[2013–14 Gib LR 540]

R. v. I. MARRACHE, B. MARRACHE, S. MARRACHE and TURNBULL

SUPREME COURT (Grigson, Ag. J.): July 2nd, 2014

Criminal Law—fraud—conspiracy to defraud—accused guilty if dishonestly agrees to prejudice, or risk prejudicing, others' rights knowing has no right to do so—may join conspiracy at any time—evidence of express agreement unnecessary if can show parties worked together to achieve common goal

Criminal Law—fraud—defences—guilty even if intended to repay victim; just following orders; or unaware specific act criminal, provided satisfies mens rea and actus reus of offence

Criminal Law—fraud—dishonesty—dishonest if dishonest by standards of reasonable, honest person and accused aware actions dishonest by that standard—intention to repay victim may be relevant to dishonesty

The defendants were charged with two counts of conspiracy to defraud.

The defendants were key members of a Gibraltar law firm, M & Co. The first defendant, IM, was the senior partner; the second defendant, BM, was the managing partner; the third defendant, SM, was the finance director (together "the brothers"); and the fourth defendant, LT, was the senior managing clerk. M & Co. also had a London office where IM worked and which was operating at a loss, and a Spanish office. All three offices held their finances separately, although IM had access to the Gibraltar accounts and SM was a signatory to the Spanish client account. M & Co. also operated a trustee company, C, and a corporate management business, G, which managed companies owned by trusts which C managed.

The financial arrangements of M & Co. were that ledgers were kept on a computer system which detailed all financial transactions, and all withdrawals made by each of the brothers were marked in individual spreadsheets and distributed to each brother. The Solicitors' Account Rules required that M & Co. hold its clients' money in a separate account from its operating account and that the firm's money should not be mixed with the clients' money. Although M & Co. operated a separate client account, each brother claimed either that he was not familiar with, or had not been trained in, the Rules. M & Co.'s auditor and accountant, YZ, was run by W, with whom IM had worked closely. YZ performed several

audits of M & Co. and found that M & Co. was financially healthy and that there were no irregularities in its records. M & Co.'s assets, however, were frequently treated as the brothers' own assets, for example, *inter alia*, buying a property to be held on trust for their sister, RM; paying off one brother's credit cards; and paying for their own living expenses.

Several witnesses alleged that SM had used money from the client account to pay wages in the firm on several occasions. They also claimed that he had instructed them to make excuses when a client wished to access its funds (*e.g.* claiming that the money was paid on a rolling deposit). This had to be done when the money requested was not in the client account and SM required extra time to locate sufficient funds.

In 2004, N opened an account with C. BM alleged that, as part of this deal, N agreed to pay a £3m. fee, which was taken from the account. After N wished to close the account, however, he claimed that no such fee agreement had been made and demanded full repayment. N instituted proceedings against M & Co., which were settled. MB negotiated a loan from J, a bank, to pay the settlement.

In 2005, X became a client of M & Co. He purchased a property in Gibraltar through a company which was managed by G and owned by a trust administrated by C. X placed further large sums of money into the M & Co. client account, usually to be invested or to be placed into trust. BM alleged that X had given him a "wide discretion" to do with the money as he saw fit, provided that it was returned with interest, and used the money to pay for several large personal expenses. X, however, claimed that no such discretion had been given. In 2009, G mortgaged X's Gibraltar property to J. BM alleged that he had done so with X's consent, although he did not have any record of this consent and X alleged that he had not consented to, and had no need for, the mortgage.

BM offered further property to J as security for loans, including property held for the benefit of RM, H and K, and having done so subsequently requested them to confirm in writing that permission had been given. Both H and K complied with this request, but did so because they felt that they were indebted to BM. There was no other evidence to show that they had actually consented before the properties had been offered and H subsequently claimed that he had not actually done so. Further, when BM instructed G to offer the properties, its employees confronted BM and SM and asked if the clients were aware of the transactions. BM informed them that the clients were aware and had agreed, but that they wished the transactions to be discreet, and the employees should therefore not discuss the transactions with the clients. The employees described BM and SM as being particularly annoyed at being challenged and refused to sign the documents.

In 2009, Y complained to the Admissions and Disciplinary Committee that M & Co. had waited an unreasonably long time before paying money to her and, when it had paid, had done so by a post-dated cheque. M & Co. alleged that the cheque had been post-dated because of concerns over a postal strike and to ensure that the cheque would not be delivered to the

wrong recipient. The complaint was brought to IM's attention, who consulted YZ. YZ claimed that it would perform a thorough review of M & Co.'s client account, although there was no evidence that it ever did so. In 2010, BM informed X that M & Co. was being audited by an external company and that there could "be trouble." BM requested that he sign a letter confirming that the funds which had been paid to M & Co. were given on a "purely discretionary basis" to be returned within five years, but X refused to do so.

The defendants were charged with two counts of fraud. Count 1 alleged that they had conspired to cause or permit client money to be transferred out of client accounts in the firm. Count 2 alleged that the defendants had fraudulently conspired to offer client properties and the property purchased for RM as security for loans, even though they did not have authority to do so.

The Crown relied on several recordings of conversations between RM, BM, SM and IM ("the Rebecca tapes"). These recordings included statements by BM to the effect that, *inter alia*, they had used clients' money to fund their extravagant lifestyle, that they had fraudulently mortgaged property purchased for RM's benefit to repay clients, that they had instructed staff deliberately to delay repaying clients where there was not enough money to do so, that they had spent too much money and that it would not ultimately be possible to repay the money they had taken. SM was also recorded as admitting that the brothers had mortgaged RM's property to J to allow them to repay client money which they had used.

The Crown further relied on the testimony of S, a forensic accountant, who found that the amounts held in the M & Co. bank accounts were significantly different from the amounts recorded on its computer system and that substantial sums of money must have been wrongfully paid out of the client account. This was supported by the analysis of a chartered accountant who found that YZ must have failed to act as a competent auditor, that it must have made adjustments to the computer record of transactions to distort M & Co.'s true position and that it must have known that M & Co. was in violation of the Solicitors' Accounts Rules.

IM submitted that he did not have knowledge of the fraud and that any illegal actions had been solely undertaken by BM, SM and LT. IM had left the running of the Gibraltar office to BM and, as he trusted his brother, had not enquired about the firm's finances. Whilst he had been sent several emails regarding M & Co.'s debts and financial difficulties, he alleged that he had not received them. Further, although IM had made substantial withdrawals from the client account, and had used money from the client account to pay off his credit card debts, this had been at the request of clients (*e.g.* after IM had paid for a client's trip to Iraq).

BM submitted that he had not acted dishonestly and therefore a charge of fraud could not be made out. Although he was under a legal obligation to comply with the Solicitors' Accounts Rules, he knew nothing of them and had merely used the accountancy system which IM had established. His failure to distinguish between the client account and the firm's

account had therefore been irresponsible and a failure of management, but it had not been dishonest or criminal.

IM and BM both submitted that although money had been withdrawn from the Gibraltar client account, there had been sufficient money in the Spanish client account to cover the withdrawals. The only reason that clients had not been repaid, therefore, was that the liquidator had failed to consider this account and had not dealt with it during the winding up.

SM submitted that he had not known that any fraud had been taking place at the firm and that any actions which he had taken had been under instructions from IM and BM, as his superiors. SM had not been a partner at the firm and therefore did not have the authority, knowledge or access necessary to perpetrate the frauds.

The Crown submitted that, as LT had interacted directly with clients and had been responsible for delaying client payments, she must have known that M & Co. had insufficient funds to meet its obligations and that it was transferring money away from the client accounts. It also submitted that as LT had a central role in the negotiations between M & Co. and J, and knew that the properties offered were trust properties whilst having had no evidence that the clients had consented to their being offered as security, she must have known that they were being fraudulently offered.

LT submitted that she had merely been an employee in M & Co. and that she had neither the incentive nor the ability to assist in the fraud. Although she had participated in delaying payment to certain clients, there was no evidence to show that she had known that the money had been dissipated, nor that she was a party to the dissipation. Further, although she had been a key negotiator in the loans secured from J, she had merely been acting on the information given to her by the brothers and had not been aware that there was anything suspicious about the transaction.

Held, finding BM and SM guilty on both counts, IM guilty on Count 1, and dismissing the charges against LT on both counts:

(1) A defendant was guilty of conspiracy to defraud if he or she, together with at least one other conspirator, dishonestly agreed to prejudice the rights of others, or to take the risk of doing so, and knew that he or she had no right to do so. A party was dishonest if, according to the standards of reasonable, honest people, what was said or done was dishonest and the defendant must have realized that his or her actions were dishonest by this standard. Further, a party lied if he or she made a statement, whether in writing or orally, which was untrue; that he or she knew that it was untrue at the time; and that he or she intended the recipient of the statement to accept it as true and to rely on it. A party could join the conspiracy at any time and, as there was rarely evidence of an express agreement, the agreement could be inferred if the parties were proved to be working together to achieve a common goal. Although the defendants were being tried together and were accused of conspiring together, the court must ensure that it considered each defendant and count separately (paras. 5–7).

(2) A defendant could be found guilty of fraud even if he or she intended to repay the victim. Although an intention or hope to repay, or a lack of desire for the victim to lose money, would be relevant to the issue of dishonesty, this did not prevent the defendant from meeting the requirements for fraud. Further, it was not a valid defence for a defendant to claim that he or she was "just following orders," and it did not matter if the defendant did not know that an action was criminal, or that he or she did not understand the relevant principles of the law, provided that what he or she did, combined with his or her state of mind, satisfied the elements of the offence charged (para. 5; para. 8; para. 13).

(3) The judge was not required to make his decision based on the concept that a Gibraltarian juror held different standards from a non-Gibraltarian juror. The qualification for jury service was residence not nationality and, moreover, there was no evidence that certain conduct would be acceptable to a Gibraltarian that was not acceptable to others (para. 6).

(4) The evidence in the Rebecca tapes could only be admitted against each defendant in certain circumstances. It was clear that the tapes were an accurate recording of what the parties had said, but these statements were only admissible against the speaker if he accepted that he had said them, or if (a) he denied saying the words, but (b) the court was nonetheless satisfied that he had said the words, and (c) the court was satisfied that what he had said was true. Further, SM's statements were only admissible against BM if BM had been present when SM was speaking and did not dissent from what SM said in circumstances where he disagreed and could reasonably be expected to have said so (para. 5; para. 123).

(5) The money in the Spanish client account could not have been used to cover the shortfall in the Gibraltar account. It was clear that SM had access to the Spanish client account and there was nothing to indicate that his access to that account had been impeded. It was therefore unlikely that the brothers would not have taken the money from that account to avoid M & Co. going into liquidation. Moreover, it appeared that the account would not have had sufficient funds to cover the entire shortfall, particularly as at least a portion of that money would have belonged to Spanish clients and so been unavailable. Further, it was clear that YZ had deliberately altered M & Co.'s financial records to enable the fraud. As there was no benefit for itself in doing so, it must have done so for M & Co.'s benefit and would not have done so without informing IM, BM and SM (paras. 48–49; paras. 84–85).

(6) IM must have been aware of the fraud. As the senior partner, he must have known, in general terms, how the firm covered the gap between income and expenditure, particularly as it was inconceivable that YZ would have fraudulently modified the records without notifying M & Co.'s partners. It was not believable that IM had failed to receive the emails

which had been sent to him, nor that he would continue to trust BM after the firm had been sued by N. IM must also have known that Y had not been paid because there had been insufficient funds in the client account to cover the amount. YZ must therefore have been brought in by IM to assist in the concealment of the problem, not to disclose it. Further, IM's claim that his drawings had been artificially inflated was rejected. He had failed to show that his withdrawals were made for the benefit of clients and his excuse that his client had wished to make large payments from the client account for tax purposes was unpersuasive. The court was therefore satisfied that IM prejudiced the client's rights, whilst knowing that he had not been entitled to do so, and had known that doing so was dishonest, and was thus guilty on Count 1 (para. 261; para. 274; paras. 278–279; paras. 287–289; para. 300).

(7) BM must have known about the Solicitors' Accounts Rules. He had been in practice as a commercial lawyer and as the managing partner of M & Co. for a number of years, had a duty to acquaint himself with the Rules, and worked closely with YZ, who would have been familiar with them. He must, therefore, have known that he was not entitled to use clients' money. It was clear that, despite this, he had habitually used clients' money in such a way as to risk prejudicing their rights, that he had known that he was not entitled to do so, and that he knew that he had been acting dishonestly. He was therefore guilty on Count 1 of fraud (paras. 92–94; paras. 113–114; para. 131).

(8) The evidence proved that SM knew that M & Co. was funding the Marrache family and making large payments to the brothers, and that the income that it was generating was insufficient to cover these expenses. He further knew that client money was being used to meet the shortfall, that money from one client was being used to satisfy payment requests from others, and that money had been borrowed from the bank to meet M & Co.'s liabilities. Additionally, he was complicit in lying to clients to disguise these activities and knew that fictitious statements of accounts had been created. He had therefore prejudiced the clients' rights, whilst knowing that he had not been entitled to do so, had known that doing so was dishonest, and was thus guilty on Count 1 (para. 161).

(9) There was no evidence to show that LT had known that the money in the client fund had been dissipated and it was appropriate to accept that she shared the common belief that M & Co. had significant available funds. Further, she was entitled to rely on the evidence given by YZ that M & Co. had a clean bill of health. As there was no direct evidence to show that she had dishonestly agreed to cause or permit client money to be transferred out of client accounts—and the indirect evidence was insufficient to support the inference that she did—she must therefore be found not guilty on Count 1 (paras. 217–219).

(10) The Crown had failed to show that IM was guilty on Count 2. There was no reliable evidence to show that he knew that M & Co. did not

have absolute ownership of the properties offered to J. The emails which had been sent to him relating to these properties were not sufficient to achieve the criminal standard of proof, particularly as BM had become increasingly alienated from IM after 2009 and it was not necessarily the case that he would have shared all of the firm's financial details (para. 303).

(11) The court was satisfied that BM and SM had not received authority from X, RM or H to offer their properties as securities. The letter which H signed after the offering was clearly false and was not capable of granting consent to the offering. Further, it was clear that both BM and SM were aware that they were acting dishonestly and did not have authority to act. They were therefore both guilty on Count 2 (paras. 202–205).

(12) There was no reason why LT should have been suspicious that C's clients had not given their consent to the offering of the properties as security. BM was a persuasive liar (and her superior) and there was no reason why she would doubt the legitimacy of the instructions which he had given her. Although she had been aware that C's employees were uncertain about the transactions, this was insufficient to show that she had acted fraudulently. She was therefore not guilty on Count 2 (paras. 231–234).

Case cited:
(1) *R.* v. *Fernandes*, [1996] 1 Cr. App. R. 175, referred to.

J. McGuinness, *Q.C.* for the Crown;
J. Cooper, *Q.C.* for the first defendant;
D. Lovell-Pank, *Q.C.* for the second defendant;
C. Finch for the third defendant;
Ms. A. Cotcher, *Q.C.* for the fourth defendant.

1 **GRIGSON, Ag. J.:** This is a judgment. It is not a summing-up. Before making the decisions that follow, I have reviewed all of the admissible evidence. I have considered the submissions of counsel. I make it plain that I am entitled to draw reasonable inferences from the facts as I find them to be. Although I have considered the submissions of all counsel, the scope of my conclusions is not bound by those submissions.

2 I shall refer to the defendants by their initials as a matter of convenience. I am not going to set out the evidence in detail. For example, the evidence of the email traffic is of itself undisputed and it would be pointless to reproduce it here. I shall, where necessary, refer to what witnesses said about various emails.

3 I have not resolved every issue that has arisen between the Crown and the defendants, nor every issue that has arisen between defendants. I have only made decisions upon those issues I regard as necessary in order to reach true verdicts. I am not going to detail the "fobbing off" of Kosicka,

Volterra and Doyle. That Kosicka was fobbed off is really not in dispute. His money was dissipated. He lost it all. There is no point in even trying to resolve the dispute between IM and BM as to the villas in Duquesa. I do not need to do so. BM's explanation for his emails to Volterra, namely that Volterra was giving him instructions over the phone which were directly contrary to the instructions in his emails, is as unlikely as IM's inexplicable failure to receive or read emails which were clearly forwarded to him, but neither of these are actually crucial.

4 In this judgment, where I use the term "satisfied," it is to be taken as meaning "satisfied as to be sure." Where I use the word "proved," it means "proved to the criminal standard" unless I specifically say otherwise.

The law and evidence

5 Before counsel made their final speeches, I handed down a note headed "directions." No counsel sought to dissent from them, although Mr. Cooper queried whether para. 23 was general or specific to BM. It was general. The directions were:

> "1. Each defendant faces two counts. Both allege conspiracy to defraud. To defraud is to act dishonestly to prejudice or take the risk of prejudicing another person's right, in the knowledge that one has no right to do so.
>
> 2. A criminal conspiracy is an agreement by at least two persons to commit crime.
>
> 3. A defendant is guilty of conspiracy to defraud if the prosecution proves that he or she agreed with at least one other named conspirator dishonestly to prejudice the rights of others or to take the risk of doing so, in the knowledge that he or she had no right to do so.
>
> 4. A person may join a conspiracy at any time.
>
> 5. The burden of proof is at all times on the prosecution. The court must be satisfied on the evidence as to be sure of guilt before it can convict.
>
> 6. 'The evidence' means that evidence given and ruled admissible since the opening of the case to the jury by the prosecution.
>
> 7. The court must consider the case of each defendant separately and each count separately.
>
> 8. Dishonesty
>
> The court must determine—
>
> (a) whether, according to the standards of reasonable honest people,

what was said or done by a particular defendant was dishonest; and if so satisfied

(b) whether that defendant must have realized that what he or she was doing or saying was, by those standards, dishonest.

