guarantee are in a name not party to the *Mareva*, we may, if required, be forced to divulge the identity of the depositor which will not be in the best interest of the bank.

I understand that Mr. Tavernier (who looks after the Gibraltar connection), who is on the CAI Geneva board, has expressed a disappointment in the support and co-operation from London in this relationship.

In light of the above information, a decision, in liaison with the legal department, is required, with the intention to provide the client with a suitable period to refinance his facility."

32 Following further inquiries by Lovells in relation to the RSL account with CACI London, Margaret Garner, the head of Group Legal Services of CACI London, confirmed the facility granted to RSL, the balance of the account, and that no further borrowing was permitted. In response to the request for "a list of any objects pledged by Robin Symes or Robin Symes Ltd. to Credit Agricole by way of security," she replied: "No objects are currently pledged by RSL or Robin Symes personally to [CACI London] in respect of the facility."

33 On August 13th, 2001, CACI Gibraltar transferred to CACI London $9,860,278.78 with the accounting reference: "Transfer Guarantee Repayment—CAI London Guarantee Repayment—CAI London." By email that same day, CACI Gibraltar requested return of the original guarantee for cancellation. On August 29th, 2001, CACI London closed RSL's account with the reason given in the bank's internal form being that "the client received a court order. We felt not very safe with this client. Therefore we prefer to close the account." On October 3rd, 2001, Lombardi transferred $1,033,853 to Tradesk Ltd., essentially depleting Lombardi's account at CACI Gibraltar. It appears that part of those monies were, *inter alia*, used to settle the professional fees of Mr. Jakob, but $876,568 was transferred to Seralunga Ltd., a BVI company of which, according to Liechtenstein banking documentation, Symes was the beneficial owner. On April 16th, 2002, Lombardi was dissolved.

Evidence of the witnesses of fact

34 Against the transactional background I have set out, I turn to the evidence by the witnesses of fact in relation to various aspects of the transaction at the Gibraltar, London and Paris branches.

35 At the hearing, the claimant did not call any live witnesses of fact, albeit it was intended to have Mr. Canepa available for cross-examination. I shall deal with his evidence somewhat extensively in due course. Less controversially, the claimant relies, amongst others, upon the witness statements of Dr. Oliver Nesenhson, a Liechtenstein lawyer who undertook inquiries for the claimant in relation to the involvement by Audina and Mr. Jakob. Those issues, to the extent that they are relevant, were determined at the trial of the preliminary issues, in particular in relation to the money trail. Similarly, the evidence of the claimant's London solicitor

Mr. de Walden, dealing with Mr. Tavernier's role and the latter's knowledge of Symes's affairs, is of no consequence in relation to what now falls to be determined given the ruling of the Court of Appeal (Civil Appeal No. 14 of 2011) dismissing an appeal in which it was sought to further amend the particulars of claim to allege attribution of knowledge of Mr. Tavernier to CACI. Of some relevance, but not controversial in so far as it is not in dispute, is the witness statement of Mr. Phillips, the administrator of the estate of Christo, which is to the effect that the disclosure by Eversheds, who acted for RSL and/or Symes, in relation to the banking arrangements entered into by RSL with CACI makes no reference to Lombardi or the "silent guarantee." Mr. Phillips also details the cost of the facility to RSL which he calculates as $71,500 and interest (had the full amount been drawn down) in excess of $180,000.

The Gibraltar end of the transaction

36 Mr. Canepa provided each side with significantly contrasting witness statements. Although it was anticipated that he would testify, the afternoon before he was scheduled to do so, Mr. Canepa contacted the claimant's solicitors and informed them that he was in urgent transit to Madrid, and that as he had previously advised was going to be in Panama for the rest of the week, and that he would be unable to attend either on the day scheduled or during the week thereafter. Both parties having recognized the potential difficulties in having Mr. Canepa appear before the court, they sensibly took the precaution of serving hearsay notices in respect of his evidence.

37 Mr. Canepa's statements are the only evidence by a witness of fact who was there at the time in relation to the Gibraltar end of the transaction. Although evidence as to discussions between Mr. Simpson of the claimant's Gibraltar solicitors and Mr. Mirepoix who joined CACI Gibraltar in September 2001 was also tendered, that evidence which relates to conversations arising as a consequence of related proceedings when the claimant obtained a disclosure order against CACI Gibraltar does not, in my view, provide any assistance in the determination of the issues before me.

38 Mr. Canepa is a barrister by training, and currently is a director of Private Clients Consulting. As aforesaid, he was at the time of the transaction the Legal and Compliance Manager of CACI Gibraltar. In his witness statement, dated March 16th, 2011 and relied upon by the claimant, he paints a picture of (a) his joining a branch with "no form or structure of compliance procedures, [where] everything was *ad hoc*"; his initial task being to set up a Legal and Compliance Department; and that he reported to and considered his boss to be the general manager of the branch, Bertrand Lepissier, albeit ultimately he was responsible to the bank's headquarters in Paris. He illustrates the manner in which the

branch operated by reference to the fact that there was only one computer, and that most of the client information was held in the mind of Mr. Tavares, who was the former head of the bank and who stayed on for a period of time following Mr. Lepissier's appointment. According to Mr. Canepa's statement, one of the aims of Mr. Lepissier was to move away from retail banking to private banking and he was trying to develop the branch into a "Swiss-style private bank." Although new procedures were implemented, "the need to complete these was marginalized" when other branches such as Geneva, London or Paris were involved, given that due diligence would have been completed at that end and relied upon in Gibraltar. CACI Gibraltar was deferential to Geneva, Paris and London and there was an overt keenness to be co-operative, resulting in relaxing procedures when this assisted inter-branch business. Mr. Lepissier and his team were concerned about meeting targets and ensuring that CACI Gibraltar was financially viable.

39 It also appears from this witness statement that Mr. Canepa's relationship with Mr. Lepissier became strained. He brought Mr. Lepissier's conduct in relation to certain unrelated transactions involving IMF funds and Uzbekistani officials to the attention of the Paris office and requested an audit. Mr. Lepissier became aware that Mr. Canepa had spoken to Paris without first informing him, and this permanently damaged their working relationship. According to Mr. Canepa, the audit report established failings in respect of the level of information on client files and the application of KYC principles and the absence of procedures to establish the source of funds of large transfers. That much is certainly made out in the limited extracts of the audit report exhibited to his witness statement. Mr. Canepa also says that he resigned before the outcome of the audit, one of the main factors for his resignation being the internal problems and the disregard for policies and procedures.

40 In respect of the transaction in issue, Mr. Canepa, in his witness statement for the claimant, reviews some of the documentation and expresses surprise at the reference "investment only" in the KYC form—as opposed to it stating that it was for the purposes of providing a back-to-back guarantee—and it being signed by Ms. de Monspey of CACI London, who was aware of the purpose for which the account had been opened. Mr. Canepa acknowledges that certain documentation relating to the transaction appears to have been given to him. However, he is unable to recall whether or not it was in fact brought to his attention. He also makes the point that the fact that the guarantee was to be a "silent guarantee" was not drawn to his attention. This is a somewhat surprising statement if the fax of June 20th, 2000 with a post-it endorsed "FAO James Canepa" was brought to his attention given that it contains an extract of the CACI London "Credit Department Analysis" document and

the detailed description of the transaction accompanying it in which the guarantee is described as "(to remain silent)."