9. Knowledge of the law

The fact that a defendant did not know what was criminal and what was not, or that he did not understand the relevant principles of [common] law, does not provide a defence if what he or she did combined with his or her state of mind satisfies the elements of the offence charged.

10. Lies

A person lies if—

(i) he or she makes a statement, whether in writing or orally, which is untrue;

(ii) at the time the statement is made, he or she knows that the statement is untrue; and

(iii) he or she intends the recipient of the statement to accept it as true and rely upon it.

11. In this case, no adverse inference arises from the decision of any defendant—

(i) not to answer questions during the investigation;

(ii) not to give evidence; or

(iii) not to call, or seek to call, W or Y.

12. Good character

No defendant has any relevant previous conviction. IM and LT have called evidence of positive good character.

Evidence of good character is relevant and must be taken into account on behalf of each defendant—

(i) as to credibility; and

(ii) as to propensity.

13. Evidence of good character is not conclusive as to innocence.

14. Where, in the course of the trial, evidence has been given which proves that a defendant has acted dishonestly, such conduct necessarily diminishes the weight to be given to the evidence of good character.

15. What a defendant has said in interview is only evidence for or against that defendant, unless he has averred the truth of what he said in court.

16. The Rebecca tapes

What BM is recorded as saying on tape is admissible as against himself, and the other defendants, where he has accepted that he uttered the particular words and the court finds that what he said was true.

17. What BM is recorded as saying on tape is admissible only against himself where—

(a) he denies uttering the words;

(b) the court is nonetheless satisfied he did so; and

(c) the court is satisfied that what he said was true.

18. What SM is alleged to have said is admissible in his case if the court is satisfied—

(a) that he uttered the words; and

(b) that what he said was true,

and is admissible in the case of BM where

(i) BM was present when the words were uttered; and

(ii) BM did not dissent from what SM said in circumstances where had he disagreed he could reasonably be expected to have said so.

19. Oliver Withoeft: The court must take into account when deciding what weight to attach to his evidence:

(i) that he could not be cross-examined; and

(ii) any other evidence which reflects upon the truthfulness or accuracy of his statement.

20. The court must approach with caution the testimony of any witness where there is reason to believe that that witness may have a personal reason for giving evidence adverse to a particular defendant. An example would be Abraham Marrache (AM) in respect of BM. The court invites counsel to identify such witnesses.

21. A previous statement of a witness, if accepted by the witness as true may:

(i) be evidence of the truth of the statement; and

(ii) be evidence of consistency.

22. A previous statement of a witness where the witness does not accept either that it was true, or that he or she said it, may be evidence of inconsistency and relevant to the weight to be given to the witness's evidence.

23. The court may, if it is reasonable to do so, accept part of a witness's testimony as reliable whilst not accepting the whole of the witness's evidence."

6 I have been urged to make my decisions as if I were a Gibraltarian juror. I make the following comments:

(i) The qualification for jury service is residency, not nationality;

(ii) I could only apply "Gibraltar standards" if there were evidence of them. No witness was cross-examined on the basis that certain conduct was acceptable to a Gibraltarian, whereas it might not be acceptable to others. BM gave some evidence to that effect; and

(iii) If the underlying suggestion is that Gibraltarians have some sort of lower standard when it comes to honesty, I reject it. Such a suggestion is as insulting as it is unjustified.

7 Mr. Finch asserts that there is no evidence of an express agreement to defraud. I add to the directions: "24. In criminal conspiracies, there is rarely evidence of an express agreement. An agreement may be inferred if the parties are proved to be working together to achieve a common goal."

8 Mr. Finch raises as an issue whether SM can be found to be a voluntary participant in a conspiracy if he were "following instructions of a superior(s)." "Just obeying orders" has not been a defence since (at least) the Nuremberg Trials. There is no suggestion here, let alone evidence, of duress, as legally defined.

9 Mr. Finch asserts that "knowledge is an issue because the knowledge must be knowledge of criminality coupled with the alleged participation so that it constitutes the requisite *mens rea* when doing a relevant act." I refer to para. 9 of the directions, and add direction 25:

"25. SM is guilty of the particular count being considered if and only if it is proved—

(a) that he participated in the overt acts alleged;

(b) that he was not acting under duress;

(c) that when he did so he was acting dishonestly;

(d) that when he did so he was acting in concert with at least one

other named co-conspirator who was also acting dishonestly; and

(e) that he acted at the behest of others provides no defence if (a)–(d) are proved."

10 Following counsel's submissions I add the following:

"26. In considering the testimony of any witness (which includes IM, BM and AM) and in considering what any defendant said in interview, allowance must be made for the passage of time, the circumstances in which the witness was when the statement was made and the dangers of hindsight.

27. In considering the wording of emails, what the words conveyed and what inferences may be drawn from the wording, the court must keep in mind the circumstances in which the author was, and that, for the most part, the emails were not drafted in the expectation that they would be subject to forensic analysis. Ms. Cotcher, Q.C. makes a valid point when comparing the words 'beg, steal or borrow' in one email, apparently from a once popular song, with the phrase 'I could eat a horse.' Neither, she argues, is to be taken literally."

11 I add to para. 15 of the directions: "Whilst what LT and SM said in interview is to be taken into account when considering their guilt or innocence, it is not evidence given on oath or affirmation, and it has not been tested by cross-examination."

12 The Crown has been criticized for using the words "theft" and "stealing" in describing the dissipation of client money from client accounts. I have reminded myself of ss. 5(3), 6(1) and 6(2) of the English Theft Act 1968. Section 5(3) states:

"Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other."

Section 6(1) states:

"A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal."

Section 6(2) states:

> "Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights."

See also *R.* v. *Fernandes* (1).

13 I comment: An intention to repay money appropriated, a hope to do so, or the lack of any wish that the "victim" should lose money is relevant to the issue of dishonesty, but none are otherwise elements in an intention to defraud. If a defendant is proved to have taken the risk of prejudicing another's right then, subject to proof of dishonesty, it is no answer to say "I always intended to repay," or that "but for the untimely intervention of the authorities, X or Y or both would have got their money back."

14 I approach this case on the basis that no defendant either wanted the "victim" to lose his or her money and that each, at the least, hoped that the money would be repaid. It has to be said the evidence suggests that such hopes became increasingly forlorn.

15 BM has asserted, repeatedly, that, had there been a better controlled and more subtly nuanced intervention into Marrache & Co. ("M & Co."), there would have been sufficient funds to pay out the creditors. In my judgment, that is unlikely to be true, but I do not need to make a decision as to that because it is irrelevant to his guilt or innocence. The overt acts upon which the Crown relies preceded any intervention. Dishonesty, if proved, had already taken place. I have no regard for his allegations of a conspiracy within the authorities to bring down M & Co. The downfall of M & Co. was caused by the conduct of those within the firm. The actions of the authorities, whatever the motive or motives, simply operated to expose what had already been done.

The background

16 From the admitted facts:

> "1. Marrache & Co. was a law firm based in Gibraltar (with offices in London and Sotogrande), which specialized in the provision of legal and corporate services to corporate and private clients, including the formation and operation of trusts. Its principal office in Gibraltar was at 5 Cannon Lane. The firm operated a trust company, Cabor Trustees Ltd., whose principal office was at 292 Main Street, and a corporate management business, Gibland Services Ltd., whose principal office was at 206–210 Main Street.

2. The two partners of the firm were (a) [IM], the Senior Partner, based in the London office (at 15 Hanover Square, W1), but also with an office at 5 Cannon Lane; and (b) [BM], the Managing Partner, based in the Gibraltar office.

3. The "Finance Director" of the firm was [SM], based in the Gibraltar office, who was the senior employee of the accounts department of the firm.

4. [LT] was employed as senior managing clerk and worked in the conveyancing department based in the Gibraltar office.

5. Staff of Marrache & Co, Cabor and Gibland were employed by Kristy Secretarial Services Ltd., a service company connected to the firm. The directors of Kristy were Equity Nominees Ltd. and Gibland Nominees Ltd."

17 M & Co. was founded by IM. He was called to the bar in England in 1982. He did a pupillage in London. He returned to Gibraltar in 1983 to assist his father, Samuel Marrache. The father was married to Reina Massias. They had seven children. Abraham ("AM") was the oldest followed by IM, Joshua, Rebecca, Raphael, SM and BM.

18 AM made his career in banking outside Gibraltar. He currently lives in England. He has no professional qualification in law or accountancy. He became involved in M & Co. at the invitation of IM, and at a late stage. He was the only witness called by IM and was the only material witness called by the defence. He exhibited considerable animus to BM, describing him as a sociopath.

19 AM left regular employment in 2000 with a pension of £12,200 a year and what he described as a "golden parachute." Thereafter, he worked as a consultant on occasions with IM. He said that M & Co. would bill the client for his fees and then pay him. He was involved with the attempt to set up the Close-Marrache Bank and with the Boyd project. He received payments from M & Co., sometimes funded from client accounts. He said he was unaware of this. He asserted that these payments were not "from M & Co.," who were not parties to either Close-Marrache or the Boyd project, but payments authorized by IM and (tacitly) by BM, who were. He was unable to account for the fact that when his son Sam had worked for Hanover, his wages were paid by M & Co. Hanover was the London equivalent of Gibland. This aspect of his evidence was wholly unconvincing and, coupled with his obvious animus towards BM, makes it necessary to approach all of his evidence with caution.

20 Neither Joshua nor Raphael had any legal qualifications. Neither was ever employed by M & Co., nor any associated company. Both benefited substantially at the expense of M & Co.

21 Having returned to Gibraltar, IM began to practice law and that practice became M & Co. His father owned properties which included Fortress House, the family home, and a derelict office building at 5 Cannon Lane. IM worked from 5 Cannon Lane and Rebecca became his secretary/receptionist. As the practice expanded, so the premises were renovated and staff employed. Among the earliest were Carol Haw, an unqualified but experienced legal managing clerk specializing in corporate and commercial work, and Gabriel Garcia Benavides, a qualified Spanish lawyer who ran the Spanish department. The Spanish department is to be distinguished from the Spanish office in Sotogrande, which was opened in 2009 and which plays no significant part in this trial. At first, Carol Haw worked principally for IM. Latterly, she worked for both IM and BM.

22 It is a necessary inference that IM was responsible for setting up the accounting systems and procedures of M & Co. He does not claim to have been ignorant of the requirements of the Solicitors' Accounts Rules, although he said in interview that he was "not trained in them." The Solicitors' Accounts Rules came into effect in 1973. In those Rules, at r.2, "solicitor" is defined as "a person admitted and enrolled as a solicitor of the court, and includes any person admitted and enrolled as a barrister and acting as a solicitor under section 32 of the Act." M & Co. held itself out to be barristers and solicitors.

23 From the admitted facts:

> "15. Throughout the period of count 1, M & Co. was obliged by rules made by the Supreme Court of Gibraltar (known as Solicitors' Accounts Rules) not to draw money out of a current or deposit account held with a bank and designated as a 'client account' unless the money was:
>
> - properly required to be paid to, or on behalf of, the client;
> - properly required to pay a debt owed to the firm by the client or to reimburse the firm for money it had paid out on behalf of the client;
> - drawn on the client's authority; or
> - properly required to pay the firm's costs where a bill of costs had been delivered to the client and the client had been informed the money would be paid towards those costs."

24 BM qualified as a barrister in the United Kingdom. He did not do a pupillage in England, but when he returned to Gibraltar in 1988 was pupilled to IM. BM asserts that (a) IM never taught him anything, but what he learnt came from Carol Haw; and (b) the system, whereby client money was mixed with other funds and used indiscriminately, was already

in place. It is central to his defence that he had no idea of the requirements of the Solicitors' Accounts Rules. He became the "Managing Partner."

25 SM worked for M & Co. in 1986. Subsequently, he studied economics in New York. In 1996, he returned to Gibraltar and was given the title of Financial Controller/Director. Whatever title he was given, he was in charge of the accounts department. He had no legal qualification, nor any accountancy qualification. He was not, and could not have been, a partner of M & Co. Some staff thought he was a partner. Some treated him as if he were one. Although salaried and unqualified, he took substantial drawings from M & Co. Although he was not liable for the debts of the partnership, he was nevertheless made bankrupt with IM and BM, which is an indication of how he was regarded.

26 When interviewed by the police following his arrest, he said that he was aware of the "old Solicitors' Accounts Rules and that they had been upgraded."

27 LT joined the firm in about 1996 and was head of the conveyancing department. She was also a director of Cabor.

28 One of IM's early successes arose in 1988 when he was appointed solicitor to the liquidator of Barlow Clowes. The liquidator was W, then of Ernst and Young but latterly CEO of YZ. W and IM worked closely together. YZ became the accountants for M & Co. and produced the annual accounts and the certificates of compliance with the Solicitors' Accounts Rules. YZ and W enjoyed high professional repute.

29 Samuel Marrache died in 1996. His properties, and the family tobacco business, A.S. Marrache & Son, were left in trust. Each property was owned by a company. The beneficial owners of the companies varied. The beneficiaries were the brothers. The trustees were AM, IM, SM and BM. AM had little to do with the running of the trust. Reina Marrache had the income produced by the trust "for life." She continued to live in Fortress House and was cared for by Rebecca who, with her children, also lived there. Reina Marrache died in May 2008. Rebecca continued to live at Fortress House.

30 It is unnecessary to go into how 6–10 Cannon Lane became part of the Marrache portfolio, but its acquisition led to M & Co. purchasing 34/4 Cornwall's Lane for Rebecca.

31 It is beyond doubt that in the running of M & Co., no distinction was made between the firm and the family. By way of illustration, the upkeep of Fortress House (which included staff) was paid for by M & Co. Raphael and Joshua Marrache received "drawings" from the firm. M & Co. never paid rent for the offices at 5 Cannon Lane. It was M & Co. who bought 34/4 Cornwall's Lane for Rebecca. Although IM claims that his personal drawings were inflated and included expenses incurred for

business purposes, the evidence is that M & Co. paid for the living expenses of IM, BM and SM. I am not going to rehearse the cross-examination of IM and BM on this topic. It is also proved that M & Co. paid off the credit cards of IM, SM and BM, with no distinction being made between personal and business expenses. I am satisfied that AM's drawings come into the same category. They were not separately authorized by either IM or BM.

32 From the admitted facts:

> "6. On February 8th, 2010, the Financial Services Commissioner of Gibraltar appointed Frederick White as Authorized Administrator of Gibland and Cabor.
>
> 7. On February 11th, 2010, the Supreme Court of Gibraltar appointed Adrian Hyde as Equitable Enforcement Receiver of Marrache & Co. to enforce a judgment debt obtained by consent in the capital sum of €1,786,900, obtained against the firm and the first three defendants in favour of Portino Comercio SA.
>
> 8. On February 15th, 2010, the Supreme Court of Gibraltar appointed Adrian Hyde and Edgar Lavarello as Joint Provisional Liquidators of Marrache & Co.
>
> 9. On February 24th, 2010, the Chief Justice of Gibraltar appointed Frederick White as Authorised Administrator of Marrache & Co. On January 6th, 2011, the Chief Justice terminated the appointment with effect from December 21st, 2010.
>
> 10. On March 17th, 2010, the Supreme Court of Gibraltar ordered the winding-up of Marrache & Co., and confirmed the appointment of Adrian Hyde and Edgar Lavarello as Joint Liquidators of the firm.
>
> 11. On November 26th, 2010, IM, BM and SM were adjudicated bankrupt by the Supreme Court of Gibraltar, pursuant to the Portino judgment that had remained unpaid."

33 The indictment reads:

"IN THE SUPREME COURT OF GIBRALTAR

THE QUEEN

-v-

ISAAC SAMUEL MARRACHE

BENJAMIN JOHN SAMUEL MARRACHE

SOLOMON SAMUEL MARRACHE

&

LEANNE TURNBULL

Who are charged as follows:

COUNT 1

STATEMENT OF OFFENCE

Conspiracy to defraud, contrary to Common Law

PARTICULARS OF OFFENCE

ISAAC SAMUEL MARRACHE, BENJAMIN JOHN SAMUEL MARRACHE, SOLOMON SAMUEL MARRACHE and LEANNE TURNBULL between the 1st day of July 2004 and the 9th day of February 2010 conspired together to defraud clients of Marrache & Co. ('the firm'), and or trusts connected to such clients, by dishonestly:

i. Causing and permitting monies and/or credit balances in bank accounts belonging to, or due to, those clients and trusts to be transferred out of clients accounts of the firm;

ii. Causing and permitting the said monies and/or credit balances, or their proceeds to be misapplied by way of:

a. transfers to other clients accounts of the firm;

b. transfers to office accounts of the firm;

c. payments of staff wages and other operating costs of the firm;

d. payments representing the drawings of Isaac Samuel Marrache, Benjamin John Samuel Marrache and Solomon Samuel Marrache from the firm;

e. redemption of mortgages on properties beneficially owned by Isaac Samuel Marrache, Benjamin John Samuel Marrache and Solomon Samuel Marrache, and/or by others unconnected to clients of the firm;

f. other payments for the benefit of Isaac Samuel Marrache, Benjamin John Samuel Marrache and Solomon Samuel Marrache or others; and

g. other payments, unconnected to, and not authorised by clients of the firm; and

iii. Causing and permitting the creation of documents, such as internal ledgers, client account statements, other accounting documents and written communications to clients, which (a)

concealed the misapplication of client monies; and (b) showed false and misleading balances in client accounts.