41 Mr. Canepa acknowledges that he received a standard form introduction from Mr. de la Borde Caumont and that he must have queried it as the following day he received a fax from him confirming that the customer had been introduced by Mr. Tavernier. Despite the lack of recollection he then goes on to state:

> "As I knew that Paris had approved the transaction and that it was being repeated to me that this was a referral from Maitre Tavernier, it was readily apparent to me that there was little I could do or have done to stop the transaction. It was over my head."

42 Mr. Canepa also expresses concern in relation to the comment on the Credit Application Form approved by CACI Gibraltar that London were "to establish the commercial benefit of the operation for the parties concerned" and that he would have been concerned by this comment given that lack of commercial benefit is a pointer to money laundering. Finally, he also expresses the view that had he seen the Swift 100 form which sets out the details of the payment into the Lombardi account at CACI Gibraltar with the source of funds as "one of our clients," he would have been "most concerned" and would have required urgent checks to have been carried out. Mr. Canepa then goes on to conclude:

> "Had I known that the account was not to be used for investment purpose but rather for a back-to-back guarantee with no apparent commercial benefit to the client, that the guarantee was to remain 'silent' (which I assume means nobody should know about it) and that the source of funds had not been identified, I would have been very suspicious as to the true purpose of the account and the facility being provided. Lepissier would have been the only person in the Gibraltar branch that would have known all aspects of what was going on in every department, and would therefore have all information surrounding Lombardi. I was only involved in the compliance aspects."

43 This assertion is then followed with an exculpatory explanation that although he sent a letter to Lombardi signed by him and the Credit Manager, and he provided some facility documentation, he would merely have been asked to sign the letter and he simply did not marry that with the KYC he had also been preparing for Lombardi. I have not had the benefit of having Mr. Canepa testify, but it is an explanation which, on the material before me, I do not accept. The letter, dated June 28th, 2000, and co-signed by Mr. Canepa as Legal and Compliance Manager, enclosed *inter alia* two sets of draft minutes drafted "as an example for you to minute in the company minute book addressing the issue of commercial benefit." This was then followed by a fax dated June 29th, 2000, also

co-signed by Mr. Canepa, the final paragraph of which reads: "As discussed, we shall be unable to issue the guarantee without first receiving the duly signed transaction documents and the arrangement fees . . ." Only two days earlier, on June 26th, 2000, Mr. Canepa had been involved in fax and email exchanges with Ms. de Monspey and Mr. Jakob in relation to the opening of Lombardi's account with CACI Gibraltar. It is clear that he was reviewing KYC issues and the facility almost simultaneously, therefore his assertion that he did not marry them defies belief.

44 On June 8th, 2011, less than three months after his first witness statement, Mr. Canepa produced a witness statement for the defendant. The position he adopts in that witness statement is markedly different. Although asserting that he does not recall the specific transaction, having reviewed the documentation, he expresses the view that the manner in which the transaction was handled was standard. That—given the letter of introduction from the Head of Private Banking in London and the introduction to him in turn by Mr. Tavernier, and approval of the transaction by the Paris Credit Committee—explains why he and the management of CACI Gibraltar felt comfortable with the transaction proceeding. He also proffers the view that the funds being remitted with the description as to source "as one of our clients" did not cause concern because it was not unusual at that time. He then concludes:

> ". . . I am certain that if I had had any concerns or been provided further information about it, I would not have allowed the transaction to proceed and would not have proceeded if I'd had any suspicion that the funds being remitted . . . did not belong to the customer . . . As compliance officer at the time, I absolutely deny being wilfully involved in a dishonest scheme or even having turned a blind eye to any impropriety . . . the Gibraltar Branch was dealing with a customer who had been well introduced by the London branch, as branches tended to rely on each other's due diligence."

45 Given the inherently contradictory statements and the disingenuous stance he adopts in his statement for the claimant by asserting that he did not marry the KYC with the facility issues, and in the absence of his evidence being tested through cross-examination, I am of the view that, save to the extent that his evidence is supported by documentation contemporaneous to the transaction, I can ascribe no weight whatsoever to his factual evidence. To the extent that he expresses views as to the propriety of the transaction, I attribute no evidential value whatsoever to those views one way or the other.

46 The only other evidence by a witness of fact in relation to CACI Gibraltar was provided by Bertrand de Margerie, who at present is part of general management of Private Banking with Credit Agricole (Suisse) SA, and at the time of the transaction was General Secretary of CACI's Private

Business Line in Paris, and whose evidence-in-chief essentially related to the Paris end of the transaction. Possibly because of the absence of any witness who was with CACI Gibraltar at the time of the transaction being available for cross-examination, Mr. de Margerie was cross-examined somewhat extensively about the Gibraltar branch and its then general manager, Mr. Lepissier. Mr. Lepissier has been identified by Mr. Moverley Smith in his opening as the person to whom the bank delegated responsibility, and who was the "directing mind and will" of CACI (see *El Ajou* v. *Dollar Land Holdings plc* (7)). When asked about Mr. Lepissier's character, his evidence was that ". . . he was a professional banker. He was somebody probably around my age and, therefore, with experience." Later, in relation to his role within CACI Gibraltar, Mr. de Margerie said:

> "Mr. Lepissier—there was, you know, how would I say, separation of the role in Gibraltar, like anywhere else, where, actually, the credit people would look at the credit issue, the compliance people would look at the compliance issue and the general manager making a final decision with the support of all his colleagues."

When taken to Mr. Canepa's evidence—to the effect that CACI Gibraltar was overly deferential towards and cooperative with other CACI branches—Mr. de Margerie's evidence was that that was not his impression, but that it was a small office that was trying to expand its business. Whilst in relation to Mr. Canepa's statement that everyone in CACI Gibraltar was always "conscious of the need to develop business to ensure that it was financially viable," there was what would appear an obvious reply by Mr. de Margerie in the context of what was a commercial entity; namely that CACI Gibraltar "had a budget and tried to achieve it." Unsurprisingly, he readily accepted that CACI Gibraltar had to be "financially viable."

47 Cross-examined about an article in the March 15th, 2005 edition of *Le Monde* which reports the imposition of sanctions on CACI, in part premised on the receipt by CACI Gibraltar of $38m. which could have been the proceeds of corruption in Nigeria and which was discovered in June 2000, and the impact which this had on the closure of CACI Gibraltar, Mr. de Margerie's evidence was that he did not become aware of the "scandal" in 1999 when, according to Mr. Canepa, the story broke. Rather, his evidence was that the Gibraltar branch had closed because the financial bubble had burst, and that in 2001 CACI had reviewed its private banking operations which resulted in the closure of Gibraltar, London and Belgium, and the sale of the Italian private banking operation. He further testified that as far as he was aware, no disciplinary proceedings were brought against Mr. Lepissier, nor was he dismissed, but that rather he left the bank on or about the summer of 2001.

The London end of the transaction

48 The evidence by witnesses of fact in relation to the London end of the transaction is significantly more extensive, albeit there is a substantial amount of overlap.

49 Mr. de la Borde Caumont, at present the head of business development at Faisal Private Bank in Geneva, was at the time of the transaction the head of Private Banking with CACI London. In a witness statement tendered pursuant to a notice of hearsay evidence he essentially says that he has no recollection of the detail of the transaction; that Symes was introduced by Mr. Tavernier, who had a good reputation in Geneva as a lawyer who acted for well-known clients; that Symes was introduced as a well-known and reputable art dealer with a high net worth who was planning to retire and move to Switzerland if he was not already there; and that on that premise he agreed to establish a banking relationship. No file note by Mr. de la Borde Caumont reflecting that recollection has been disclosed. His evidence is also to the effect that the fact that the facility should have been secured by a deposit held in Gibraltar was not unusual for the time; that the arrangement fee of $20,000 and interest of 1.5–2.5% above LIBOR was standard, and the fact that the funds received by CACI Gibraltar came from Liechtenstein or that the remitting party was described as "one of our clients" would not have been alarming at the time.

50 Mr. Leonard, at present a director in the Credit Risk Department at UBS Wealth Management in London, was in 2000 the Private Bank Credit Manager at CACI London. His no longer being with the bank serves to minimize suggestion that his evidence might be coloured by a sense of duty to his employer. Whilst his testifying could be motivated by a desire to preserve his professional reputation, if he had been involved in wrongdoing, the easiest course of action could well have been not to engage at all in this process. In his witness statement and oral evidence, he provided some insight into the management structure and decision-making in relation to the approval of credit facilities at CACI London. He explained that as part of the bank's management system, he reported to Mr. de la Borde Caumont and to Mr. Trypanis; that Mr. de la Borde Caumont was the Head of Private Banking with no risk or credit authority whilst Mr. Trypanis, as Head of Credit, had responsibility for approving the private banking credit deals; that the CACI London credit team had authority to approve facilities under $5m., but larger transactions required authority from Paris; and that he had no recollection of the details of this transaction, but that he would have flagged any concerns which he may have had and thereafter if appropriate would have submitted the application to the Credit Committee, which was made up of seven or eight individuals, and then Paris, once local support was obtained.

51 His evidence was that this was a transaction which was not unusual other than for the fact that antiquities were offered as collateral, and that the large gallery which RSL had near the CACI London offices, and the large facility of $10m. plus—which it had at Citibank—added credibility. As he put it:

> ". . . [A]t year 2000, this was a bog standard very vanilla transaction: repaying a bank facility in collateral would be a guarantee from ourselves . . . we were in a different place 12 years ago. If I looked at this now, obviously, the level of transparency, the laundering issues, everything will be done to the *n*th degree."

When cross-examined as to the source of the funds deposited in Gibraltar:

> ". . . [C]redit in London would not have been privy to that information . . . All we would have seen would be the London aspects, as opposed to where the funds came from in Gibraltar . . . we would not be privy to how the flow of funds from Liechtenstein—or wherever they came from—to Gibraltar. Our counter-party risk was a guarantee from Gibraltar which guarantee Gibraltar controlled via assets which we found out to be cash."

52 In relation to the use of the terminology "silent guarantee," and guarantee "to remain silent," essentially his evidence was that "silent" was the term used within CACI for internal guarantees given that strictly it was not a guarantee, as the bank could not provide a guarantee to itself. Whilst as regards the nature and purpose of the transaction he had this to say:

> "On the face of it, having a facility to repay a debt at another bank was very, very common, and the collateral was coming from a branch of Credit Agricole, so, if at the time I would have thought anything untoward I would have mentioned it, but the credit committee in London consisted of a legal person who would have looked at it. If there had been anything untoward then it would have been questioned and discussed at the time . . . the purpose of the transaction was clear . . . to repay a debtor, a third party. That is very common. It was common in 2000 and it is very common now."

53 Pressed upon whether, if a transaction is structured in a certain way for tax purposes, those details need to be understood he conceded that "perhaps 12 years back the level of detail was not as great as it is now." Taken to the bank's memorandum by the Group Compliance Officer, dated January 17th, 1996 and the excerpt in the appendix:

> "Consideration should be given to the plausibility of a customer's explanations about the financial background of these transactions. In this respect, it is important that a customer's explanation (ex.: pertaining to tax purposes or foreign currency legislation) are not accepted without verification."

Mr. Leonard was unable to provide a cogent explanation as to how this requirement was complied with in relation to the Symes transaction. Rather, he limited himself to saying that his role was to approve a counterparty credit risk and that anything untoward would have been discussed at the credit committee.

54 Mr. Leonard was also cross examined in relation to his comment in his email of July 4th, 2001, following the grant of *Mareva* relief against Symes in which he stated: "Although the assets securing the Gibraltar guarantee are in a name not party to the *Mareva*, we may, if required, be forced to divulge the identity of the depositor which will not be in the best interest of the bank." Asked about whether the email evidenced the general secrecy which surrounded the transaction, Mr. Leonard denied that that was the case. It is an unhappily drafted sentence, in my view it does not however support the proposition of general secrecy surrounding the transaction but rather merely highlights concerns as to the bank's potential exposure following the grant of injunctive relief.

55 Notwithstanding that she had no recollection whatsoever of the transaction, the bank also relied upon the evidence of the account manager Ms. de Monspey. Given the time which has elapsed, it is not a matter for which she can be criticized. I accept that she has no recollection, and in my view, that of itself evidences that from her perspective this was just another client and an ordinary transaction. Ms. de Monspey has not been employed by the bank for a very long time; she ceased to work in private banking in 2005, and therefore I accept that there is no palpable motivation for her to be anything other than an honest witness, and her testimony that she would never have acted improperly cannot be ignored:

> "But, if I had any suspicion, I would have mentioned it, but you know, if you do not suspect, because compliance was our main concern, we wanted to respect the laws and each time we had a new client we were very careful about compliance, so, if I had had any suspicion, I would have mentioned it."

Ms. de Monspey also gave a cogent explanation as to why the expression "investment only" is to be found on the Lombardi KYC form. As she put it—". . . because we had a long term view on a client. So, even if he was asking for something else, the purpose of having a client in private banking is to manage a portfolio." When cross-examined as to the discrepancies in relation to Symes estimated worth, she said:

> "Well, it is always difficult to know—in this case I don't remember, but generally it is always difficult to know because they don't tell you everything, so clients at the beginning of a relationship are a bit secret—but not secret, you know they don't tell you everything immediately and it is through a relationship that you know the amount or the size of the wealth they have."

As to why her name appears as account officer for Lombardi notwithstanding that she was in London, she surmised that she was probably asked to fill the "know your client," albeit the possible explanation she postulated as to her involvement in forwarding documentation to Mr. Jakob and Ms. Frittita in Liechtenstein is somewhat lacking.

56 With almost 40 years in banking, Mr. Trypanis finally retired in 2003. His last position was from 2000 as Senior Manager Risk with CACI London. He had some recollection of the transaction because part of the proposed security had been a statue, which was not common, and because he learnt that Symes's partner was Christo whose family was known to his Greek family. Albeit only in some small measure, the evidence in his witness statement provides some insight into the changes affecting banking around 2000 where he alights upon the increased burden of regulation and how that made private banking increasingly difficult, ultimately leading to CACI London closing down its private banking division in 2001–2002. In relation to the propriety of the transaction, his evidence was that although his area of responsibility did not include compliance, as he puts it he—

> ". . . considered it an important element of the risk assessment for the bank not to be associated with disreputable business and I would therefore have raised objection to any transaction where I thought that such a risk existed, however well secured the bank might have been . . . I advised in favour of the transaction proceeding and the matter was then referred to Paris for approval. Robin Symes appeared to be a reputable art dealer from the information which the bank had."

In relation to the arrangement fee and the interest charged, his evidence was that it did not strike him as unusual. When cross-examined, Mr. Trypanis explained that within the bank there were three aspects to the transaction:

> "It seems to me that you have three parties involved in this situation in the bank, one was Gibraltar, who was taking funds from the client and was ultimately taking the risk for the transaction that London put on its books; and ultimately then the loan had to be approved in Paris, so these three elements constituted the entire file. The entire file, though, was never seen except in Paris."