COUNT 2

STATEMENT OF OFFENCE

Conspiracy to defraud, contrary to Common Law

PARTICULARS OF OFFENCE

ISAAC SAMUEL MARRACHE, BENJAMIN JOHN SAMUEL MARRACHE, SOLOMON SAMUEL MARRACHE and LEANNE TURNBULL between the 1st day of January 2009 and the 9th day of February 2010 conspired together to defraud:

a. Clients of Marrache & Co. ('the firm'), and/or trusts and companies associated to clients; and

b. Jyske Bank (Gibraltar) Ltd.; by dishonestly:

i. causing and permitting properties beneficially owned by clients of the firm, or associated trusts and companies, to be used, or offered as security, for overdraft facilities of the firm with Jyske Bank; and

ii causing and permitting the execution of a mortgage over 77 Ragged Staff Wharf, Queensway Quay, Gibraltar, a property beneficially owned by a company and trust associated with the firm, in order to secure the indebtedness of the firm and/or its partners and principals to Jyske Bank."

The issues

IM

34 When IM was cross-examined, Mr. McGuinness, Q.C. took him through each of the overt acts pleaded in each count. IM accepted that each had been proved. In his closing speech, Mr. Cooper, Q.C. accepted that this was the case. IM in evidence accused his brothers BM and SM as being responsible for that conduct which he accepted was criminal. He was inclined not to include LT as a conspirator, albeit he had done so when interviewed by the police. Mr. Cooper was not prepared to exclude LT from the conspiracy.

35 The issue, said Mr. Cooper, was knowledge. He accepted that by December 16th, 2009, IM had acquired knowledge of what had happened

but argued that that did not make IM a party to the conspiracy: IM was seeking to save M & Co., not prolong the criminality.

36 If I find that there was a conspiracy between BM and SM the issue can be shortly stated: "Have the prosecution proved that he knew of and was a party to the activities of BM and SM?"

BM

37 He also accepted that the Crown had proved each of the overt acts alleged in counts 1 and 2. I quote from Mr. Lovell-Pank, Q.C.'s final submission:

> "**How the Crown puts its case.**
>
> It is unnecessary to spell out again the Crown's case against [BM]. Mr. McGuinness's note for his final speech identifies the only live issues as:
>
> Knowledge of what was happening.
>
> Being a party to what was happening.
>
> Dishonesty.
>
> We agree.
>
> In [BM's] case the only real live issue is dishonesty.
>
> [BM's] part is summarized at 25–33 of the closing."

The issue is: "Have the prosecution proved that, in acting as he did, [BM] was dishonest and that he was acting in concert with another named conspirator?"

SM

38 No significant challenge was made on his behalf by Mr. Finch to the Crown's evidence as to the overt acts. In his closing address, Mr. Finch said:

> "Reference count 1, there is no dispute that clients [who] deposited monies with M & Co. have experienced losses of those monies to a greater or lesser extent due to the way the firm managed those funds. No issue is taken to the original banking documentation covering the relevant transactions . . .
>
> Reference count 2, there is no dispute that certain client properties that did not belong to M & Co. (not Rebecca's property) were used to obtain banking facilities."

39 I do not understand the caveat as to Rebecca's property, given the contents of the admitted facts and what SM is proved to have said on the

"Rebecca tapes." BM said that he regarded 34/4 Cornwall's Lane as part of the family portfolio. SM did not give evidence. I read these two paragraphs as an admission that the Crown has proved the overt acts alleged in count 1 and count 2. There is no question but that SM was a party to those overt acts.

40 The issue is: "Has the prosecution proved that [SM] was acting dishonestly and in concert with at least one other named conspirator?"

LT

41 At no stage was any challenge made to the evidence of the overt acts pleaded in count 1 and count 2 by any counsel representing LT. As appears from Ms. Cotcher's speech, the issues in her case are participation, knowledge and dishonesty.

42 In these circumstances, it is unnecessary to set out in any detail the "overt acts." The evidence of the movement and use of client money can be seen in the timelines and the graphics to be found in the jury bundle. The evidence of Azopardi, Risso, Halle and Carlton was read. What happened to the money paid into M & Co. client accounts on behalf of Magner, Burrow, Burrows and Doyle (or the trusts they represented) was not the subject of challenge. I shall only refer to specific areas of their evidence where it is necessary to resolve what I have identified as the issues.

Evidence of Luke Steadman

43 Mr. Steadman is the forensic chartered accountant who was instructed by the Royal Gibraltar Police to assist in their enquiry into the collapse of M & Co. His report was considered and accepted as accurate by Cobham Murphy Ltd., the forensic accountants instructed on behalf of all defendants.

44 Although criticisms have been made of Mr. Steadman's conclusions, his findings, as set out in the schedules and charts that he prepared, have not been the subject of any valid attack. I shall deal with the two principal criticisms from para. 49 onwards. It is convenient to set out his conclusions as they appear in his witness statement (at paras. 86–89), which he adopted as his evidence-in-chief.

> "86. At June 30th, 2007 the following differences have been identified:
>
> (a) Totalling **£10.3m.** as between the amounts recorded in accounting ledgers as due to clients of Marrache & Co. (£10,759,321—Schedule 4) and amounts held in client bank accounts (£486,185—Schedule 3.3).

(b) Totalling **£10.3m.** as between the amounts recorded in accounting ledgers as due to clients of Marrache & Co. (£10,759,321—Schedule 5) and balances reported as due to clients by YZ in Accountant's Report Forms required under Solicitors' Accounts Rules (£464,947—Schedule 5).

(c) Totalling **£10.3m.** as between the amounts of Client Bank Balances used in the compilation of the Financial Statements of Marrache & Co. (£10,759,798—Schedule 5) and balances reported as held in client bank accounts in the Accountant's Report Forms (£465,688—Schedule 5).

(d) Totalling **£9.4m.** as between the total of the profits of Marrache & Co. for the years ending June 30th, 1998 to 2007 (£3,581,113—Schedule 1) and the total amounts recorded in the accounting ledgers of Marrache & Co. as payments to [BM], [IM], [SM], family members and in respect of Fortress House over the same period (£12,950,845—Schedule 6).

87. In the period 2006 to 2007 a total of £4.4m. of drawings (Schedule 6) paid to [BM], [IM], [SM], family members and in respect of Fortress House have been disguised as arriving at the Financial Statements by means of journal entries, the effect of which is to overstate Client Bank Balances by £5.5m. (see paragraphs 83, 84). Additionally further journals totalling £4.8m. (see paragraphs 60, 65) were debited against revenue and had also the effect of overstating Client Bank Balances by this additional amount (a total of £10.3m.) and reducing drawings recorded in the Financial Statements.

88. No financial statements are available after June 30th, 2007. As regards to the Four Alleged Victims, the difference between amounts due to them (as recorded in their respective client ledgers) and the total of all office and client bank accounts maintained by Marrache & Co. at March 2010 was **£11.5m.** (Chart 3).

89. As an accountant I conclude that payments categorized as drawings in the accounting records of the Marrache Businesses and paid to or on behalf of Marrache family members were not paid exclusively from the available profits of the Marrache Businesses. By June 30th, 2007 at least £10m. had been paid out of amounts held for clients." [Emphasis in original.]

45 YZ was responsible for preparing and submitting the financial statements of M & Co. to the Commissioner of Income Tax. On March 17th, 2009, it submitted statements for the years 2005, 2006 and 2007. The submission was by W and each was signed by IM on January 20th, 2009. The balance sheets were signed by IM and BM. YZ was also

responsible for preparing and submitting the certificates of compliance with the Solicitors' Accounting Requirements.

46 Mr. Steadman was highly critical of both the financial statements and the Solicitors' Accounting Requirements. His criticism was endorsed by Cobham Murphy who reported.

"SECTION 7

[YZ] INVOLVEMENT

> [YZ] accepted appointments as accountants to Marrache & Co. as auditors and accounts to Cabor Trustees Limited and Gibland Secretarial Services Limited.
>
> These are significant appointments which carry a high degree of responsibility to adhere to professional standards and to comply with all regulatory requirements.
>
> The findings and conclusions of the Luke Steadman witness statement cast severe doubt on the action of [YZ] in carrying out its assignments for the Marrache businesses.
>
> The Financial Services Commission appointed inspectors to undertake a review of the work carried out by [YZ] as Auditors to Cabor Trustees Limited and Gibland Secretarial Services and the outcome of that review was that the [YZ] director responsible for the assignments was held to have failed to act as a competent auditor and had not complied with the relevant professional standards required of him.
>
> Two independent experts, Luke Steadman and Deloitte, had reached similar conclusions about [YZ's] involvement in the preparation and audit of Financial Statements for the Marrache businesses. Those Financial Statements failed to give a fair and accurate view of the businesses and masked the true movement of funds during the years under review.
>
> Records were maintained in the businesses which included all transactions. Those transactions were recorded on a SAGE accounts package and as is normal with small businesses, the SAGE would be provided to the accountants to prepare the financial statements.
>
> The evidence reviewed suggests that the information provided to [YZ] should have been sufficient on its own for accurate accounts to be prepared and if that information had been properly processed then the financial statements would have shown significantly overdrawn partners' capital accounts and the wide gulf between the sums owed on client account and the available funds to repay those liabilities.

The Financial Statements and Returns made to the Solicitors' Regulation Authority bore no resemblance to the accounts that should have been produced from the prime records and SAGE data available to [YZ].

The difference between the final accounts and the SAGE data provided were achieved by means of Journal entries made by [YZ]. Journal entries are adjustments made to accounts to correct errors and mis-postings so as to produce accurate accounts.

Attached at Appendix 7 are copies of the journal adjustments made to the accounts for the year ended June 30th, 2006. The records maintained by Marrache & Co. show the following balances:

- Liability to clients £12,350,439.65
- Cash held on behalf of clients £4,623,573.00
- Partners' drawings £3,740,816.43

After the journal adjustments were made by [YZ] the partners' drawings were amended to £432,381.38—this is the figure that was included in the final accounts for that year.

The extended trial balance shows that journal adjustments totalling £2,726,866.65 were made to the figure of clients' cash held—the revised figure of cash held was then increased to £12,350,439.65. This equates to the liability to clients. This is however merely a paper adjustment and not the introduction of additional funds to cover the sums due to clients.

The adjustments made are large adjustments—both in real terms and when compared to the annual turnover for that year—and I would therefore have expected there to be a full explanation of the reason for these adjustments. The papers provided do not include any notes of explanation, nor any notes of discussions with clients regarding the reason for these extremely large adjustments.

Those journal adjustments, therefore, have not been made to correct the Accounts and, in fact, totally distort the true position which was reflected in the business records provided to [YZ] by Marrache & Co.

In 2007, the same position arises. The extended trial balance and journal adjustments are attached at Appendix 8.

The records provided to YZ show the following balances:

- Liabilities to clients £7,828,600.60
- Clients' cash held £2,545,822.81

- Partners' drawings £3,031,103.33

The following journal adjustments were then made:

- £2,930,720 debited to client cash held and credited to liabilities to clients. This has the effect of increasing the sums due to clients and the cash held on their behalf. Again the cash held is increased without any actual funds being introduced.
- A debit to client cash held of £10,374,900 with the corresponding entries being credits of £2,782,596 to revenue £3,392,303 to partners account and £2,000,000 to partners' drawings. Again this has the effect of increasing the figure of cash held on behalf of clients without the actual introduction of any real monies—it is a paper adjustment only.

Again, neither explanations nor notes of meetings with clients for the adjustments to be discussed or agreed have been provided—in view of the quantum involved I would expect there to be extensive documented notes of explanation from the senior manager and/or partner responsible for the client.

The journal entries for the year ended June 30th, 2006 are dated March 20th, 2007. It is therefore clear that by March 20th, 2007 at the latest, [YZ] were aware that there were problems with the client account. If appropriate action had been taken at that point, the unauthorized withdrawals from the client bank accounts may well have ceased and the shortfall would therefore have been a much lower figure.

Furthermore the accountants were responsible for completing and submitting the SRA form within 6 months of the accounting period end. They have a duty to notify SRA immediately under the 1998 rules if there was any evidence of fraud or theft in relation to client monies. They failed to comply with that requirement.

Witness statements have not been provided by the senior [YZ] personnel who were responsible for the accountancy and audit work and there is no clear explanation about why they produced or authorized adjustments to the financial statements which failed to give an accurate and fair view of the businesses' affairs."

I have included this section of the defence expert's report as a matter of convenience. It replicates the evidence of Mr. Steadman but is concise. It was effectively agreed evidence.

47 The Crown originally described this evidence by YZ as "cooking the books," a phrase which has been adopted by others. The two people responsible at YZ for the M & Co. accounts were W and his subordinate X. Both are to stand trial for false accounting. It is unnecessary for me to

determine whether one or both was responsible. I shall refer to them collectively as YZ.

48 I am satisfied as to be sure—

(i) that YZ did indeed "cook the books"; and

(ii) that they did so for the benefit of M & Co. There was no benefit to YZ.

49 In my judgment, it is inconceivable that they would have done so without informing the partners and SM.

Criticism of Mr. Steadman

50 The first criticism was that he assumed that the entries on the M & Co. accounting system (Sage/Liberate) were accurate. It was suggested by IM that the entries for his drawings were inaccurate in that they included expenditure which should have been designated as business expenses. He referred in particular to entries which he asserted related to Paul Bloomfield.

51 The court heard from a number of witnesses who had worked in the accounts department of M & Co. It was not suggested to any of them that they deliberately made false entries on the system.

52 Gary Rivett was employed as a legal cashier at M & Co. from 2005 until November 2007, when he was dismissed. He had previously worked for HSBC as a "loans clerk." Significantly, he had also worked for a firm of solicitors for two years. His line manager was SM.

53 He was dismissed by BM, who told him his services were no longer required and that M & Co. wanted someone with more experience. He was replaced by Liza Franklin, who had begun at M & Co. on July 30th, 2007 as an assistant accounts clerk. She had no experience of solicitors' accounts and was given no instruction. I regard the dismissal of Gary Rivett and his replacement by Liza Franklin as significant.

54 Originally, the office accounting system was Sage but it was changed to Liberate. In Gary Rivett's witness statement, which he accepted was accurate, he said:

> "When the Liberate system was introduced in 2007, Wendy Alsop and I reconciled the client ledgers, held on Sage spreadsheets and cashbooks. However, although the individual clients' ledgers were correct, the funds in M & Co. client bank accounts did not reflect this, as the balance shown on all the ledgers was higher than the actual funds held in the bank accounts."

55 He was cross-examined as to his "draft witness statement" but saw no significant difference. He was clear that the amount of money held in

the client ledgers was higher than the money held by M & Co. in its client bank accounts.

56 He kept the records of financial transactions, money in and money out. He reported every day to SM, telling him of what cheques had been written, what transfers made and the balances. The balances held by clients were on the Sage/Liberate system.

57 He said: "The accounts kept by the accounts department were as accurate as they could be. We did not tinker with the figures. YZ did the annual audit. That was the only point of contact. They did not query any account with me."

58 Liza Franklin worked in the accounts department until November 2009. She said: "As far as partners' drawings were concerned anything paid out was not put on 'Liberate.' There was a separate spreadsheet for each brother and each brother got a copy of his own and the other brothers' spreadsheets."

59 Vanessa Plumb, who was IM's Gibraltar-based personal assistant, said that all IM's credit cards, of which there were a number, were paid by Gibraltar. IM decided what should be paid on them and would give her instructions.

60 Daniel Tavares worked for M & Co. from October 2005 to February 9th, 2010. As part of his job he produced records for the partners—by which he meant IM, BM and SM. He produced the "Yearly Drawings Summary," an example of which is NR/IE/1 (1161) for 2009—the records for the drawings of each "partner" for each month.

61 As can be seen, for the period of January 1st–October 1st, 2009, the drawings attributed to IM were £217,602.84, to BM £242,982.44 and to SM £234,753.57. Each partner was provided with a copy of this document. He also produced monthly records of the drawings of each "partner." These were provided to each partner.

62 He said that as far as he knew the information put into the Sage/Liberate system was correct. He did not recall any partner ever querying his figures.

63 In respect of IM, he said that the documents were either emailed to him or left in his office to await his next visit. At first, IM was visiting the Gibraltar office every couple of months but, towards the end, more frequently. In the last two months he was coming every week.

64 From July 2009 onwards, IM wanted to know more and more about what was happening in Gibraltar. He was more interested in the "drawings," but he already knew what the figures were. He (IM) had been sent them.

65 I am satisfied that the entries on the Sage/Liberate system were in general terms accurate and that Mr. Steadman was entitled to rely upon them. Mr. Steadman pointed out that there were corrections made to the entries which supported his conclusion.