It would, therefore, essentially have been for Mr. de Margerie in Paris to make sure that the transaction fitted together.

57 Mr. Trypanis' evidence was also that it was no part of the London credit committee's responsibility to be satisfied as to the source of funds placed in Gibraltar, and that "silent guarantees" were common, and as I understood it, that the guarantee was described as "silent" because it was

an internal agreement within the bank. When cross-examined as to the overall purpose of the transaction, his evidence was (albeit admittedly no more than a vague recollection) that there were two elements: the interest charged by Citibank was higher, and that part of the loan was to be used to repay a loan that was guaranteed by a third party on behalf of Symes. It is not in dispute that $3.905m. was paid from the RSL facility to reduce Citibank's loan in respect of which facility Despina was a guarantor.

58 Margaret Garner, who is now also retired, was the in-house lawyer at CACI London between 1985 and 2004. Originally the only lawyer in the Legal Department, her role evolved and she held various positions simultaneously—including that of legal advisor, head of compliance, money-laundering reporting officer and fraud officer. Her final title was Head of Group Legal Services in London. In her witness statement, Ms. Garner expressed the view that CACI, when compared with other banks, was good at keeping up with anti-money laundering requirements as these emerged in the 1990s. In relation to anti-money laundering policies emanating from the Financial Action Task Force, her evidence, when examined was that these would not come to her attention until they were filtered down through the British Bankers Association or the Financial Services Authority.

59 Although—not surprisingly—Ms. Garner is unable to remember the detail of the transaction as set out in her witness statement, she recalls that—

> ". . . at the initial stage, when the opening of the account was being considered, I spoke to Mr. Tavernier, who was Mr. Symes's lawyer, on the telephone. I was anxious to do things correctly and rang Mr. Tavernier to request more information which I felt was necessary for the opening of the account. I can't recall what the information which I was after was but I do remember that my request upset Mr. Tavernier who did not appear to understand my role within the bank or why further information was required and he left me with the clear impression that he knew Mr. Symes extremely well. I stood my ground and Mr. Tavernier provided the additional information which I was requesting."

In cross-examination, Ms. Garner's evidence in relation to that conversation was that it was unpleasant, and that Mr. Tavernier did not give her any information and (surprisingly given her evident strength of character) she accepted an element of cowardliness in having Mandy Palmer—who worked in her team—take the matter up. Ms. Garner's evidence was that any such additional information would have been obtained and should be found in a file note. There is no file note before the court recording the conversation by Ms. Garner or Ms. Palmer with Mr. Tavernier.

60 In relation to the "silent guarantee," Ms. Garner had this to say:

> "I do not regard as unusual the fact that a 'silent guarantee' was in place. The term was only used to denote that there was not a formal signed guarantee. The reference to a guarantee is a misnomer, and it actually referred to a deposit held in one branch held to the order of another in relation to a facility in which the deposit would not feature as collateral. In fact, it could not be a guarantee as the arrangement concerned two branches of the same bank and the same institution cannot guarantee itself. As this was purely an internal arrangement, it did not need to be referred in the facility letter as an item of security."

Ms. Garner's evidence was also that this type of arrangement was not unusual at the time in private banking, there being very many proper reasons why it was required and provided to private banking customers. When cross-examined, she sought to provide an explanation as to the use of that terminology within CACI and its absence from the facility letter:

> "Because inter-bank risk shares from the time I joined the bank, because I asked what they were when I arrived in 1985, they had these items called silent guarantees, and I do not know why the word 'silent' got involved, but the word 'silent'—and I have read your expert's statement—is not sinister . . . it was a very peculiar statement to me when I came into the bank, that they had these things called silent guarantees, and what they were is a transfer of risk between departments of the bank and I disliked it because I said that this is not a guarantee . . . and it was explained to me at the early stages of my joining the bank that the reason that we did not put it in the facility letter was that you do not tell the client on what basis you analyse them and take a risk to lend to them. It is not a secret. It was just the way we organized our risk. London would take the full risk and the full reporting risk . . . to the Bank of England of the loan, but it would be able in the event that there was a debt at the end of it to call upon the related area of the bank that was covering it to be reimbursed."

Later, when re-examined and still endeavouring to provide a possible explanation as to why the term "silent guarantee" may have been coined, she explained that the internal guarantee did not impact upon the lending ratios of CACI London as allowed by the Bank of England, as the view of the head office in Paris was that "lending restrictions and ratios stay where they fall."

61 Also of some relevance is her evidence as to the distinct roles played by CACI Gibraltar and CACI London, and how London would not be interested in the form of security which Gibraltar took; namely that the Gibraltar and London elements would be dealt with "entirely separately," and would only be brought together at Paris level where it would have been seen by Mr. de Margerie.

62 In relation to the receipt of funds from Liechtenstein, her position was that that was a matter for CACI Gibraltar, which had its own due diligence process, and that CACI London was entitled to rely on CACI Gibraltar's inquiries. More generally however, the fact that money was remitted from Liechtenstein would not have been alarming to her as the bank often dealt with Liechtenstein foundations and trusts. Whilst in cross-examination she accepted that there would be more banking secrecy in Liechtenstein than in England, she reiterated that she would not have seen it as a suspect country and that the bank itself used Liechtenstein a lot for their private clients and their family structures. She testified that in 2000, anti-money laundering controls were far less developed than nowadays, and that there was generally less inquiry into the reasons for a proposed transaction, albeit the reason would have to make sense. Ms. Garner expressed the view that putting a structure in place to repay the Citibank debt was not odd in any way, and that back-to-back loans were very common, and that she never had suspicions about the transaction. In relation to the arrangement fee, her evidence was that although not something she was involved in, it did not strike her as high relative to the value of the loan. When re-examined as to commercial benefit, she expressed the view that there was sufficient commercial benefit in wanting to change banks and developed that assertion in the following way:

> "I do not know about bankers, but myself, I would normally think that . . . for whatever reason, whether it was arbitrage of interest rates, not liking the new manager, to me it would be commercial . . . It would be a good reason for saying, 'Can you help me out? I want to get out of my relationship with X' or 'I want to reduce my relationship with X.' That would be a commercial reason. I mean, you are entitled to move your mortgage if you don't like the Halifax, aren't you? I mean, nobody says, 'Why don't you repay the Halifax?'"

63 When the suggestion was put to her that Symes's/RSL's English lawyers had not been told about the "silent guarantee" by Ms. Palmer because Symes had asked the bank not to tell them, hers was a robust denial: "Oh no, I cannot see that. I worked with Mandy [Palmer] for a long time and she would not even consider it." And later: "I have worked with these people. What you are trying to tell me is they conspired with the client to hide something, and it is just not feasible."

64 In relation to the manner in which the bank dealt with the *Mareva* injunction, she explained that her approach was to comply strictly with the terms of an order but not go further, thereby ensuring that the duty to the customer was not breached and if there had been an error in the way that the bank dealt with the *Mareva* and the disclosure request, it was no more than an honest mistake.

The Paris end of the transaction

65 Evidence in relation to the Paris end of the transaction was given by Mr. de Margerie. I have previously dealt with aspects of his evidence touching upon CACI Gibraltar. According to his witness statement, (i) given the time elapsed since the transaction his recollection is limited and is to the effect that the transaction would have been referred to him for approval from a credit point of view; (ii) it would have involved a review of the credit risks, but Paris would have relied entirely on the branches taking care of other matters such as anti-money laundering checks; (iii) although he cannot precisely remember whether Gibraltar or London was leading on the transaction, he recalls the relationship being driven in London; (iv) there was nothing unusual about the transaction which fell within the bank's normal parameters, it not being uncommon for cross-border credit to be sought by wealthy customers, often for tax planning purposes; and (v) the introducer was a reputable Swiss lawyer (and a director of their Swiss private banking subsidiary) and there was no reason to suspect that he would introduce bad business.

66 In relation to the transaction itself, when cross-examined as to the information which CACI had in respect of Symes, Mr. de Margerie expressed the view that the relatively limited profits being made by RSL showed that RSL was going through a "rocky time," but that the bank's understanding was that Symes's activities were much larger and that he was an international art dealer in business for some time, dealing with international counterparts, and that significant reliance was placed upon his being introduced by Mr. Tavernier, and that therefore the $10.3m. transfer to Gibraltar was consistent with their understanding of Symes's wealth. As he put it:

> "It is rather complex actually to estimate what the actual worth of a customer in private banking is. It is not like you ask for a consumer credit note, and you have to get all the audit material. So as far as I am concerned, I do not know which of those internal London papers I saw. The information that was given to me, the activities of the customer, the level of introduction that we got when the introductions were made, was an element which makes me comfortable that Mr. Symes was a person of substantial means."

It is accurate to say, on the basis of the documentary evidence, that that understanding was premised upon the introducer, Symes's reputation as a dealer in antiquities, and the existing credit with Citibank.

67 In some measure, the claimant's case is advanced upon the premise that CACI Gibraltar was under significant pressure to perform and that although there were facts which should have raised considerable suspicions, it was blinded by the fact that this was a no-risk transaction for

which it was going to receive payment of a significant facility fee. Mr. de Margerie addressed the question of security/risk as follows:

> "Well, first of all let me point out that it is a general policy of the bank in private banking lending that its commitment, loans and guarantees and everything are secured by a pledge over financial assets. So therefore, for the private banking, we are not in the business in giving bank loans to our customers. Most of our loans are secured either by financial assets or by real assets, properties. That is the general policy of the bank, to be always secured. The second point I would like to make is that there is no such thing like a zero-risk transaction."

Mr. de Margerie accepted that whilst the $10.3m. covered a lot of the risk, there remained an operational risk. Indeed, it can properly be said that this action of itself makes that point good.

68 Cross-examined in relation to the commercial purpose of the transaction and how the taking of a facility to repay an existing loan made no sense, Mr. de Margerie's evidence was:

> "Well, you know, we often come across, actually, in private banking, a situation where actually for some reason a client which has assets in one place and debts in another one is perfectly happy to have this kind of arrangement, and not to try to offset the two, and those kind of requests or transactions were—in most of the time, as far as my experience is—either for tax planning purposes or for inheritance planning."

It is fair to say that there is no documentary evidence to show that the bank inquired as to whether or not tax planning was the reason for the way in which the transaction was structured.

Conclusions on the witnesses of fact

69 Without hesitation, I can say that the witnesses of fact who testified and were subjected to cross-examination came across as honest witnesses. Moreover, other than for Mr. de Margerie who works for CACI's Swiss subsidiary, they retain no links with CACI and therefore there is no obvious motivation for them to be anything other than honest. Their credibility is also enhanced by their willingness to come to Gibraltar and voluntarily expose themselves to the potential unpleasantness of cross-examination in relation to a transaction in which they were involved very many years ago. That said, I do not ignore that human nature is such that honest witnesses can, when casting their mind to past events, unintentionally seek to justify and legitimize decisions retrospectively, and persuade themselves that a certain state of mind or state of affairs prevailed as a means of justifying conduct or decisions. In this case, the added difficulty

is that the evidence of the witnesses of fact is not so much directed at establishing primary facts, but rather relates to the motivation for the taking of certain decisions whereby the transaction was allowed to proceed. The reliability which is to be ascribed to their evidence is therefore best determined by considering it against contemporaneous documentary evidence. As is apparent from my review of their evidence, I find no material discrepancy and therefore—save to the extent that I make specific criticism—on balance, I accept it.

The expert evidence

70 Principally, the claimant relies upon the evidence of its expert, Douglas Hopton, to found its claim. His opinion, as contained in his report, is essentially summarized at his paras. 5.62 and 5.63:

> "5.62 . . . [T]he suspicions . . . raised by virtue of the facts that the funds were of unknown origin, from an unknown source, from a suspect country, where the recipient was a freshly incorporated offshore holding company and where they were to be employed secretly in an arrangement with no economic or visible lawful purpose, remained wholly unallayed.
>
> 5.63 In the light of my review, I am firmly of the opinion that the transactions raised grave suspicions as to whether or not they involved money laundering, and that [CACI] did not in any adequate way allay those suspicions before proceeding."

71 Mr. Hopton is a director of DTH Assocs. Ltd., who are consultants in financial crime prevention. From 1966 to 2003 he worked for the Inspection Division of Barclays Bank, eventually becoming head of Group Fraud and Money Laundering Prevention, and during that time he was, *inter alia*, a member of the former HM Treasury money-laundering experts group. He is also the author of *Money Laundering—A Concise Guide for All Business*, first published in 2006, with a second edition in 2009. It is therefore apparent that he is an expert with very significant credentials.

72 For their part, CACI relies upon the expert evidence of Richard Palette. Mr. Palette, who at present is a self-employed expert witness, has banking experience dating back to 1970, having become senior manager of a branch of National Westminster Bank PLC between 1990 and 1993. Thereafter, he joined the internal audit of Natwest, becoming Deputy Head of Audit (Consumer Banking) to RBS/Natwest retail franchises, Ulster Bank and Coutts & Co., between 2006 and 2008, and following the acquisition of ABN AMRO by RBS, between March 2008 to July 2009 he was Head of Professional Practices, Group Internal Audit, with responsibility to deliver the RBS risk based audit methodology to ABN AMRO staff.

73 The notes of the meeting of the experts held on November 26th, 2011 and prepared by Mr. Palette show the areas of agreement and disagreement between them as follows:

> "1. This meeting was held at the home of Douglas Hopton, expert witness for the claimant, to discuss areas of agreement and disagreement in our respective reports.
>
> 2. We are agreed as follows:
>
> i The guidelines, regulations and statutes ('the guidance') referred to in our respective reports are the relevant ones.
>
> ii There is no evidence of dishonesty on the part of any employee of the defendant bank.
>
> iii Record-making and retention at the defendant bank was deficient in many areas.
>
> iv The use of the term 'silent guarantee' was misleading and incorrect, and gives sinister overtones to what the defendant claims to be a purely internal arrangement. It is not possible for one part of the same entity to guarantee another.
>
> v The introduction of M. Tavernier carried considerable weight and [could have] resulted in undue influence in the minds and actions of the employees of the defendant.
>
> vi If the bank had more detail regarding Robin Symes's purported wealth, this should have been recorded.
>
> 3. We are not agreed in the following areas, because Mr. Hopton was instructed to give his opinion from a legal and compliance perspective, whereas Mr. Palette has based his conclusions upon what was banking practice and bankers' interpretation of the guidance at the time in question:
>
> i Whether or not the defendant bank should have done more to satisfy itself on the question of the beneficial ownership of Lombardi.
>
> ii Whether or not the defendant bank should have done more to question the legality and commercial rationale behind the transaction.
>
> iii Whether or not the defendant bank could have done more in London to obtain further information about Robin Symes and his business dealings.

iv The source of the funds remitted from Liechtenstein to Gibraltar in support of the 'silent guarantee' and the checks that should have been and were made.

v The size of the transaction from the perspective of the staff in Gibraltar. Mr. Hopton correctly states that it was significant in the context of the normal business of the branch, however Mr. Palette states that the funds were expected and steps had been taken to progress the opening of the account so the transaction was not in fact that remarkable.

vi The use of the words 'investments only' on the account opening documentation for Lombardi. Mr. Palette is of the opinion that this was most likely a mistake, whereas Mr. Hopton raises the possibility that it was done deliberately to circumvent controls or the raising of questions and concerns.