66 I comment at this stage that, however busy IM was, and I accept the evidence that he was busy, he had available the information to challenge any attribution to his drawings contemporaneously. He has asserted that his brothers BM and SM were inflating his drawings artificially. There is no evidence to support that suggestion and I reject it. IM was sent the figures entered on to the system by the staff.

Bloomfield

67 Initially, IM portrayed Bloomfield as "a major property dealer" and as such a man of substance. He said that Bloomfield had a close personal relationship with John Roberts of Multiplex and, as a result of his consultancy work with Multiplex, set up a company called "Construction Strategists." M & Co. held funds for Bloomfield or his company.

68 IM said: "I was 24/7 on the go in relation to Bloomfield's property and development projects." IM met Norman Foster through Bloomfield. He and Bloomfield had a close professional relationship: "If we travelled, [Bloomfield's] expenses would be met by [IM's] credit card and deducted from the client account. It got to the state where I obtained a further credit card from the Royal Bank of Scotland for Bloomfield's use." In fact, IM produced a photocopy of the credit card dated November 29th, 2007. IM was the principal card holder and Bloomfield the secondary. IM said: "It was issued so that Bloomfield could use it then it could be deducted from his client account in Gibraltar."

69 IM also claimed that his Diner's Club Card was used by Bloomfield. There was evidence to support his contention that his credit card was used to pay for Bloomfield's travel expenses—a trip to Iraq—with Scotts Tours.

70 IM also disclosed in evidence that, on occasions, he would draw substantial sums in cash in Gibraltar which he would deliver to Bloomfield in England. He said that the £10,000 on the credit card was not enough so Bloomfield would ask for cash. This material raises a number of questions. Why, if Bloomfield was so successful, did he not have his own credit cards? Why did he need IM to deliver cash from Gibraltar? If particular credit cards were dedicated to Bloomfield, why were the staff in the accounts department not given a specific instruction as to that?

71 Mr. Bloomfield's status was raised with Mr. Burrow, a solicitor and partner in SJ Berwin. He described Mr. Bloomfield as a "property runner" who had falsely claimed to be owed £331m.–£332m. by Mr. Burrow. No

action had been taken to pursue that claim. He described Mr. Bloomfield as both "delusioned" and as being in dire financial straits.

72 Steven Daultrey said that he had heard of Paul Bloomfield, a significant property developer who had spent a lot of time in the London office. But Bloomfield was not involved after May 2005.

73 The evidence that IM gave was unconvincing. At one stage, he suggested that his arrangement with Bloomfield in respect of the credit card and the supply of cash was because Bloomfield "was concerned about tax."

74 It was suggested that these arrangements were more in keeping with Bloomfield being an undischarged bankrupt, a suggestion which initially appeared to be denied. However IM eventually said:

> "In the past Bloomfield had been bankrupt. When he came to us as a client, his bankruptcy had ended. He did have a bankruptcy petition for non-payment of rent. Steven Daultrey dealt with that, settled the rent and the petition was withdrawn. It was in 2009, we discovered he'd been a bankrupt. He did not disclose it to us. He was a very wealthy and respected businessman."

75 I am satisfied that the picture of Bloomfield initially presented on IM's behalf and initially supported by IM in evidence was false. I am satisfied that there was no deliberate inflation of IM's drawings. I am satisfied that, in general terms, the figures produced by the accounts department and relied on by Mr. Steadman are reliable.

76 The second ground for criticism of Mr. Steadman relates to the Lexcas accounts. Lexcas was a Gibraltar registered company through which the Spanish Department of M & Co. conducted its financial transactions. It held accounts with Barclays Bank (Sotogrande branch), La Caixa and Banco de Andalucia. The accounts of the Spanish department were separate from the Gibraltar accounts of M & Co. and did not feature on the Sage/Liberate system. As a consequence, Mr. Steadman did not have them when he wrote his report.

77 The relevance of this omission is said to be threefold:

(i) it is said to undermine Steadman's conclusions;

(ii) it is asserted that there were substantial funds in the Lexcas accounts which should have been taken by the liquidator and were not; and

(iii) that these funds are directly relevant as to whether the three brothers believed that there were funds available to pay out clients.

78 In his interview (at para. 9), SM is reported as saying, in relation to the sufficiency of funds in the M & Co. client account, that the firm also

had a client account in Spain—Lexcas. Lexcas had bank accounts in Spain with three banks and its accounts were mixed client accounts and office accounts. Without the Lexcas accounts, the police did not have the "whole information." He agreed that Lexcas was the missing link. His department did not handle the Lexcas accounts; that was the Spanish Department under Gabriel Garcia Benavides.

79 Charles Gomez, acting for BM, wrote to Messrs. Cruz & Co. on July 4th, 2013. Cruz & Co. acted for a company called PWC, who had managed Lexcas Ltd. since March 21st, 2011. He asked for copies of all bank statements for Lexcas Bank accounts at Barclays, La Caixa and Banco de Andalucia for the years 2003–2010 and a variety of other documents. Apparently this letter was not answered. No application was made to me.

80 In October 2013, a witness summons was issued at the request of IM which required Mr. Edgar Lavarello, the joint liquidator of M & Co. to produce, for the period 2003–2010—

(i) the accounts of Lexcas Ltd.;

(ii) all account statements and data in respect of Lexcas accounts for the above period; and

(iii) all accounts and/or ledgers in respect of the above-mentioned Lexcas accounts.

81 Mr. Lavarello produced the following:

"Further to the summons dated October 21st, 2013 which was received at our offices on October 25th, 2013, please find enclosed the following documentation in respect of the bank accounts held in the name of Lexcas Limited for the period from 2003–2010.

(1) Covering letter from Grant Thornton enclosing the following:

(a) Barclays Bank, Sotogrande—Account Number . . .

(b) Barclays Bank, Sotogrande—Account Number . . .

(c) Barclays Bank, Sotogrande—Account Number . . .

(2) La Caixa, Spain bank statements:

(a) Account Number . . . —Batch 1 (Period 31.08.03–31.12.09)

(b) Account Number . . . (Date–19.03.04)

(c) Account Number . . . (Copies for period 02.01.07–09.01.07 + 03.01.09–16.02.09 + 01.01.10–27.08.10)

(d) Account Number . . . (Copies for period 01.01.07–01.01.08 +

01.01.08–29.12.08 + 02.01.09–03.09.09 + 01.01.10–19.02.10 + 14.07.10–01.08.10)

(e) Account Number . . .

– Credit number . . . (Period 07.03.05–07.08.06)

– Credit number . . . (Period 07.01.05–07.08.06)

– Credit number . . . (Period 07.12.04–07.03.06)

Edgar C Lavarello

Joint Liquidator of Marrache & Co.

Dated this 29th day of October 2012."

82 Mr. Steadman was shown these documents in the course of his cross-examination. He had the opportunity to consider them overnight. His conclusion was that the content did not affect his conclusions in any material way. I accept that evidence.

83 In evidence, BM relied heavily upon the absence of evidence relating to the Lexcas accounts, saying that there were substantial sums of money held in the Lexcas account or alternatively that he believed there were substantial funds in the Lexcas account. At one point, he asserted that there were "millions in the Lexcas accounts." More than once, when asked by Mr. McGuinness to explain the disappearance of client money from Gibraltar, he proffered the explanation that there would have been a set-off against money in a Lexcas account. BM also asserted that he was constantly asking Gabriel Garcia Benavides to provide accounts for the Lexcas accounts. He said that Garcia Benavides did not comply with these requests. IM also relied on the absence of the Lexcas accounts and asserted that there were substantial profits being made by the Spanish Department.

84 I comment:

(i) The absence of the Lexcas accounts was not drawn to the attention of Messrs. Cobham Murphy.

(ii) The Lexcas accounts were mixed accounts. If they contained substantial sums of money, a high proportion of such money would have been Spanish client money and not available to pay out to Gibraltar clients.

(iii) The Spanish department dealt mainly with conveyancing. The Spanish property market was badly hit following the banking crisis of 2008.

(iv) SM was a signatory on the Lexcas accounts. This was the evidence of Garcia Benavides and confirmed by BM.

(v) Gabriel Garcia Benavides was a salaried employee. He was regarded, certainly by IM, as a trusted employee. He was invited to the meeting of December 18th, 2009 with Carol Haw and LT.

(vi) Given IM's professed ignorance of the Gibraltar accounts, it is difficult to see from where he acquired this information.

(vii) It is only BM who asserts that Benavides was deliberately obstructive. Although he was accused of theft from the Lexcas accounts, it was not suggested in cross-examination that he was deliberately obstructing the partners accessing funds in the Lexcas accounts. Both Carol Haw and AM refer to him reporting on the position of the Lexcas accounts at the December meeting.

(viii) Given the desperate state that M & Co. were in in late 2009, had Gabriel Garcia Benavides been obstructive, he would have been dismissed and the funds accessed.

(ix) Carol Haw's evidence is that when desperate attempts were being made to provide evidence to the ADC, that there was enough money in M & Co. to pay Mrs. Halle and that the London (Steven Daultrey) and the Spanish departments (Gabriel Garcia Benavides) were asked to help and that neither had sufficient funds to cover the relevant period.

(x) Mr. Hyde said that initially his powers as liquidator did not apply to the Spanish accounts but that an application was made in Spain and in the end he received the balance, a total of €100,000.

85 I am satisfied that there was no substantial "pot" of money available in the Lexcas accounts to enable M & Co. to pay out Gibraltar clients or other debts, for example stamp duty, tax and social security.

86 I am equally satisfied that the evidence of BM as to (i) Garcia Benavides, (ii) substantial funds in Lexcas, and (iii) his belief that there were such funds is simply untrue.

The Solicitors' Accounts Rules

87 The point is made that a breach of the Solicitors' Accounts Rules is not a criminal offence. Mr. Lovell-Pank, Q.C. stated that BM accepted that M & Co. were in breach of the Solicitors' Accounts Rules. "The client account was considered by BM to be run as a 'pooled account' into which amongst other funds, went fees and money personal to BM and his brothers." He might have added that money was taken out of the client account to pay for, *inter alia*, partners' drawings, staff salaries and the upkeep of Fortress House. The use of money from the client accounts was indiscriminate and opportunistic.

88 The primary purpose of the Solicitors' Accounts Rules is to protect client funds. Subject to any agreed variation, when a client puts money in

a solicitor's client account, his expectation is to be able to recover that amount of money on reasonable notice. The secondary purpose is to protect the solicitor. If the Rules are followed, there can be no dispute as to a client's entitlement.

89 The regime is not voluntary. Both IM and BM had a legal obligation to comply with the Rules—IM accepts that he was under that legal obligation. He claims credit for the fact that the London office complied with the Rules. It is to be noted that the obligation in London only arose when the client account was opened in October 2008 and that the managing partner, Steven Daultrey, was very well aware of the requirements.

90 If IM is right to claim credit for the London office compliance, it must follow that he was aware of the requirements of the Solicitors' Accounts Rules. He does not deny that he was aware of the Rules, although in his interview he said that he was not trained in them. I comment that the Rules are short and not difficult to understand.

91 As senior partner, IM was under a duty to ensure that the Rules were complied with. There is no evidence that he ever did so. In the circumstances, this failure can properly be described as irresponsible. It is no answer to that charge to say that he was too busy.

92 BM stated that he knew nothing of the Rules. He said that he did not know that only partners could sign cheques on the client account. If that is true, it is evidence of gross irresponsibility. He was the managing partner. It was his responsibility to "manage" the partnership. He had a plain duty to acquaint himself with his professional obligations, both to the clients of the firm and the firm itself.

93 I do not equate irresponsibility with dishonesty. It is highly relevant to the weight to be given to the evidence of good character in particular to that called on behalf of IM.

94 Whilst a failure to comply with the rules is not a criminal offence, it may well be evidence of an intention to take the risk of prejudicing another person's right. I am not convinced by BM's assertion that he knew nothing of the Solicitors' Accounts Rules. He was in practice for years. YZ certainly knew of them. I am satisfied that, as a trust lawyer, BM knew that money held on behalf of clients was not an asset to be exploited for the benefit of M & Co. but was to be used, if used at all, only for the benefit of the client. I am satisfied that he knew he was not entitled to put client funds "at risk of prejudice" without specific authority. He had no authority in respect of the funds of Portino/Doyle, Halle, Risso, Azopardi and Burrow.

Nuchowicz

95 Benjamin Nuchowicz was a Belgian hedge fund manager. An American lawyer called Joseph Lurie, who had office space in M & Co.'s London premises, introduced Nuchowicz to IM. Nuchowicz was the settlor of the Lariola Trust and, as a matter of inference, of the Asset Management Settlement Trust and the Tall Cyprus International Trust as well.

96 IM's account was that Nuchowicz had a problem in Belgium and was going to leave the country. He wanted to transfer his trusts to Gibraltar. IM was too busy and, in any event, not interested. He was not involved with Cabor, M & Co.'s professional trust arm. Cabor was BM's creation and had evolved under his direction. Nuchowicz insisted but IM refused. The next thing he knew was that Nuchowicz had gone to Gibraltar and met BM. BM phoned him from the gym to say he had taken Nuchowicz on as a client. US$37m. were transferred to Jyske Bank.

97 IM said:

> "That was the last I heard for a year. In May 2008 we got a claim acting on behalf of Carey Trustees in the Channel Islands. When I asked [BM] about it he said that when he took on Nuchowicz as a client, Nuchowicz had agreed a £3m. fee. This was news to me. My reaction was to instruct James Neish, Q.C. to represent Cabor."

98 London counsel Victor Joffe, Q.C. was also instructed "to verify whether we were entitled to £3m." Steven Daultrey was also involved. IM discovered that Nuchowicz was waiting for the Belgian limitation period to expire. Lawyers in Belgium had been instructed by M & Co. to advise Nuchowicz "to verify the Belgian Law."

99 IM said that, after due consideration, "we had to deal with the matter properly." He subsequently discovered that BM had thought Nuchowicz was a soft touch. He, IM, did not know when the money was taken nor where it went. He said: "The advice from counsel was that we were not entitled to the fee. There was no documentation. The money was missing. I could not find out what happened to the money."

100 In cross-examination, he told the court that he believed it was a one-off situation and drew a parallel with a man who suspects his wife is cheating, discovers that she is but forgives her. He said he believed there had been a misunderstanding between his brother and Nuchowicz. He had thought the money was still in M & Co. and was applied as profits. At this time, he had a very heavy workload and his mother had just died. He trusted his brother. The accounts were checked by professionals (YZ). In 2008 he could not point a finger at his brother. He had believed his brother's account. He told the court that he had asked BM, "Where's the fee note? Where's the evidence?" BM could not answer.

101 IM said that he relied on BM to find the money. He knew that the money to repay Nuchowicz came from an increased loan facility from Jyske Bank. He was not involved in the negotiations. He did not know that Jyske Bank were told that the reason for the increased facility was to buy out the shares in the family portfolio of two of the brothers. In his interview, IM gave this account (at para. 28):

> "He was asked about a client called Nuchowicz. He was initially referred to [IM] in London who took an instant dislike to him and did not want him as a client. The client went to Gibraltar, met [BM] and transferred he thinks $34 million. This would have been in 2004. He was a client for 4 or 5 years. [BM] thought Nuchowicz was a 'soft touch' because he had tax problems so he diverted the client's money and thought he could blackmail the client if he wanted it back because of his tax problems. But then the client's tax problem suddenly disappeared and in 2008 Nuchowicz instructed Hassans to recover his money from M & Co. He thinks [BM] replaced Nuchowicz's money with money borrowed from Jyske Bank. Nuchowicz got his money back but this was obtained from [IM's] property portfolio that supported the Jyske loan. This was an example of [BM] playing with 'parallel accounts.' [IM] did not know where the money had gone."

He was reported as saying (at para. 74):

> "He was asked again about Nuchowicz. He said their mother had died on 3.5.08. It was during that month that Nuchowicz blew up. Hassans were acting for him relation to the recovery of the trust. [IM] was told Nuchowicz needed about £3 million. [IM] did make enquiries as to where that money had gone. It drove him mad that [BM] had the audacity to touch anybody's money. He was not happy about the position but they had to deal with the predicament that [BM] had kept to himself in relation to Nuchowicz. They were very united and decided the best thing was to assist. At the same time Raphael was being bought out."

He was also reported as saying (at para. 83):

> "He was reminded that in 2008 one of the properties added to the facility was Fortress House and he had said in the interview earlier that [BM] had told him he was in desperate need of money quickly to pay Nuchowicz—and it was put to him the 2008 facility was not for the purpose of buying property it was to pay off Nuchowicz. He replied that when he challenged [BM] his brother had told him it was to used to buy properties, and at the time he thought he had been told the truth, but 'I suddenly realised that he'd been doing something in parallel without disclosing it.' The interview continued:

Q. So at the time did he tell you or didn't he tell you . . . in 2008 that he needed the money quickly to pay off Nuchowicz?

A. He told me that he needed money urgently, right, and I, it was, you know, but that time it wasn't rocket science because we had been sued by Hassans and Partners for the money of the trust and I put two and two together, right, and I challenged him and it was Nuchowicz.

Q. So since 2008, and we have discussed this before, if Nuchowicz's money wasn't there and it was trust money, it's not really an excuse to say we are using it so it's gone, and if he tells you in 2008 so you've known for all that time since 2008 that there's something wrong going, that there is something seriously wrong here.