Signed

Douglas Hopton [Signature] Date 15/11/11

Richard Palette [Signature] Date 15/11/11"

The "could have" in square brackets at para. 2(v) is not to be found in the joint statement, but merely reflects a modulation of position by Mr. Palette who, in examination-in-chief, said that on reflection he would have said "and could have resulted in undue influence" as opposed to the more categorical position found in the statement as drafted.

74 Given the manner in which the claim is advanced, I examine the issues and relevant evidence in respect thereof, adopting in some measure Mr. Hopton's approach.

Know your client procedures—failure to fully carry out KYC requirements in respect of Lombardi or its beneficial owner, Symes, before opening the account

75 CACI Gibraltar is criticized by Mr. Hopton for accepting identification documentation notarized by Mr. Jakob, who was also a director of Lombardi, and for accepting the assertion that Symes was the beneficial owner of Lombardi without undertaking further inquiries. It is legitimate criticism, but in the context of the claim it has no causative nexus in that the fundamental purpose of these checks was to positively identify the client and the individuals identified were who they were meant to be. As regards the acceptance of the assertion that Symes was the beneficial owner of Lombardi, similarly it is not in dispute that that was the position.

The bank's approach does however evidence a less than rigorous approach to anti-money laundering procedures.

76 Mr. Hopton also criticized the bank for describing Symes in the detailed description of the proposal as "a well-known client." He opined that someone known to the bank for three months could not reasonably be called a well-known client, and therefore draws the inference that it was a deliberately misleading statement. I agree with Mr. Mowschenson's analysis that, when read in the context of the overall proposal, Mr. Hopton's interpretation is artificial.

77 There is also the related criticism that the letter of introduction dated June 26th, 2000 from Mr. de la Borde Caumont to CACI Gibraltar—stating that Symes had been known to CACI London for three months—was irregular, as CACI Gibraltar's customer was Lombardi and not Symes. It is criticism which I would categorize as being of form over substance. Given that Lombardi had only been incorporated on May 3rd, 2000, and that its directors and shareholders had disclosed that Symes was the beneficial owner of the shares and the moneys, I struggle to understand how CACI Gibraltar can properly be criticized for having accepted that letter for the purposes of discharging certain KYC obligations in respect of Lombardi.

78 That is not to say that legitimate criticism cannot be levied against Mr. de la Borde Caumont for issuing that letter, particularly in relation to the statements: "I am/We are in possession of full details regarding the customer's background and business operations" and: "I/We further certify to you that I/We are satisfied of the legitimacy of the funds to be held or dealt with by you for the customer." As Mr. Hopton highlights, there is an absence of documentary evidence showing checks and verifications carried out by CACI London to support its view that the funds were legitimate, and it is evident from the material before the court that the full details were essentially limited to the information conveyed by Mr. Tavernier and the material provided by or for Symes himself.

79 The related criticism by Mr. Hopton, which is also justified, is the attribution, in the KYC form signed by Ms. de Monspey, that Symes's estimated net worth was of $50m. In his report, Mr. Hopton properly concludes that there is nothing in the documentation available in the context of these proceedings to justify such a figure, nor is there any material to suggest that checks were undertaken to justify it. Indeed, RSL's 1998 accounts with net current assets of £500,000 could not have provided a basis for such an estimate.

80 Mr. Palette provided a possible explanation as to how the bank reached such a conclusion when he was cross-examined as to Symes's net worth and the value of the personal guarantee:

> "You would want to know that there is something—as you say, some substance that sat behind the guarantee. If I may perhaps add some context, because throughout I have tried to put myself into the minds of the people who are assessing this, and it would seem to me that they set store—as was the custom in private banking at that time—by the fact that they had been told by the introducer that he was a man of substance and, however strange that might seem today, the culture in private banking was such that those statements would be taken at face value then."

That explanation in large measure ties in with the opinion, upon which both experts agree, that the bank placed excessive reliance upon the involvement of Mr. Tavernier. Mr. Hopton in his report takes it further and suggests that there may have been some confusion as to whether the introduction was being made by Mr. Tavernier *qua* Symes's lawyer, or *qua* director of CACI Suisse. It is not an unfair assumption, but one which is not premised on evidence and therefore no more than speculation. However, that Mr. Tavernier was putting CACI London under some pressure is in my view an inference which can properly be drawn from the evidence and which is exemplified by Ms. Garner's testimony touching upon her conversation with him.

Source of funds

81 In large measure the issues touching upon the source of funds are intertwined with KYC matters, albeit viewed from a different perspective. In analysing and opining in relation to the source of the funds, Mr. Hopton in his report cogently draws the distinction between the identity of the person providing the funds and the origin of the funds in the sense of the means by which the funds were generated. Mr. Hopton measures the steps taken by the bank as against a CACI Gibraltar internal directive dated March 20th, 2000 prepared, *inter alios*, by Mr. Canepa and issued by Mr. Lepissier which, setting out the obligations of an account officer, states:

> "This KYC form must be carefully completed when setting out the details of the client. Attach to the KYC form a detailed note to be referred to as a 'relationship note.' This note is to be prepared by the account officer and must set out how the relationship with the client has been established, details of his/her financial standing and what type of transactions the client is considering to effect. Further information on the origin of the assets is to be received at the commencement of the relationship. The details of the bank from which the funds are to be received are also essential. This note should be even more detailed in the case of a company."

Mr. Hopton also highlights provisions found in CACI (at the time Indosuez) group guidelines which, under the heading "*Money laundering*," provide at paras. 2.6.2 and 2.6.3:

> "2.6.2 Very strict instructions should be given to the various units:
>
> To authorize cash transactions only when the bank is certain as to the origin of the money and of the end purpose of the transaction presented.
>
> To refuse any transaction:
>
> involving unusually large amounts of money;
>
> of doubtful origin;
>
> originating from non-habitual middlemen; or
>
> when the end client is insufficiently known.
>
> 2.6.3 Specific instructions shall be given by the private bank, particularly with regard to tax havens, trust or back-to-back transactions. These instructions shall be regularly updated."

Against these requirements, he measures the limitations inherent in the letter of introduction provided by Mr. de la Borde Caumont.

82 These failures, he opines, are compounded by the fact that Liechtenstein, from where the moneys were transferred, was identified on the OECD Financial Action Task Force on Money Laundering review of June 22nd, 2000 as a non-cooperative country, in respect of which the Task Force recommended that "financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions . . ." I attach no significance to this criticism, given that the Task Force recommendation was made at almost the same time as the transaction was proceeding and it is, I think, inconceivable that the findings of an international organization would have filtered down to banks at branch level that swiftly. Moreover, I do not ignore Ms. Garner's evidence, which I accept, as to the attitude which prevailed at the time in relation to transactions involving Liechtenstein.

83 Essentially, premised on the foregoing, on the issue of the source of funds, Mr. Hopton in his report opines:

> "5.54 As a result of the breaches, the suspicions that were raised that the transactions involved money laundering and were accordingly dishonest and improper, remained unsatisfied. In my opinion, an honest banker would therefore have refused to proceed with the transactions."

84 The suggestion of dishonest conduct evidently fell when the experts produced the joint statement, and when cross-examined in that regard, Mr. Hopton had this to say:

> "*Q*: And so, again, you have a reference at 5.58 to an honest banker would therefore have been suspicious about the transaction. You are not suggesting that the bankers were dishonest. You withdraw that right through the report, do you?
>
> *A*: It is a word I have used, and I repeat what I said earlier; that there is no evidence of personal individual dishonesty.
>
> *Q*: Well, there is no evidence of personal individual dishonesty; there is no dishonesty.
>
> *A*: It is a word I frequently use in other contexts and I may have used an incorrect word, from what you are saying, Sir, but I am not suggesting personal dishonesty."

It is accurate to say that whilst no longer suggesting dishonest conduct, Mr. Hopton maintained that the transaction was suspicious in the sense that the bank should have undertaken further inquiries. Specifically, in relation to the source of the funds, Mr. Hopton's opinion was that the fundamental question was whether the funds being received by CACI Gibraltar were the property of Symes. As he put it when cross-examined:

> "*Dudley, C.J.*: Let me interrupt there. What precise questions should he have posed and to whom to allay your concerns?
>
> *A*: The most important question, My Lord, is regarding the source of funds, *i.e.* were the funds coming in the property of Mr. Symes, which is what they are alleged to be.
>
> *Q*: And, if the answer to that had been in the affirmative, what then?
>
> *A*: Then their suspicions would have virtually disappeared, because they would be his funds going into his company. That is the fundamental point of the origin or source of funds.
>
> *Mr. Mowchenson, Q.C.*: So, if you got that answer, you would not find this inherently suspicious?
>
> *A*: Unless something else happened in the course of the transaction that gave you a different opinion.
>
> *Q*: Right.
>
> *Dudley, C.J.*: So it goes back to that core issue as far as you are concerned?
>
> *A*: This whole question of KYC in the broadest sense, My Lord."

85 It is fair to say that the specific information which CACI Gibraltar, had in relation to the source of funds was, other than the letter of introduction from Mr. de la Borde Caumont, limited to the entry in the Swift transfer print out, showing that on or about June 28th, 2000, $10,299,985 was remitted by LGT Bank in Liechtenstein to CACI Gibraltar via Bankers Trust Co., New York, endorsed as being sent by "one of our clients." This description was, according to Mr. Palette, standard at the time.

86 The other evidence in relation to any verification undertaken as to the source of funds is to be found in a document entitled "Diligence Report—Date Order," dated August 9th, 2000, and which is attached as "Exhibit c" to the answers by CACI Gibraltar to a CACI internal audit report. This report identified the absence of systemic control on the origin of large funds, with the consequent risk of reputation, as money-laundering schemes could remain undetected. I set out the answer provided by CACI Gibraltar to that part of the report because it puts the "Diligence Report" in context:

> "Any incoming funds above $500,000 are verified to be correct. A message is sent to the remitting bank to confirm due diligence has been effected on their side and they are satisfied with the origin of the funds. All inquiries are recorded in a programme developed locally to ensure a good follow up is maintained (see Exhibit c)."

Although the "Diligence Report" shows that verification of sums under $500,000 was also sought, that is I think of no consequence. For present purposes, it is relevant that the transfer of $10,299,985 from LGT Bank is to be found in the report and its status endorsed as "OK." Although the report evidences that certain inquiries were made, the problem, as raised by Mr. Hopton when cross-examined, is that we do not know what precise question was asked of LGT Bank. Therefore, it is difficult to determine what weight if any is to be attributed to this element of verification.

87 I accept that it was desirable to seek the information as suggested by Mr. Hopton. That, however, is not mutually exclusive with Mr. Palette's evidence—which I also accept—that it was not unusual at the time to receive transfers with the description "one of our clients." It is against that factual matrix that the bank's conduct needs to be judged. That said, the failure by the bank to make full inquiry was ultimately of no substantive consequence. Crucially, if full inquiry had been undertaken, and as Mr. Hopton suggested, LGT Bank had been asked if the funds were remitted by or on behalf of Symes, the reply would have had to be that it was transferred by the Pataco Foundation; that Symes was during his lifetime the primary beneficiary of Pataco and that he was the beneficial owner of the moneys. That much is clear from the documents exhibited to the witness statement of Dr. Oliver Nesensohn.

Nature of business

88 Although Mr. Hopton accepted that at the time it was common practice to establish special purpose vehicles (in this case Lombardi) without their having a business plan other than to provide a service to the ultimate beneficial owner, such as tax planning or asset holding, he was of the view that by virtue of the Financial Services Commission March 2000 Anti-Money Laundering Guidance Notes, there remained a need to obtain details of the nature of the business. Section 4.03 of those Guidance Notes provides:

> "When a business relationship is being established, the nature of the business that the customer expects to conduct with the institution should be ascertained at the outset to show what might be expected as normal activity. This information should then be updated as appropriate and as opportunities arise. In order to be able to judge whether a transaction is or is not suspicious, institutions need to have a clear understanding of the legitimate business of their customers."

He opined that even if an SPV is incorporated for tax planning purposes (and rightly he pointed out that in this case there is no evidential basis which suggests that such was the purpose of this transaction) there would be an obligation on the bank to make enquiries to ascertain that the proposed tax structure was legal. In support of his opinion, he cogently relies upon a CACI London internal memorandum from Legal Services dated January 14th, 1999, which dovetails with issues touching upon the source of funds and which states:

> "Make sure the information you receive as to the origin and source of funds is satisfactory to you personally, if you do not understand the explanation or are otherwise suspicious, even if you suspect it relates to tax avoidance, refuse the instructions and report to the Money Laundering Reporting Officer."

However, when cross-examined, he accepted that in 2000, whilst major banks probably insisted on seeing tax advice, some of the smaller banks may not have done.

89 Mr. Hopton, in his report, went on to form the opinion that Lombardi providing a guarantee for the benefit of RSL was inconsistent with it being a holding company and mreover that there was an absence of documentation showing that questions were asked as to Lombardi's proposed business, and that such enquiries would have been made by an honest banker, and that the lack of checks did not constitute good banking practice. He further questioned the "investment only" entry in Lombardi's account opening form when the documented purpose was to provide a guarantee to RSL. He opined that such a misstatement was "a serious matter from a compliance point of view." Premised upon the foregoing, he

concluded that if CACI Gibraltar had no information as to Lombardi's business, its receipt of $10.3m. was inherently suspicious.

90 In the experts' joint statement, and in cross-examination, Mr. Hopton no longer maintained his assertion of dishonesty. I also fail to understand why a company described as a "holding company" cannot properly give a guarantee provided that it was not *ultra vires* its objects, and that there was corporate benefit. In this regard, an exchange between Mr. Mowschenson and Mr. Hopton during cross-examination, albeit somewhat extensive, is instructive:

> "*Q*: Then, when Mr. Canepa decides to—when he is considering the commercial purpose of the transaction, he gets from the company the documents at 6/183. And he gets a resolution. What I am saying to you is that he is concerned about the commerciality, if you like, he is trying to satisfy himself about this, some people might say that it was not necessary to do this, but he thinks that he needs to satisfy himself about the commerciality, so he gets a resolution from the directors that it was within the commercial interests of the company for the purposes of its business—right?
>
> *A*: Yes.
>
> *Q*: And then he gets another resolution over the page, and the relevant parts are para. 5, really, 186, the chairman referred to the minutes of the shareholders' meeting earlier in which the shareholders had instructed the directors of the company to enter into the transaction, and to execute the transaction documents. The shareholders had also advised the directors of the company that the shareholders would obtain a benefit by virtue of the bank issuing the guarantee, as the same shareholders held shares in both the company and the UK company. Do you see that?
>
> *A*: I do, sir.
>
> *Q*: And you heard Ms. Garner yesterday saying that, well, that would satisfy the company that this was perceived to be a commercial benefit by what, if you like, you would call the client?
>
> *A*: I have to agree with that.
>
> *Q*: You agree with that.
>
> *A*: Yes.
>
> *Q*: And it refers to both shareholders and the company.
>
> *A*: And the directors.
>
> *Q*: You agree with that?
>
> *A*: I agree with that.