. . .

A. In 2008, as soon as I found out about it, I challenged him, okay. He gave me an assurance that there wasn't anything else amiss, right, we continued with the audits, right. You must remember that they had accounts system within an account system within accounts system, right, which I was not involved in. As much as I was doing the work bringing the money in and dealing with the clients, it wasn't a situation whereby all the balloons had come up and I could run away [and] start ringing the bells. I couldn't call the police and say 'hey my brother has been touching Nuchowicz money,' you know? My mother just died, we were mourning, ok? What would my parents think of me handing over my brother over to the police for having done something which was improper and most I could do was challenge him to tell me the truth. I brought in a Q.C. in England . . . I've involved my partner in London, Stephen Daultry. We looked at the situation and when I said to you 'you know what about this £3m. of Nuchowicz,' he started by giving some story that in fact Nuchowicz owed us £3m. in fees, right, that was how it started it started by the fact that I was right and he should have got an engagement letter, a specific engagement letter for what he was doing with Nuchowicz. I didn't like Nuchowicz, I told you from the very beginning, and that Nuchowicz owed us £3m. I said Nuchowicz owes as £3m., ok, fine. I got all the proceeding which we had from Nuchowicz. James Neish was involved in Gibraltar acting for us and I got Victor Joffe, Q.C. in London to act to be able to analysis what was the position in relation to the trust and when in fact what was the indebtedness. It wasn't a situation that I just walked away and had noticed we wanted to know that whether in fact he, Nuchowicz, was in fact correct or not or where we as [BM] was telling us where we were correctly in claiming the fee which [BM] was saying."

102 BM's account was different. He said that Nuchowicz had an issue with the Belgian tax authorities but that his problem was the possibility of

bad publicity for his fund. At a meeting held in M & Co.'s London office in 2004, it was agreed that M & Co. would "act as a barrier" and that £30m. would be transferred to them. Nuchowicz was also concerned about tax liability. Nuchowicz agreed to pay M & Co. a success fee of £3m. Joseph Lurie made a file note of this agreement. BM said: "I never asked him for a copy."

103 In cross-examination he added that he himself had made a contemporaneous file note. He had left it in a blue file in the London office. When Nuchowicz took legal action, neither the file nor the note could be found.

104 This was an example of what Mr. McGuinness called "making it up as you go along." If it were true that he had made a file note, it would have been at the forefront of his account. I am satisfied this was a dishonest embellishment.

105 BM said:

> "We could draw down on the £3m. as soon as the £30m. arrived. I never sent a fee note. It was not customary to do so. We never notified Nuchowicz when we drew down money. We never sent him notification of any kind. The fallout with Nuchowicz occurred exactly when the Belgium tax limitation period expired. Nuchowicz went back on the agreement. He said he never owed us any money. We had no documents so we were told we had to pay."

106 BM said:

> "In 2008 Nuchowicz wanted his money. He could not handle Roy Sharma [Sharma was employed as a solicitor at Cabor]. It presented a problem as we had taken the fee of £3m. IM knew. We all knew. We took legal advice which was that in the absence of proof it was difficult to show that the agreement had been made. Lurie was uncooperative. We had to mortgage part of the family portfolio. Nuchowicz was a crisis, not a moment of desperation."

107 BM produced two documents. The first was a file note of a meeting held on December 5th, 2007. According to the note, present at the meeting were Nuchowicz, Lurie, BM and IM. It appears from the note that M & Co. was not happy with the way the trusts were being run, which was that Nuchowicz was running them. Lurie and Nuchowicz were not happy with Roy Sharma.

108 This suggests, at the least, that IM was rather more involved than he led the court to believe.

109 The second document, marked R59, is a fax dated June 10th, 2008 and sent to BM. It is unsigned but appears to come from a Charles Duce and Maurice Eloy. It is headed "The Lariola Trust" and is stated to be an opinion concerning personal income taxation in Belgium in respect of the

Lariola Trust. It relates to Benjamin Nuchowicz and the beneficiaries of the trust, Mr. Nuchowicz's wife and two daughters. The conclusion is as follows:

> "Period of limitation
>
> In respect of all liability to personal income tax in Belgium the standard limitation period is 3 years, beginning on January 1st of the year after the year in which the income was earned (article 354, alinea 1er du CIR 1992). This period is extended to 5 years in the event of fraud (article 354, alinea 2 du CIR 1992). With regard to income earned in 2004, the normal limitation period of any claims by the Belgian Tax Administration has expired on December 31st, 2007. However, in the event of there being a tax liability on the part of Mrs Tania Rubinstein in the circumstances described above, given the existence of the Letter of Wishes, we consider it likely that the 5 year period would apply, in which case the expiry of the limitation period would be December 31st, 2009."

110 I make the following comments:

(i) The action by Nuchowicz was filed on June 3rd, 2008;

(ii) The advice is dated June 10th, 2008; and

(iii) The limitation period in respect of the beneficiary is December 31st, 2009.

Far from supporting BM's account, these documents are incompatible with it. Carol Haw was an impressive and in my judgment a truthful witness. She had drafted her own witness statement which she confirmed was accurate. In particular she confirmed the accuracy of page 37:

> "[BM] also said that [AM] was causing a lot of the problem between them and said that his father had been right not to have trusted [AM]. [BM] also told me that he thought the firm was going to go down over 2 years before. I asked him why and he said that a client called something like Ben Nukovitch had set up a trust to protect himself from Dutch or Belgian tax claims. He went on to say that around the time his mother had died, Nukovitch, who had obviously been waiting for the Dutch or Belgian limitation period for the tax problem to expire, demanded his money back. He said that it was something like £3m. (I can't remember the exact amount). He said that to pay Nukovitch they had hurriedly arranged a refinancing of their overdraft and managed to pay the money. After that conversation with [BM] and the next time [IM] phoned me, I questioned him about what [BM] had told me about Ben Nukovitch. I asked him if he knew about it. Isaac replied 'Yes, I told him not to take that guy

on as a client, but he did. Can you believe that I had all this going on at the same time my mother died.'"

111 James Neish, Q.C. of Triay Stagnetto Neish was called to give evidence. He detailed the transfer of the assets of Lariola Trust, the Asset Management Settlement and the Tall Cyprus International Trust from Cabor Trustees to Carey Trustees, a Guernsey trust company. He had been instructed by M & Co. at the beginning of June 2008 to act for Cabor in an action brought against Cabor by Carey, filed on June 3rd, 2008. Carey claimed to have been appointed trustee of the three trusts and sought an order that Cabor immediately deliver up and transfer to Carey all the assets of the three trusts. Carey was represented by Hassans. The claim was settled on July 2nd, 2008. Between June 6th, 2008 and May 15th, 2009, M & Co. made 23 transfers in varying amounts to TSN. It appears that Cabor received £120,000 on account of fees and expenses. He gave no evidence-in-chief concerning his instructions. He was asked no questions in cross-examination.

112 BM claimed in evidence to be a commercial lawyer. He admitted that he was, or at least held himself out to be, an expert in trust law. He personally advised both Jim Magner and Nuchowicz on trust matters.

113 On his own account, BM admitted that—

(i) the agreement to pay a fee of £3m. was never reduced to writing. There was no letter of engagement. He did not even confirm the agreement in correspondence;

(ii) he withdrew client/trust money from a client account without either written or verbal authority; and

(iii) he did not notify the client that he was going to withdraw the money, nor did he notify the client that the money had been withdrawn.

114 His account of the £3m. being a success fee is simply unbelievable. I am satisfied that he used Nuchowicz's money for his own purposes and did so dishonestly. His account to the court was untrue. His conduct in relation to the Nuchowicz trust money was dishonest. That no defence was filed and the action was settled so quickly supports that finding. That the debt was paid in instalments strongly suggests that the money had been dissipated.

115 It was BM who was responsible for negotiating the increased loan facility with Jyske Bank which allowed M & Co. to pay back the money. He was responsible for the lie told to the bank that the money was to be used to buy the shares of two of his brothers in the family property portfolio. That the loan facility was a commercial transaction and that the bank was fully secured does not render this less of a lie.

116 In respect of IM he admits that in June 2008 he knew that—

(i) BM had removed £3m. of client/trust money;

(ii) he had done so without any authorization;

(iii) he had not notified the client before withdrawing the money nor afterwards;

(iv) if there had been an agreed fee, there had been no letter of engagement; and

(v) BM had not even rendered a fee note.

117 However, the matter goes further than that. Any lawyer, especially an experienced commercial/litigation lawyer, investigating this claim and the alleged defence would have required production of M & Co.'s bank statements and internal accounts. No such action happened.

118 If IM really wanted to know when the money was taken and where it went, he could have asked the accounts department of M & Co. or YZ. Apparently he did neither.

119 When IM was asked what he actually did when faced with the loss of £3m. by his brother's negligence, he was unable to give a coherent answer. The evidence is that he did nothing. In my judgment, his failure to take any positive steps to ensure that this situation did not occur again provides positive evidence that he knew and approved of the unauthorized use of client funds. Otherwise he would have stopped it. A man may forgive his wife for cheating but he will be rather more vigilant thereafter.

120 The claim by Nuchowicz could not be defended because:

(a) there was no genuine defence; and

(b) to run any defence would necessarily have involved the risk of exposure of gross abuse of client/trust funds and a complete failure to comply with the Solicitors' Accounts Rules, in particular Rule 10.

The Rebecca tapes

121 I have already given a judgment (reported at 2013–14 Gib LR 380) as to the admissibility of this evidence. I shall not repeat the findings of fact. Had there been a jury, the evidence would have been repeated. IM confirmed that the transcripts were accurate and that the attributions of words to the speaker were correct. He also said that Mr. Finch had been given copy tapes at the same time as he was.

122 BM had had the opportunity to give evidence about the tapes when I was dealing with admissibility. He did not do so. In evidence he asserted (i) that the tapes had been edited so as to remove any reference to other Gibraltarian law firms, and (ii) that there were passages that he did not recognize as words he had spoken. He suggested these passages might

somehow have been edited in. None of these matters had been raised with IM when he gave evidence.

123 Having listened to the tapes twice and having had the opportunity of hearing BM give evidence over many days, I am satisfied that the tapes are an accurate recording of what BM said. I cannot be sure that references to other law firms have not been excised but I cannot see any reasons for such editing and there are no obvious gaps in the recordings which suggest editing has taken place.

124 The tapes contain admissions by BM that 34/4 Cornwall's Lane was used as security for an increased overdraft facility with Jyske Bank and that this was done without Rebecca's knowledge.

125 It is admitted that Jyske Bank did not know that Rebecca Marrache was the owner of Laughton Properties, the company who owned the underlease.

126 The facility letter was signed by IM, BM and SM.

127 I have no doubt that using another person's property in this way is, at the least, to take the risk of prejudicing another's right. To do so without telling either "the other person" or the bank is quite plainly dishonest.

128 What BM said in the course of the conversations he had with Rebecca Marrache and her husband Alistair Miller has to be considered in context and I have done so. The transcripts are exhibited as are the discs themselves. The following paragraphs are significant. On the transcript of disc 1 (at 13): "25 years, we've been living, we've been living way beyond our means." On the transcript of disc 2 (at 3):

> "It's not for that. We've been moving money 20–25 years now. [IM] . . . [IM] says that the last four . . . that the last four years everything has developed. It's a lie. We've been moving . . . moving money 25 years. 25 years we've been moving money."

And (at 5):

> "And these are the matters that just are . . . Rebecca it's all been a lie. For 20 years it's been a lie. It's been . . . it's all been a lie and now for the past four years [IM] has said '[BM] been in Gibraltar for four years. I'll blame [BM] for the past four years and say everything happened because of [BM].' And it's complete bullshit because it's been going on for the past 11 years. And the truth of the matter is that . . . the . . . the . . . the good . . . good thing we did was to get properties because by buying properties we at least had some equity there to react when . . . when the clients asked for money but it's been a lie. It's been a lie basically. It's difficult because it mean . . . and [IM] is playing now that the card that I . . . he didn't know anything. How can he say he didn't know anything?"

And (at 6):

> "But everything that we sold was to repay clients. We've been repaying clients, repaying clients, repaying clients. We sold Library Street for half a million to repay clients. We sold Irish Town and the other one to repay clients. We've just sold Main Street to pay 580 grand to Jyske Bank to put towards . . . to put everything up to date with Jyske Bank and to give 250 grand to some insurance guys that we owed some money to. It's been to repay client. That's what it . . . that's what it comes down to. That's what I'm saying to you. It's been one thing after the other, after the other, after the other, after the other. It's a difficult scenario but I mean it's . . . it's . . . unhealthy."

And (at 7):

> "It's been a lie, yes, it's been a complete lie and we're just waiting for the . . . waiting for the deal, waiting for the bank to happen. The bank hasn't happened. £700,000 down the road it still hasn't happened. Waiting for . . . for . . . for . . . for Econ. Didn't happen. Waiting for getting into one of the gambling companies. Didn't happen. Just waiting for something to just actually take us out of this mess but it hasn't happened."

And (at 8):

> "I'll tell you what's going to happen if we all start breaking off. We'll have the police in my office, they'll close the po . . . they'll close the . . . the . . . they're longing to do that. They'll bring the court into the office. They'll throw us all out."

And (at 18–19):

> "And [IM] is pretending he knows nothing about anything but the debt goes back 20 years [tapping sound] or 25 years. Maybe with half a million, then one million, then one and a half million, then . . . we'd sell a property, then it comes back to two million, then three million, then we'd sell a property . . . and make one million . . . yes, replacing clients' ones. [inaudible] We . . . we've also done well, Alistair. We . . . we . . . we bought shares in medicines for like half a million and we'd sell them for two million. We made a lot of money. We bought the one in the, you know it, the one in . . . the one we bought for . . . in Main Street we bought for what? Four hundred and thir . . . five hundred thousand from . . . from Tomas Kosicka and I sold it twice . . . and I made money twice and we've just sold it for nine hundred grand. Okay, money to go to Jyske to sort out Jyske and money had to go to the insurance boys but we cleared it. We've been using property . . . the property has been . . . has worked very well because we've made has been to repay the clients and now we're at the level whereby we're coming of the tunnel, we owe less and less

> money to the clients . . . Because there I was sign . . . signing everything, trying to get out . . . trying to out of a hole otherwise last year we would have gone down. I have no doubt about it. We would have gone down. That's the end. It's been a whole mesh of lies to be honest with you."

And (at 25–26):

> "I said, '[IM], how can you say that in the past four years? This has been going on . . . Gabrielle has known about this for years?
>
> We've been living off the client account. We've been repaying and living, repaying and living, repaying and living but then we had this guy called Nukowicz who basically screwed us and when that happened [clapping sound] panic.
>
> We got the cheques, we gave it to them otherwise we would have gone down because this guy has had no remorse and Jaime Levy was laughing all the way to the bank, 'Are they going to bring the money? Have they brought the money? Is the money there? Are you sure it's cleared?'"

129 In evidence, BM said this in respect of the post-Nuchowicz period:

> "[M & Co.] was not earning sufficient money to meet its liabilities. The nature of the business was not strictly a law firm. There was a parallel business investment and property. At the end there was a cash flow problem. People were chasing us. We were fobbing them off but that does not equate with dishonesty. We always intended to pay back."

130 "Fobbing off" here means telling lies to your client so that you can postpone paying him his money or postpone following his instructions as to what should be done with his money in the circumstance where you have already used it for your own purposes. Whether or not you intend to pay in the end does not render such behaviour honest. It is patently dishonest. A classic example is the letter addressed to Robert Homem of Portino dated January 26th, 2010. It is signed by SM but created at BM's request. It states that "[M & Co.] hold £1,835,266.74" for and on behalf of Portino (it should refer to euros, not pounds). That statement was false to the knowledge of both SM and BM. BM's justification, that there were funds available to be drawn down in a Swiss bank account, is highly unlikely and no justification for the lie.

131 In my judgment, this is evidence which proves:

(i) that BM habitually used clients' money in such a way as to risk prejudicing the clients' right;

(ii) that he knew he was not entitled to do so—why else keep it secret from the clients? and

(iii) that he knew that what he was doing was dishonest.

I am satisfied of his guilt on Count 1.

SM

132 In his interview, SM said that he had been the finance director since 1986. He said: "I followed instructions from my superiors which were my partners and my brothers." He described the system and stated that he was aware of "the old Solicitors' Accounts Rules and that they had been upgraded."

133 When asked if the Accounts department checked that there were enough funds, including any in the Lexcas accounts to cover payment out of the client accounts in Gibraltar, he said that he was not aware of Lexcas but would check the balances daily on the client accounts.

134 When asked if he knew where all the money had gone, he said: "I think it was the day-to-day running of the business." Given his detailed knowledge of exactly where the money went, this is simply a lie.

135 He said that, as finance director, his role was the day-to-day running, and dealing with cheques and transfer requisition forms on the instructions of his superiors. He asked for the help of a chartered accountant. YZ should have guided him. It would have helped to have a chartered accountant or YZ there constantly. If he identified something wrong he would obviously bring it to the attention of his superiors, which he would do.

136 When it was suggested to him that wages in December 2009 had been paid from clients' accounts, he said the account included funds in relation to properties that were being sold, fees were also coming in and "moneys were going to be replaced." When asked what would happen if money did not come in, he said that it would because they had all the properties with Jyske Bank.

137 When asked if he was saying that clients' money was taken and then in order to put the money back they sold properties, he replied "no." There was a habit of getting salaries from client accounts and there was property to cover the firm's position. Whatever the balances were in the client accounts, there was an overall global amount. He said he took no part in what had happened. He was "a simple spectator."

138 Daniel Tavares said that people regarded SM as a partner although he knew SM was not a lawyer. He was the finance director. He added: "Whatever he called himself, he was treated like a partner and acted as one." Mr. Tavares regarded SM and BM "as one."

139 Mr. Tavares said that towards the end (the last two years) it was apparent to him that the money coming in did not cover the money going out. He raised this with SM who told him that "it was being dealt with." SM gave him the impression that money would be brought in from elsewhere. I comment that SM must have known there was no "pot of money outside Gibraltar."

140 Gary Rivett said that wages for the staff went from the office account to Kristy or Penzance. Especially in his last few months (in 2007), there was insufficient money in the office account so that funds were transferred from whichever client account had funds in it. It was BM or SM who decided which account—"probably [SM]."

141 As to partners' drawings, Mr. Rivett said that they were not dependent on which account had money in it. Sometimes they were paid from clients' accounts. Partners' credit cards were paid from the office account if there were funds. Instructions came from SM. Credit card payments mostly related to IM.

142 Mr. Rivett described how, if a client was constantly ringing up about a transfer but the money was not in the bank and the transfer could not be done, he would speak to SM who told him to say that there was no one in the office to sign the transfer. Sometimes that was true.

143 Mr. Rivett said that he did raise his concerns about the use of client money to pay expenses. SM assured him that the firm had money in the background. Mr. Rivett had heard that there were M & Co. bank accounts in Switzerland. A lot of people in the firm believed there was money in the background.

144 Wendy Alsop worked in the accounts department of M & Co. for 6½–7 years starting in 2000. She dealt with bank reconciliations, purchase and sale ledgers, and client statements. She completed transfer forms, usually on the instructions of SM, although sometimes from BM. She took the forms to be signed—usually by SM.

145 She knew that money was transferred from client accounts to the office account, sometimes for the payment of wages. Once she said to SM that it was not right to do so. He replied that she should do her job. In her witness statement she had said she was firmly told to do her job or they would find someone else to do it.

146 She completed client statements. The credit and debit information came from the cash book. The figures for interest should also have come from the cash book but sometimes SM told her what to put in. She did not regard this as deceitful but an attempt to keep a proper record.

147 She also had access to the client bank account statements. She thought she could not reconcile the bank statements with the client statements.

148 If a client wanted to draw on his funds, she was sometimes instructed by SM to make excuses.

149 She decided to leave M & Co. as they were struggling to find the money to pay the staff wages.

150 Liza Franklin, like Gary Rivett, reported to SM every day. In his absence, she reported to BM, who was in charge.

151 She put the information about balances of the various accounts on to a spreadsheet and gave it to SM. He would tell her if money was coming in. Money going out was evidenced by cheques or transfers. When she knew of the movement of funds, she put the information on to spreadsheets and on to the Sage/Liberate system. She never had time to reconcile the figures.

152 When money was coming in, SM would tell her to where it was to be posted so it could be entered on Sage/Liberate.

153 If she got a "*billet-doux*" she would list it and ask SM from which account it should be paid. If SM was away, she would ask BM. If a payment was to be made, she would write the cheque and it would go to SM to be signed. A *billet-doux* was the office term for a request from a fee earner that money be paid out.

154 On June 24th, 2009, she received an email from RBS Gibraltar informing her that the office account was £107,731.11 overdrawn. She was instructed by SM to cover it from "clients." She was able to do this using the EQ system. This was done as and when necessary, not every day but quite regularly, but she had to be given specific permission by BM or SM.

155 A similar crisis arose on June 30th, 2009. The bank required £11,000 within 15 minutes or they would start returning cheques. [SM] was not available. She emailed BM to say she would have to "sort it from the client okay?"

156 On July 2nd, 2009, the account was £111,483.29 overdrawn. On July 7th, 2009, the account was £113,553.34 overdrawn. Two cheques, together totalling £12,684.95, were returned.

157 On July 7th, 2009, Pauric Caldwell (Magner's financial advisor) transferred €300,000 to the euro client account. On July 10th, Magner was seeking confirmation of its receipt and requesting transfers to two other accounts. There was no immediate reply but, on July 14th, Ms. Franklin

informed Magner that the funds had been received and had been automatically put on a "rolling deposit" to mature on Wednesday, July 22nd, 2009. On July 15th, she sent Magner a lengthy explanation.

158 Ms Franklin's evidence was: "[SM] would have told me what to say. The money was not put on a rolling deposit. That was just an excuse. The money had gone into an M & Co. account." There is no dispute as to the fact that SM was a signatory on the M & Co. accounts. Until the summer of 2009 he was a signatory on the client accounts. He was the signatory on the Lexcas account. He was a resident trustee in respect of the Marrache family portfolio.

159 On the Rebecca tapes, he admits being a party to the inclusion of 34/4 Cornwall's Lane in the Jyske facility without her knowledge. He must have known that the bank was given a false reason for the use to which the increased loan would be put. Given his position, he can hardly have been unaware of the removal of £3m. from the Nuchowicz trust money. He signed the facility letter.

160 He made further admissions. On the transcript of disc 1 (at 31):

> "This, this firm . . . I mean the, the, the money that goes out . . . the fee income wasn't sufficient to carry on with what was going on and everything was too similar to the Attias family, it was similar that, you know we had to keep up with the payments of everyone, the payments of, of not the properties, the payments of everything it came to the situation whereby . . ."

He is recorded as saying (at 35):

> "Can I tell you, Rebecca, can I tell you something? For whatever reason you know, we we maintain with all these thing that have been going on for a lot of years with a lot of pressure, I can tell you. With a lot of pressure trying to sort out the problems and everything was, and, and I mean . . . We had a lot of pressure you know it. In the moment of desperation you try and save yourself in any way that you can."

He did describe himself as a stooge (at 40) but this was in the context that IM was denying knowledge that Fortress House and 34/4 Cornwall's Lane had been included as security for Jyske Bank. He went on:

> "I should have been from the moment that I said it and I told you back in 1996 when I came back from the United States and I knew that this firm wasn't working out and I told them both that it was not working out, so that you just didn't understand the . . . law business. You do deals left right and centre and everything changes
>
> . . . at that moment in time I should just have left you know that I've had a lot of pr . . . I have been the that's dealing with the banks with

> the pressure of, of constantly . . . with all the finance centre . . . I mean and, and the sad thing about it is that from the moment go I should have just said listen, this position should be by, taken by a chartered accountant, unrelated to the family. Because why . . . just go ahead and do that and sometimes I told, Rebecca, sometimes I would turn round and speak to myself you know. One day this is just going to blow up. And it's blown up."

Having referred to selling the property on Main Street, he said (at 42):

> "At, at the end of the day, part of it . . . had to pay the mortgage or that property which was £500,000 and the rest I think was counter-balancing a situation that we most probably had with a client. Or something like. I can't remember exactly."

He said (at 46):

> "You didn't see that everyone has just carried on with a normal life for the past twenty years nothing eased you know everything was paid for everything you know . . . When everything was hunky-dory no one asks just they put their hands into and that's it."

Rebecca Marrache disputed that she had "taken." SM said, "It's the same, it's the same Joshua, Joshua's getting £2,000 every month just for having the name Marrache . . ." Rebecca Marrache again (at 48) denied that she had "taken." SM replied:

> "We used to go to trips to, to el, el, el with mummy you know, to, to for Pesach to, to the Biblios, everything was paid from the office, we were all having a great time the trips to London, I mean to, to New York, to [IM's] wedding, everything was paid from the office, everything came out from the office. We never thought we thought everything, that's why I say that it reminds me a lot and it's similar because it's a great family, the Attias family. It came to a point where the Attias family were not making money sitting at the only possibility of making illegal money, which was illegal importation from China leaving the VAT *etc.* basically fraud all right and he turned round to Jimmy and I vote for Jimmy and Sonia, may she rest in peace and he said if anyone has got a better idea to bring money to maintain this family come in and do it. In the meantime we have to do this, and this is similar. This is similar we just was trying to keep up."

161 The evidence proves that—

(i) SM knew that M & Co. were funding Fortress House and members of the Marrache family;

(ii) SM knew that M & Co. were making substantial payments by way

of "drawings" to himself, to IM and to BM which included the paying of their personal credit cards;

(iii) SM knew that the income generated by M & Co. was insufficient to fund (i) and (ii) above. Nor was it sufficient to pay staff wages;

(iv) he knew that client money was used to meet the shortfall;

(v) he knew that client money was used to meet the demands of other clients;

(vi) he knew that money was borrowed from the banks to meet M & Co.'s liabilities, *inter alia*, to clients;

(vii) he knew that lies were told to clients to disguise these activities;

(viii) not only did he know of the above activities but was complicit in them: he directed the staff in the accounts department;

(ix) he knew that the statements of accounts produced for customers were fictional; and

(x) he knew that these actions were dishonest.

I am satisfied of his guilt on Count 1.

Magner

162 Jim Magner was, and is, a wealthy man. He made his wealth from internet gaming. His company was SIA. Pauric Caldwell was the Financial Controller of SIA from August 2005 onwards and advised Magner.

163 Magner came into contact with M & Co. when he sought and acquired category 2 resident status. He was a high net worth individual. To qualify as such, he acquired an apartment at 77 Ragged Staff Wharf. 77 Ragged Staff Wharf was actually owned by Marlowe Holdings. LT did the conveyancing.

164 Acting on the advice of BM, two trusts were set up for Magner's benefit, Greene and Lamotte. Magner was the settlor of both but the beneficiary of neither. He was advised that he could not be a beneficiary. He was financial advisor to both and he believed that this gave him the power to control the trusts.

165 Marlowe Holdings was an asset of the Greene Trust, and was administered by Gibland. The trust was administrated by Cabor.

166 Magner was BM's client, certainly from 2005. They became friends. It is plain that Magner trusted BM. It is equally plain that that trust was misplaced. Everyone at M & Co. knew that Magner was BM's client.

167 Over a number of years Magner put large sums of money in M & Co. client accounts. Some, usually the smaller amounts, were for specific

investments. There is a dispute as to the rest. Magner asserted that this money was to be put into the trusts. He said that the reason for these deposits was to build up the assets in the trusts. He wanted to invest the money in managed funds so he put the money on deposit with M & Co. prior to investing with new fund managers.

168 BM's evidence was that Magner had given him a complete discretion to deal with the money as he thought fit and that his only obligation to Magner was to return the money with interest on demand. At a later stage in his evidence, he added "on reasonable notice."

169 There is no dispute that Magner did "invest" very substantial sums with M & Co. How much and what happened to the money is evidenced in the graphics and timelines.

170 Mr. Magner's evidence presents certain difficulties.

(i) His understanding of the workings of trusts and his position as settlor and financial advisor was, in my judgment, less than coherent. He said in evidence that he believed he was a beneficiary of both trusts. If he was not, he said, it had not been explained to him. He was told he could not be a named beneficiary but that this was a technicality. It was impossible to know what his understanding was from before the collapse of M & Co. and what he learnt after it. His knowledge of the Solicitors' Accounts Rules seems likely to have been acquired after February 2010;

(ii) He was less than forthcoming about the geographical origin of SIA's profits and of his knowledge of attempts by state and federal authorities in the USA to restrict, if not outlaw, online gaming;

(iii) He omitted reference to a €300,000 loan that he made to BM in his witness statement because he was "embarrassed" to admit it. The sum was claimed in the civil action against M & Co. as "trust money"; and

(iv) He asserted that he did reside on occasions (albeit not often) at 77 Ragged Staff Wharf but seemed to accept that at some stage Joshua and Corinne Marrache had lived there. BM said that Magner never lived there.

171 There is no doubt that Magner funds were used for purposes which could not benefit Magner or the trust and could only benefit BM. Magner money funded one of BM's holidays. Magner funds were used to pay off SM's mortgage. In my judgment, it is unlikely that Magner knowingly gave BM as wide a discretion as BM alleges. However I cannot be sure that Magner did not give BM a wider discretion than he is now prepared to admit.

172 What is clear from his own evidence is that, whatever discretion BM had, or thought he had, his obligation was to return those funds on notice. It is BM's own evidence that, from 2007 onwards, and with increasing aggression, Magner and Caldwell were asking for those funds with

interest. It is equally clear that BM failed in his obligation. Magner lost all his money.

173 There are specific areas where I accept Mr. Magner's evidence without reservation:

(i) Mr. Magner was a Gibraltar tax payer. He instructed M & Co. to pay his tax. In November 2009, Mr. Magner asked for confirmation that his tax had been paid. On November 27th, 2009, BM confirmed that it had been paid. The tax had not been paid, although M & Co. had had ample funds from Magner with which to pay it. On February 3rd, 2010, Mr. Magner received a tax demand for £24,068. Mr. Magner said he regarded this as a breach of trust. I regard it as clear evidence of dishonesty. The only possible reason not to pay this money was that M & Co. did not have the funds to do so;

(ii) The loan of €300,000. The evidence of Mr. Magner and of BM on this topic largely coincide. BM had made an investment in two flats in a development of flats under construction in Jerusalem. He had fallen behind in making his stage payments. He asked Mr. Magner for a personal loan. The tone of his emails gets close to desperation;

(iii) On December 2nd, 2009, BM sent the email. It ends: "This matter is now increasingly urgent as they want confirmation that the funds are on their way. Please revert to me urgently";

(iv) On December 2nd, Caldwell forwarded the money to M & Co. On December 3rd, €100,000 of it was paid to Biscay Consultancy. BM did not recall authorizing this payment nor what it was for. The balance was transferred to the National Westminster Sterling Account. None of it was used to pay the developers;

(v) BM told Mr. Cooper that he had not informed Magner either before or after the receipt of his money of this change of use. When cross-examined by Mr. McGuinness, BM said he had called Magner and told him about it; and

(vi) In my judgment, this conduct of BM was clearly dishonest *vis-à-vis* Magner and his evidence that he had told Magner subsequently, is another late fabrication.

174 Additionally,

(i) Magner's apartment at 77 Ragged Staff Wharf was mortgaged to Jyske Bank for the benefit of M & Co. on February 25th, 2009. Marlowe Holdings, along with IM, BM and SM, entered into a guarantee for the whole of M & Co.'s liability to Jyske Bank;

(ii) Mr. Magner said that he had not mortgaged the property. He never intended to and he had no need to. He did not consent to the property

being mortgaged. He would not have consented to Cabor mortgaging the property for the benefit of M & Co. The guarantee of £10m. could not possibly be for the benefit of the beneficiaries. He had subsequently received a formal demand for £9,347,482 from Jyske Bank;

(iii) BM said that Magner had consented probably some weeks before. He conceded that there was no record of Magner's consent;

(iv) I comment that Magner could almost certainly afford to meet M & Co.'s debt to Jyske Bank. It is wholly improbable that he would consent to put himself at risk of doing so by consenting to the guarantee;

(v) Mr. Magner told the court that, on February 4th, 2010, he had received a phone call from BM, who told him that Grant Thornton were in the offices auditing the accounts. He told Mr. Magner that there was going to be trouble. He was emailing a letter to Mr. Magner asking him to sign it to help them out. The letter reads:

"Dear [BM],

I write to confirm that I have given you funds amounting in total to £6,203,974.62 on a purely discretionary basis to invest at your discretion.

I understand that these funds are currently illiquid and accept that they will be returned to me within the next 5 years from the sale of properties within the portfolio. In so far as security for the fund is concerned, I accept that the partners of [M & Co.] will undertake to be personally liable for these funds and that I am content with this security.

I have obtained independent legal advice, and am content to confirm that I am in agreement with any action that you may have taken in respect of these funds.

Kind regards

Yours sincerely

Jim Magner"

(vi) Mr. Magner immediately consulted his Irish solicitors with a view to going down and confronting BM. There was no truth in the letter and he was not prepared to sign it; and

(vii) BM asserted that the letter was an accurate reflection of his arrangement with Magner. He also asserted that email traffic which would support his account and which had been left in a wallet in his office had gone missing. I reject that account.

175 Hayley King had worked for M & Co. for 19 years. Specifically, she worked for Gibland. She left on December 19th, 2009. Gibland set up

companies and provided insurance shareholders and directors—Equity Nominees and Gibland Nominees. Cabor dealt with trusts. She told the court that if the law firm instructed Gibland to act for a company, and if the company was an asset of a trust, Gibland would notify Cabor of the transaction. Sometimes Cabor already knew. She produced the minutes of a board meeting of Marlowe Holdings held on February 23rd, 2009 which approved the mortgage between Marlowe Holdings and Jyske Bank. She had represented Gibland Nominees. Gardenia McMahon represented Equity Nominees. Gardenia McMahon also worked for Gibland. She also produced the indenture of mortgage. The company resolution and the guarantee were produced in exactly the same way.

176 Ms. King said that copies of the documents would be sent to Cabor and the originals returned to the conveyancing department where LT was in charge. It was her understanding that the matter went no further.