Q: So that Mr. Canepa, whatever his faults, the issue being concerning you about the commercial purpose, he had tried to resolve the issue.

A: He appears to endeavour to do so."

91 I am of the view that the issue of corporate benefit, in the sense of whether or not the transaction was *ultra vires* Lombardi, is in the context of this claim largely irrelevant. In any event it may be that Mr. Canepa's minutes resolved that matter. As regards the use of the words "investments only" on the account-opening documentation for Lombardi, I accept Ms. de Monspey's explanation that this reflected a long-term view of a private banking client. In any event, I fail to see how the use of that phrase could have led to controls being circumvented, or how it could have been intended for it to have that effect not least because the nature of the transaction was apparent from the credit application.

Commercial rationale/economic and visible lawful purpose

92 Premised upon the CACI Gibraltar credit application form dated June 20th, 2000, in which it is commented "we have been advised by Credit Agricole Indosuez London that they are to establish the commercial benefit of the operation of the parties concerned" and below, in manuscript, by the Gibraltar credit committee, which included Mr. Lepissier, "we assume that CAI London has requested the B/O to seek independent fiscal advice—I suggest that the existence of the business benefit of the operation be well established prior to issue our guarantee" Mr. Hopton concluded that both CACI London and Gibraltar were aware of the need to establish an economic and lawful purpose to the transaction but nonetheless failed to undertake the appropriate checks. From the documentation he inferred that the primary motivation for the bank were the fees and interest to be earned from the transaction (which are calculated by Jonathan Phillips as amounting to $231,500) and that given the level of charges there was no economic or visible lawful purpose and the bank should have been suspicious that it was a money-laundering transaction.

93 According to Mr. Hopton, the fact that the $10.3m. was being provided by Lombardi as security for a loan should of itself have raised suspicions. In support of this conclusion, he relies upon the Financial Action Task Force on Money Laundering 1996–1997 *Report on Money Laundering Typologies*, which states:

"The shell corporation is a tool which appears to be widely used in almost all members in both the banking and non-banking sectors. Often purchased 'off the shelf' from lawyers, accountants or secretarial companies it remains a convenient vehicle to launder money . . . these companies are used at the placement stage to receive deposits of cash which are then often sent to another country . . ."

94 Mr. Hopton also expressed the view that the description of the "guarantee" as "silent guarantee" raised suspicions, that it must have been silent at the request of Symes or Mr. Tavernier, and that the bank's position as stated in its re-amended defence that "silent" was an internal expression used within the bank was not corroborated by use of that phrase in the bank's internal documentation.

95 With the benefit of the evidence of Mr. Leonard, Ms. de Monspey, Mr. Trypanis and Ms. Garner, who were subjected to extensive cross-examination, I do not share Mr. Hopton's conclusions. Although there may be legitimate argument as to whether or not there should have been more scrutiny, I am of the view that the staff at CACI London did not consider that there was anything untoward with the transaction, and that they considered that the putting of a structure in place to obtain a facility for the purposes of repaying another bank with an "internal guarantee" as collateral was standard. I also accept that the term "silent guarantee" was a CACI term of art and that nothing sinister can be inferred from the use of that phrase. As regards the fees generated for the bank, I also accept the evidence of Mr. de la Borde Caumont, Mr. Trypanis and Ms. Garner that the fees generated for the bank for the transaction were not unusual. A plausible explanation as to why the matter was dealt with in the way it was is to be found in the evidence of Mr. Palette who whilst accepting the need to understand the transaction testified:

> ". . . I am trying to paint a picture whereby this sort of structure, whereby a client is prepared to pay a premium, a fee, that to you and I might seem exorbitant, would be a relatively normal thing in private banking. I guess, when one sees the transaction set out like this and you think that it is going to cost so much over a period of time, that is not necessarily a red flag . . ."

Size of transaction

96 It is not in dispute that the material attached to the audit report of CACI Gibraltar shows that in the period May 1999 to July 2000 it handled few large transactions, with the Lombardi deposit being the largest. The next largest amounting to $3.2m. Given the size of the transaction, Mr. Hopton in his report opined that it was more important to ensure that KYC was fully undertaken and relying upon the other failures he ascribed to the bank he stated that "an honest banker would therefore have been suspicious about the transactions and have carried out more checks."

97 I fail to see how the size of the transaction relative to the type of business undertaken by CACI Gibraltar should have generated suspicion, and accept Mr. Palette's view as expressed in the joint statement that the funds were expected and steps taken to open the account. If suspicion is to arise in relation to the size of a transaction, that must be because an

amount of money is unusually large relative to the client and not the branch. That essentially brings one back to KYC issues.

Conclusions

98 I am of the view that in principle it was perfectly proper for CACI to rely upon Mr. Tavernier as an introducer of substance, and given his directorship in CACI Suisse, to attach significant weight to his introduction. That said, there is substance in the criticism that too much stock was placed upon it and, allied to that, there was a somewhat lax approach to KYC, including insufficient inquiry into Symes's wealth. The bank also failed to comply with some of its own internal regulations and, no doubt because the transaction was structured through three different branches, it did not have a comprehensive overview of it. However, the standards by which the claimant would have had CACI scrutinize the transaction are, when viewed in the context of 2000, a counsel of perfection. It is clear from the evidence that the approach then was very different from what it is now and the level of scrutiny to which transactions were exposed far less stringent. It is evident from my review of the evidence that I agree with the opinion of both experts that there was no dishonesty on the part of any individual within CACI. Nor do I find any evidence to adequately support the proposition that any individual within the bank was aware that they had been drawn into a dishonest scheme and then turned a blind eye to it. Indeed, the fact that this was a transaction which was structured in two different jurisdictions and was then sanctioned by head office in a third jurisdiction strongly militates in support of my finding that there was no awareness of any wrongdoing or unconscionable conduct by CACI staff. To the extent that the claim is framed in terms of dishonest assistance and knowing receipt it therefore fails.

99 The proprietary claim requires somewhat distinct consideration. The bank's defence to that claim is that it was a *bona fide* purchaser for value without notice. It is evident from the foregoing that I accept that the bank acted *bona fide*; however, the issue remains as to whether it was on notice and what further inquiries—if any—it should have made, and whether following such inquiries it would have become apparent that the transaction was improper. The single most serious failing which the claimant's expert can ascribe to CACI is its failure to make full inquiry from LGT Bank as to the source of the funds. If such inquiries had been made from LGT Bank, and it had replied in line with the evidence before me, CACI would have been told that the moneys had been transferred by the Pataco Foundation of which Symes was the beneficiary. The proceeds of sale of the collection were laundered at or by the time it was paid into Pataco, and further inquiries by CACI as to their source would have disclosed nothing material which would have put them on notice that the transaction was probably improper. The proprietary claim also fails.

100 For these reasons, Irene's claim is dismissed. I shall hear the parties as to costs.

Claim dismissed.