177 Maria Penelope Garcia worked for Cabor as a trust administrator. She refreshed her memory from her own file note dated February 24th, 2009. Gardenia McMahon had telephoned her to say that Marlowe Holdings were to obtain a mortgage from Jyske and that she would be sending copies of the documents sent to her by LT to Ms. Garcia. This was the first that she knew of this. She knew that Marlowe Holdings as a "Magner" asset held by (she thought) the Greene Trust.

178 She received the documents, the mortgage and the guarantee. She spoke to BM, who was a director of Cabor Trustees and the person who had most contact with Magner. He told her that this was something LT was doing and any enquiries should be directed to her. She spoke to Kelly Keatley at conveyancing, who told her that Marlowe was to be sold. Later, she got a telephone call from LT, who told her that the matter was not being proceeded with.

179 Gardenia McMahon confirmed that if a company which was an asset of a trust intended to enter into a mortgage, it would be handled by M & Co. The conveyancing department would hand the documents to Gibland where "we signed them." If it was part of a trust, Gibland notified Cabor and sent them copies of the documents. She said that the mortgage and guarantee from Marlowe Holdings came up from conveyancing to be signed and dated. That, she said, was what they did. The next day she got a phone called from Penny Garcia to say the transaction had not gone through.

180 It is relevant and convenient to deal with other properties that were offered as security to Jyske at this time.

181 On the same day that 77 Ragged Staff Wharf was offered and accepted as security, 34/4 Cornwall's Lane was offered and accepted. 34/4 Cornwall's Lane was owned by Laughton Properties. Rebecca Marrache

was the beneficial owner. She knew nothing of this transaction. BM and SM both admitted on the "Rebecca tapes" that the property had been mortgaged without her knowledge or consent.

182 Also originally offered, but in the event not completed, were:

(i) A flat at 431 Watergardens. This property was owned by Whaddon Chase Properties, an asset of the Howarth Foundation Trust whose settlor was Malcolm Howarth; and

(ii) 326 Watergardens, a property owned by Worthing Associates and an asset of Flamingo Trust. Robert Kampf was the settlor of the trust. Mr. Kampf did not give evidence. Carol Haw produced an email dated February 5th, 2010 from BM to which was attached an email of the same date from Robert Kampf to BM. It reads:

> "Dear [BM]
>
> I am writing to confirm that I gave you permission in July 2009 to go ahead and mortgage my apartment, no. 326 Watergardens, Gibraltar.
>
> Please let me know if you need any additional statement or if you want me to come by the office within this afternoon as I am in town and can sign a paper with you if that is what is requested by whoever needs to see this.
>
> Thank you
>
> Robert Kampf"

183 Malcolm Howarth gave evidence. He was a difficult witness to examine in chief and impossible to cross-examine. Mr. Lovell-Pank described him as "bonkers." He certainly bore a great deal of ill-will to [BM]. He did not think highly of Marcus Killick of the Financial Services Commission either.

184 In evidence, Mr. Howarth emphasized that he was a self-made man who had risen from being a child in care of the local authorities to become a successful businessman and a happily married father in good health. He blamed his subsequent financial and personal loss on BM.

185 He said that, advised by BM, he had set up a trust for the benefit of his children. He became an HNI and, as he needed a residence, he purchased 431 Watergardens. He did not appreciate that he needed to live there and, at the suggestion of BM, it was let. He understood that BM put relatives in the property.

186 He had received a telephone call from BM on February 5th, 2010. BM was in a distressed state. He said he was at hospital and that his wife was at death's door. He told Mr. Howarth that one of the girls at the office had made a mistake and put a mortgage on 431 Watergardens. He was

very sorry but he would be in all sorts of trouble and would Mr. Howarth send him an email saying that the mortgage was authorized.

187 Mr. Howarth felt indebted to BM, who had saved him from prison after he had been involved in a road traffic accident. He sent the email. It reads:

> "Dear [BM]
>
> Re Whadden Chase Properties Ltd.
>
> Apartment 431 Watergardens Gibraltar
>
> Just a short note to confirm that last year I did authorize you to charge this property.
>
> I will expect the mortgage to be released within the next three months.
>
> Kind Regards
>
> Malcolm Howarth"

188 On February 9th, 2010, Mr. Howarth received information which led him to believe he had been duped. He told the court that he had never agreed to his property being mortgaged and had never signed any document authorizing a mortgage.

189 BM agreed that he had "saved Mr. Howarth from jail." He said that Mr. Howarth had consented to his property being mortgaged. It was not evidenced in writing. What Mr. Howarth had said in the email was true. Mr. Howarth suddenly changed after BM's arrest. He was paranoid.

190 Given his obvious animus towards BM and his apparent eccentricity, ordinarily one would hesitate to accept Mr. Howarth's evidence, if it stood alone. However, Mr. Howarth struck me as essentially a truthful witness (in contradistinction to BM) and his evidence does not stand alone.

191 Gillaine Gonzalez had worked for Gibland for 20 years. On November 12th, 2009 she had received a telephone call from LT who wanted some documents signed urgently on behalf of Equity Nominees. Ms. Gonzalez said that if the conveyancing document related to a company underlying a trust, the usual procedure was that Gibland would notify Cabor. She asked LT about this. LT said there was no need as Cabor had already been informed. In fact, Gardenia McMahon signed the documents.

192 The next day Ms. Gonzalez mentioned this matter to Hayley King. Ms. King said she would have been informed of those matters by the beneficial owners. Ms. King thought that something was not right. It was a client who always dealt with Ms. King.

193 Ms. King confirmed this account. She, Ms. Gonzalez, and Ms. McMahon went to see LT. She asked if the clients (Whaddon Chase and Worthing Associates) were aware of these documents. Ms. King said that LT replied that she could not confirm that the clients knew as she had not met any of the clients. She was acting on the instructions of BM. She had spoken to BM and SM who had met the clients. Ms. King was not happy with this. LT suggested she speak to BM.

194 Ms. Gonzalez said that LT told them that as far as she knew the clients were aware of the transaction. Ms. King wanted to see BM and LT said she should do so.

195 The three ladies went to see BM. Ms. King said that BM and SM were present when they got to BM's office. Ms. Gonzalez thought that SM arrived a few seconds after they did.

196 Ms. King said that SM was very irate, which was unusual. SM said that they were questioning things they should not question. There were things they did not have to know and neither he nor BM had to explain to them (the ladies) their (BM and SM's) dealings with clients. Ms. King was very angry. She asked for a written assurance that the clients knew. BM said that although he was under no obligation to do so, he would put something in writing. They left. On the way out, LT gave her the signature pages of the documents.

197 Ms. Gonzalez said that when Ms. King asked if the clients knew, BM said it was confidential. He had spoken to the clients. There was nothing more to be said. He said that if Ms. King wanted confirmation, he would send an email. SM tried to calm things down. The email BM sent reads:

> "Dear Gardenia
>
> Pls sign and return the documents to Leanne this is a private and confidential matter agreed with the clients and therefore should remain this way so pls do not mention to clients as they do not want anyone to find out about the arrangement.
>
> Thank you
>
> [BM]"

198 Ms. King was not prepared to sign. Because of this incident and other matters—tensions in the office and the struggle to get funds to pay the staff—she resigned the following Monday.

199 Ms. Gonzalez told the court that she did not know what the email meant and she did not know what happened to the documents. She thought "it didn't go through."

200 Ms. McMahon confirmed that she had signed the documents on November 12th, 2009 as they were said to be urgent. She also confirmed, in general terms, the events of the 13th. She said that both SM and BM were present. She had thought SM was a little bit agitated. When Ms. King asked about the documents, BM said that the clients knew. It was all very confidential. They were not to tell anybody. Ms. King asked for this to be put in writing. Ms. McMahon said: "There was argument and agitation. Why were we asking for this—we shouldn't ask."

201 Ms. McMahon described herself as disappointed and upset. She did not want her signature on these documents. LT gave her the documents back and she destroyed them. She saw the email. She did not sign the documents.

202 I am satisfied that the mortgage on 77 Ragged Staff Wharf and the guarantee by Marlow of the debts of M & Co. were completed without the knowledge or consent of Mr. Magner. I am satisfied that whatever discretion BM actually had, it did not provide any authorization for this transaction.

203 I am equally satisfied that Mr. Howarth had not consented to his property being offered as security to Jyske Bank and that at the time he had no knowledge that it might be.

204 The *ex post facto* consent which Mr. Howarth did sign was as false as the *ex post facto* letter which Mr. Magner did not sign.

205 This evidence implicates SM as well as BM. I am satisfied that in respect of both all the elements of Count 2 are made out.

LT Count 1

206 The prosecution case depends upon inferences to be drawn against LT from four tranches of evidence:

(i) her dealings with specific clients, namely Doyle, Phillips, Luise and Risso;

(ii) her detailed knowledge of the loan facility negotiations with the banks on behalf of M & Co;

(iii) her general knowledge of the financial state of M & Co; and

(iv) what she said in interview.

207 It is important to keep in mind that LT was a salaried employee. Unlike SM she did not benefit from the activities of M & Co. beyond her salary.

208 Her role was that of head of the conveyancing department. There is no evidence to suggest that she had any access at all to the internal

accounts of M & Co. There is no evidence that she had any access to the bank accounts of M & Co. There is no evidence that she had any control over what happened to money coming into M & Co. nor as to money going out. Insofar as the evidence of the staff in the accounts department, she is referred to as simply the person in charge of conveyancing.

209 Daniel Tavares prepared the Risso statement at LT's request. He said that the request was not unusual. He did not have the necessary information so he got the historic interest figures from the internet. He produced similar statements for other fee earners. He checked the interest rates and then passed it on to SM. The figure for the deposits came from the historical manual ledger on the Sage/Liberate system. The document reference is OPVALL-JO/RISSO/1 2970.

210 He does not suggest that LT knew how the statement was prepared. There is nothing in the statement itself to put LT on notice that Mrs. Risso's money was not earning interest on deposit. Her position was the same as other fee earners.

211 Insofar as her general knowledge of the financial position of M & Co. is concerned, crucially there is no evidence that she knew anything of Nuchowicz. There is no evidence that she knew the real reason for the 2008 loan facility, nor that she was a party to the bank being deceived.

212 Her general state of knowledge is to be compared with that of Carol Haw and other members of staff outside the accounts department. No one suggested that they were parties to any conspiracy, although some admitted to giving excuses to clients which they knew to be false. However, it is clear that she knew in respect of Barclays and Jyske that M & Co. accounts were substantially overdrawn.

213 There is good evidence that she was a party to "delaying" the payment out of the Portino funds (Doyle). She did give an assurance that Doyle's money would be kept in a segregated client deposit account. There was no reason why it should not have been. The ultimate responsibility for where the money went would have rested with the accounts department, SM and/or BM. It is true that BM did not remember giving LT instructions to say this. He did say that LT acted "on instructions."

214 As far as Mr. Phillips is concerned, she knew of the delay in repaying his deposit. She was anxious that he be repaid. She knew of the delays in paying Mr. Luise. Again, she was anxious that he should be paid. It is an inference to be drawn from this evidence that she knew that client money had left the client account and that wherever it was, it was not immediately accessible. It is not a necessary inference that she knew this money had been dissipated nor that she was a party to that dissipation.

215 To state that LT encouraged Mrs. Risso to place her money with M & Co. is to put the prosecution case at its highest. There is no evidence to

show that LT knew what happened to those funds (see TT/Risso timeline 12). The evidence is that she would not have known. Mrs. Risso did not ask for her funds to be transferred until after LT had left M & Co. and then it was a request that they be transferred to LT.

216 In the agreed record of her interview (at para. 11), LT was asked if she suspected that there was a time when the funds were not there. She replied "no," what she suspected was that the firm was not doing things properly. It was a large firm, everybody was working hard, there was lots of money coming in and they always said they had other things, there were the properties. When things went wrong at the end, it all seemed a bit suspicious but she never imagined it would come to that. She said (at para. 12): ". . . YZ had been in and done an audit and gave them a clean bill of health and the firm had a trust fund manager and a compliance manager . . ." The agreed record of the interview states (at para. 58) that she was asked if she knew the true reason clients did not get their money back. She replied:

> "The true reason why they were not getting the money back I knew that in some instances they had touched clients' money but I did not think there was any harm done because I thought that they had money in the clients' accounts which they designated outside for that client. I did not know that they would give the client the money. She was asked if she had agreed to lie to clients and she said she agreed to delay."

217 I comment:

(i) in assessing the weight to be given to what LT said in interview and in determining which inferences are to be drawn (either for or against her), I must have regard to the fact that she is of good character and that the witnesses who spoke of her character did so in the highest terms;

(ii) that, given that it was a common belief amongst staff members that there were significant funds available to the Marraches outside M & Co. money, it is appropriate to accept that LT shared that belief. This is directly relevant to dishonesty and to (iii) below;

(iii) that M & Co. needed to borrow substantial funds from banks may evidence a cash flow problem. That would not be unusual following the 2008 banking crisis. Given the belief at (ii) above, it is not a necessary inference that M & Co. did not have sufficient financial resources and reserves to meet their debts to clients;

(iv) LT was entitled to rely upon the evidence that YZ had given M & Co. a clean bill of health; and

(v) a person may be guilty of dishonest conduct in respect of one overt act of a conspiracy without being a party to the conspiracy alleged against

him. A man who steals a car which is subsequently used in a robbery is only guilty of conspiracy to rob if he knew the purpose to which the stolen car was to be put before he stole it.

218 It is convenient to mention here that, in contradistinction to LT, each of the three brothers knew that there were no other significant funds. The Boyd development had faltered after the Irish banking crisis. The Close-Marrache Bank was unlikely to produce returns that were both immediate and substantial and, in any event, IM and BM had to produce £1m. to fund that project. BM and SM must have known of M & Co.'s (Kristy's) debt to the Government. The documents that IM produced to show substantial shareholding were shown to be less than convincing by Mr. McGuinness.

219 Count 1 requires proof of a dishonest agreement to cause or permit client money to be transferred out of client accounts of the firm. There is no direct evidence that LT did so and such evidence as there is not sufficient to draw an inference that she did. This allegation requires proof that she knew the funds were to be transferred before the transfer took place. There is no such evidence. As to (a), (b), (c), (d), (f) and (g), there is no evidence that LT agreed to these acts and no specific evidence that she knew of them. Such as there is is not sufficient to allow an adverse inference to be drawn. As far as (e) is concerned, there is no sufficient evidence of dishonesty. There is no evidence implicating LT in such activities. I find Count 1 unproven against LT.

LT Count 2

220 On my analysis of Count 2 in respect of LT, the prosecution must prove that—

(i) she knew that M & Co. had no right to offer 431 Watergardens and 34/4 Cornwall's Lane to Jyske Bank as security;

(ii) she knew that M & Co. had no right to mortgage 77 Ragged Staff Wharf; and

(iii) she had that knowledge before either event occurred.

There is an unspoken but underlying assumption for the Crown's argument that LT is guilty on Count 1. I have found the case against her on Count 1 unproved.

221 The prosecution rely upon these matters:

(i) Her central role in the negotiations between M & Co. and Jyske Bank. I have read carefully the email traffic produced by the prosecution. It is undoubtedly the case that her role was central. It gave her knowledge of M & Co.'s significant indebtedness both to Jyske Bank and to Barclays, and of M & Co.'s urgent need to provide additional properties as security. I have reminded myself of the danger of hindsight and of *ex post facto*

forensic analysis of email traffic. Her role may have been central but she was not the decision maker. She was acting on instructions.

(ii) LT knew that 77 Ragged Staff Wharf was a "Magner" property. She had done the conveyancing. She knew that Rebecca Marrache was the beneficial owner of 34/4 Cornwall's Lane. She knew that 431 Watergardens belonged to Whaddon Chase and was an asset of the Howarth Family Foundation Trust.

(iii) The Crown rely upon the "heart stopper" email. Janet Lloyd had asked Karisse Penfold for Magner's address. Karisse had sent it by reply but copied her reply to Mr. Magner. LT described Karisse as an "idiot" and this as a "heart stopper." The prosecution suggest that the danger created by Karisse Penfold was that Magner would suspect something was happening to his property. I comment that in fact Magner had no such suspicion and I do not see that an enquiry for a client's current address would alert that client to the possibility of malfeasance. In the event, Magner supplied the address at which he could be found if urgent papers needed to be sent to him.

(iv) The evidence of Ms. Garcia that after the "Marlowe" documents had been signed, LT told her that the deal was off. This was shortly before the papers were forwarded to Jyske Bank; and

(v) The evidence of Ms. Garcia that LT told her that there was no need to inform Cabor as they already knew about Whaddon Chase. The prosecution say this was a lie. The prosecution also rely upon the incident that followed. But, as BM said, he was Cabor.

222 In her interview, in relation to 431 Watergardens, she said that she knew it was owned by Whaddon Chase. She said she had been told by BM that he had the consent of the client to mortgage the property. It was after the Gibland ladies spoke to her and BM that she refused to go on, the implications being that she had believed BM initially but that, once she had doubts, that she wrote to Jyske asking for the properties to be removed.

223 Of 77 Ragged Staff Wharf, she agreed that she knew it was Magner's flat. She said that BM and Magner were very good friends and her impression was that they were in business together. She was told that Magner had loaned BM about £250,000 before Christmas. When Magner had first come to the firm and bought 77 Ragged Staff Wharf, she had dealt with that, but after that he dealt only with BM. BM said he had done a deal with Magner over the flat. BM said he had bought it and Joshua was living in it and Anjette was using the parking space. When Joshua moved out, one of the maids or the nanny moved in. She understood now that Magner had never given his permission for 77 Ragged Staff Wharf to be used.

224 She said that she was aware the flat had been put against the firm's portfolio because they were short on property to the bank. She had sent the mortgage document to Gibland and Cabor. As far as she was concerned, there was nothing suspicious and she had nothing to hide. Her boss had told her to do it. She said she was not privy to the money or whatever dealings BM, IM or SM did.

225 Of the message sent to Ms. Garcia on February 24th, 2009 saying the deal was off, she replied:

> "Maybe it wasn't going to go ahead at that point . . . Maybe it was all change . . . Maybe after I've been told to do it [BM] told me not to do it and then [BM] told me to do it again, this wouldn't be unusual for deals to be on and then deals to be off and then deals to be on."

226 The prosecution describe her explanation as weak. I note that the interview took place on February 15th, 2010, about a year after the actual event and after LT had gone through a very difficult period, as confirmed by Carol Haw.

227 She gave further detail in respect of 77 Ragged Staff Wharf and 34/4 Cornwall's Lane:

> "The second new property for the February 2009 facility was Magner's apartment at Queensway Quay. What she knew about this at the time was: '[BM] said that he was going to do a deal with Jim Magner, him and Jim Magner were from what I could see joined at the hip, . . . he told me that he had approached Jim and asked him if he could mortgage the property with a view of purchasing it or redeeming the mortgage or doing something or offsetting it or giving it something else the exact ins and outs of it at the time didn't concern me . . . now he told me yes Jim's got absolutely no problem with this, he had done a deal with Jim so that the property becomes part of ours in the portfolio . . . I never spoke to Jim ever my instructions were directly from [BM] on this not that [IM] didn't know about this subsequently he did or even at the time I don't know, but I was taking instructions from [BM].' When this property was brought into the facility she believed it belonged to the Marraches.
>
> Asked about 4/34 Cornwalls Lane that was also brought into the facility in February 2009, she said the brothers had bought that property, it was not Rebecca's. She had been excluded from the father's will. In his will, the late father had left a strict proviso that Rebecca must never own anything because of her marriage with Alistair because it wasn't any secret that Alistair was not a good man, he disappeared and came back when he needed money and after he (the father) died she continued to live at Fortress House. After the mother then died, Rebecca wanted somewhere she could say was

> hers, and so the brothers bought the property because she had not got a share in the Marrache empire. She was asked if she trusted them as bosses and she said she did, implicitly."

228 She was further questioned about Magner and confirmed that Magner and BM were very close. She reported that BM had told her of a deal between himself and Magner. She said:

> "I honestly was not suspicious because Joshua and his wife moved in to the apartment and they were living in Jim's apartment. After they moved out [BM] put his nanny in the apartment and then asked if we had the key to the garage downstairs . . . because [BM's] wife was parking her car there so he tells me he's done a deal. This is their property."

229 She dealt with the "idiot" email and she gave an explanation for telling Ms. Garcia that the deal was off. She said she had told Ms. Garcia that it was back on subsequently.

230 I do not treat what LT said in her interview as the equivalent of evidence on oath, but her account must be considered in the light of all the other evidence and of her good character.

231 4/34 Cornwall's Lane was to all appearances a "Marrache" property. Marrache properties, including Fortress House, were being used as security for M & Co. loan facilities. I can see no reason why LT would ever suspect that Rebecca Marrache had not given her consent. Nobody at Gibland was suspicious. The evidence is that had she been asked Rebecca Marrache would have consented.

232 As I understand the evidence, it was LT who told Rebecca Marrache that her flat had been mortgaged. That is not something she would have done had she been a party to the conspiracy.

233 Her perception of the relationship between BM and Magner was shared with others. I have found as a fact that Magner did not give his consent to the use of 77 Ragged Staff Wharf as a security but that is with the benefit of having seen both BM and Magner give evidence and be cross-examined. In my judgment, BM is a fluent and persuasive liar. He was also LT's boss and the managing partner of an apparently respectable firm of lawyers. I see no reason to doubt that LT was given this explanation and that she accepted it. The same considerations apply to 431 Watergardens. I add that it is wholly unlikely that BM would tell LT that he was mortgaging properties over which he had no right or consent.

234 The evidence of the Gibland ladies may give rise to suspicion but suspicion is not enough. The case against LT in Count 2 is not made out.

IM

235 IM claims to be numerically dyslexic. His claim was supported by AM. I find this claim to be extraordinary given that IM was a successful commercial lawyer who had advised the liquidator in Barlow Clowes, who advised the depositors in BCCI and who was a Companies Inspector. If this claim is made to reinforce his evidence that he did not know what was happening at M & Co. Gibraltar, despite the volume of material he was sent, I reject it. Vanessa Plumb said that from all the paperwork sent from Gibraltar to London, IM was privy to the financial state of M & Co. I am satisfied he was. M & Co. was his firm.

236 Both IM and AM gave an account of the sudden realization that all was not well in the accounts at M & Co. This was probably in July 2009. IM was in Gibraltar dealing with the Gibraltar aspect of the Russian case. He needed a printer with greater capacity than the one he had. The IT department were instructed to link his computer to the accounts department printer but somehow managed to link in the account department computer.

237 He asked AM to look at what had appeared on the screen as he was fully committed to work. He said: "We believed that what we were seeing did not fully tally with the information that we were being given."

238 AM said that in July 2009, Barclays Wealth (London) asked IM for management accounts. In turn, IM asked him for help in satisfying that request. He told IM that he was not an accountant, he had never dealt with management accounts and knew nothing about it but he would help if he could. IM said that they had better get BM and SM on to it. AM did not know why Barclays wanted this information.

239 AM said that he deduced BM and SM did not cooperate as, in July and August, Barclays were still asking for management accounts. He suggested that IM got whatever accounts he could and give them to YZ. He was told that there was a problem reconciling Sage and Liberate.

240 AM travelled to Gibraltar with IM. AM said that what he saw on the screen in IM's office made no sense. Everything on it surprised him—the butcher's bill and "weeklies" for the wives of BM and SM. It bore no relation to any accounting he had ever seen.

241 AM said that IM could not understand it. It would be good if it was cleared up by YZ. They took two or three prints and took them to London. From London, IM told them (BM and SM) that the accounts must be produced, once and for all, by the end of July. It was urgent. He needed to satisfy the bank. AM said: "We wanted to give BM and SM the benefit of the doubt and the opportunity to explain." Such accounts as he saw indicated that everything was going to the benefit of BM, SM and their wives.

242 In his interview, IM had said this:

> "[H]e had first thought something was amiss in M & Co. in June/July 2009. He and [AM] could not access certain elements of the computer program, such as [SM's] internal . . . which had been encrypted. But he and his brother realized there were two or three different systems in place. He had spoken to [SM]. He and [AM] asked Joshua's wife Corinne (an accountant) to share a forensic analysis. She found out [BM] was making transfers to the Bank of Jerusalem from Jyske Bank [as BM was said by IM to be purchasing two flats in Jerusalem] but the transferred money, Corinne said was paying for a previous property . . . this was the first time he realized [BM] with [SM] was running 'a triple account a quadruple account system.' There was not enough time for Corinne's exercise to produce back up documents."

243 IM said:

> "Referring back to the interview the day before, [IM] said that Corinne Marrache had discovered they [BM and SM] were putting sums against his name in the accounts two or three times as his drawings thus tripling or quadrupling them. It was total and absolute fraud on everyone but he was the prime victim, the major target. He expected it from [BM] and not [SM]. He referred to copies of emails he had brought to the interview [TT/IMDOC/1 at 13–14] when he finally spotted the incorrect figures. Everything had been a total sham; they had created a parallel system in the client account in relation to clients and to him. He referred again to Anjette receiving £1,500 cash every week 'from the weeklies', having her maids paid, all the outgoings of the house paid, and Monica receiving €1,000. He referred again to the schedule found in the safe as a 'time capsule' left there on purpose if anything ever happened."

244 IM said that on his return to London he arranged a weekly meeting with W at Pret a Manger and asked him to make a report. He and AM decided that, in future, they would not include BM and SM in every deal. AM took that decision as he analysed the drawings. AM started to go into the accounts department.

245 He began to liaise with Liza Franklin and to drill down into the drawings—to analyse and see what had been put against his name.

246 IM said that he believed his drawings were being falsely inflated. He and AM had been drilling down. They concluded that they were in a position to confront BM and SM. They were running the practice for their own ends. They were extracting as much as they could—more than was justified—and were concealing it. There was a centralized treasury.

Everything was put into the pot—property, family and tobacco. He was not being given a true picture.

247 He convened a meeting in the boardroom at 5 Cannon Lane. AM accused BM of stealing from the family generally and from IM in particular. BM stormed out. SM started crying and saying that as they were brothers they should all pull together.

248 AM said that after YZ was instructed to produce management accounts, a family meeting was held. The purpose was to find out what the accounts actually meant. The indication was that everything was going to the benefit of BM, SM and their wives. He asked "What was the meaning of the accounts. We need explanations for the family. Everything set up on the Liberate system was for the benefit of you and your wives." Within two or three minutes, BM stormed out. SM said that AM had upset BM by suggesting his management style was flawed. SM then told him that Fortress House had been mortgaged, something he had not known before. Nothing more was said.

249 I note, without further comment, that on July 22nd, 2009, AM "drew" £4,000 from M & Co. On August 4th, 2009, two payments, each of £5,000, were made to AM and, on August 6th, a further £2,500. IM said AM was entitled to be paid for his work on the Close-Marrache Bank. IM also "drew" over £16,000 from the firm that day. He said: "This was the first time I had drawn a substantial amount of money for a long period." He admitted that he was also taking £10,000–£12,000 per month out of London.

250 There is no evidence of this alleged triple or quadruple accounting system. The evidence is of Sage and Liberate, two office accounting software packages upon which the staff faithfully recorded the information that they were given. What AM describes is in fact exactly what the Police and Steadman found on those systems, namely that M & Co. accounts were used to fund the whole of the Marrache family—even down to light bulbs. IM was a principal beneficiary of the system. Corinne, who was in fact a bookkeeper, not an accountant, had ample time to produce a report. No trace of such a report was found.

251 There are two quite separate issues arising from this evidence. That IM was highly suspicious of BM I do not doubt, but the story of the sudden revelation of "one pot" accounting is, in my judgment, a deliberate and dishonest invention.

252 IM was the senior partner. He could walk into the accounts department at any time and demand to see all or any of the records.

253 Daniel Tavares told the court that from July 2009 onwards, IM wanted to know more and more about what was happening in Gibraltar. He was also more interested in the drawings—but he already knew the

figures. He had been sent them. IM did stop SM signing cheques on the client accounts. IM was in overall charge.

254 That the IT department would accidentally link IM's computer with the accounts computer rather than the printer is, in the face of it, unlikely.

255 It seems that in August, after this meeting, IM, BM and SM all went on holiday. AM's account of what happened in September is illuminating.

256 He said that he and IM met in London in September. There were still no management accounts and nothing from YZ. IM told him that there were problems—technical difficulties—reconciling Sage and Liberate. He told him that he (IM) had removed SM's signing powers and had made BM fully responsible for the financial and management side of the firm.

257 If that account is correct, IM had put the person he suspected of fraud in an even better position to continue his activities.

258 It is absolutely plain that all three brothers were drawing substantial sums of money from M & Co. It was obvious to Rivett and to Tavares that more money was going out than was coming in. It must have been obvious to IM. As a matter of simple logic, if the firm were spending more than it was earning then the only place that the money necessary to meet the discrepancy could come from was client accounts. The purpose of the "story" was to enable IM to claim that he did not know that M & Co.'s expenditure exceeded its income.

259 The second purpose of this invention is to provide evidence that IM had no responsibility for the "one pot" system. IM must have known that M & Co. paid no rent for 5 Cannon Lane. Equally he must have known about Fortress House. It is hard to believe that he did not know that Joshua and Raphael were being supported by M & Co.

260 BM said that the accounting system he used (by which I mean the indiscriminate use of client money) was inherited from IM. I look for some evidence which supports BM's account. I find it in the Rebecca tapes. I appreciate that this is not evidence from an independent source. However, BM did not know that he was being recorded. Although he and IM were at loggerheads, this was before any threat of prosecution and it is too early for BM to be setting down a false defence.

261 I am satisfied that IM knew in general terms how the firm had covered the gap between income and expenditure. I repeat that it is inconceivable that YZ would have "cooked the books" without notifying the partners. If he ever asked YZ to investigate the validity of his drawings, it could have been done quite quickly. There is no evidence that YZ ever reported on that.

262 When it was suggested to IM that, from Nuchowicz onwards, he must have appreciated that M & Co. were in financial difficulties, he

denied it. He relied on the money apparently in Lexcas as being earned by the Spanish department. He also asserted strongly and frequently that London was earning very substantial fees. He denied that London was financially dependent upon the Gibraltar office.

263 I do not doubt that London was earning substantial fees, but there is a very obvious difference between earning fees and getting paid them. The true picture was given by Steven Daultrey.

264 Steven Daultrey is an experienced solicitor and well acquainted with the regulations which govern the handling of client money.

265 He joined the London office of M & Co. on May 31st, 2005. He had little to do with Gibraltar, visiting no more than six times, and these visits were principally concerned with one transaction. He had no knowledge of or access to the Gibraltar bank accounts.

266 The London office was successful and attracted substantial work of good quality. He gave examples. He confirmed that IM was a busy lawyer of high repute, both professionally and personally.

267 At first, he said, the London office had no banking facilities. Costs were met by M & Co. and fees went to the M & Co. account in Gibraltar. London was a "subsidiary." In the summer of 2008, IM wanted to separate the London office from Gibraltar.

268 In August 2008, an office account was opened for the London office and, in October 2008, a client account was opened.

269 The London office inherited substantial debts which should have been met by Gibraltar but which were not. The London client account complied with the Solicitors' Accounts Regulations.

270 Although the London office was successful and generating substantial fees, there was a cash flow problem because the fees were not being met. He produced a list of unpaid "London" fees for Mr. Hyde. On occasions, his salary was paid by Gibraltar.

271 In the summer of 2009, the London office account was overdrawn and Lloyds TSB were pressing for payment. Part of the problem was that fees due to London had been paid to Gibraltar and Gibraltar would not part with them. IM claimed he had no control over Gibraltar.

272 In June 2009, Mr. Daultrey had not been paid for 4 months and his expenses had not been met for 13 months. IM, BM and SM were well aware of this.

273 In cross-examination by Mr. Lovell-Pank, Q.C., Mr. Daultrey conceded that in "ball park" figures:

(i) between August 2008 and February 2010, the fees received by London were roughly £400,000;

(ii) he and IM were drawing between £10,000–£11,000 per month; and

(iii) rent, staff salaries, expenses, *etc*. were between £35,000–£40,000 a month and London was in fact getting in about £22,000 per month—significantly less than was needed.

IM's rent was being paid from the office account (part of his drawings) and £450,000 was paid to IM's builders from the office account. At Christmas 2009, Steven Daultrey had to lend IM £4,500 so that he could fly to New York. IM told him he was "re-financing his bank accounts."

274 IM could hardly have been unaware of the true position. He was drawing down substantial funds from both London and Gibraltar in order to finance an expensive, if not extravagant, lifestyle. He had a mortgage on a very substantial house at 36 Ingram Avenue. He was paying not insignificant sums of money to have that property improved, including the excavation of the basement for the installation of a swimming pool. He rented another house in Ingram Avenue whilst that work was being done. He had domestic staff. He had children at private school. He knew that the firm had had to borrow money against family properties to pay off Nuchowicz and that the firm was having to raise more money from the banks. His explanation for this, namely that BM said that the firm needed more liquidity and that he trusted his brothers, is simply unbelievable. He had no reason to trust his brothers and, on his own evidence, good reason not to do so.

275 IM claimed not to have seen the letter from Verralls, dated December 17th, 2008, which referred to the failure by M & Co. to use money lent by Barclays to redeem two mortgages. Verralls were the lawyers acting for Barclays. He also claimed not to have seen LT's reply.

276 He said he did not receive the letter sent to BM by Barclays Wealth dated February 11th, 2009 which was forwarded to him that same day. The letter revealed that the current account (No. 792) was £139,695.58 overdrawn and that account No. 142 was £24,536.07 overdrawn. The Bank required these debts to be settled immediately.

277 In his final speech, Mr. McGuinness referred to a "recurring theme." The theme was that, confronted with an email apparently sent to him, IM would deny either receiving it or having read it if its contents proved or suggested a greater knowledge of his brothers' activities than he was prepared to admit—or indeed any knowledge at all.

278 Mr. McGuinness referred to the email in December 2008 from Barclays which disclosed that the client account was £39,851.78 overdrawn and another account was £89,678.88 overdrawn. IM denied receiving this, as he had to given his concession that a client account should never be overdrawn. He accepted that his personal assistant must have received it. It is inconceivable that she did not forward it to him given the contents. This is clear evidence of the misuse of client funds. I am satisfied that IM did receive it.

279 On January 20th, 2009, LT forwarded to IM a letter from Jyske Bank which threatened foreclosure if M & Co.'s "excess position" was not covered by the sale of 206–210 Main Street. IM claimed that he did not recall seeing this. He added that had he seen it he would not have been concerned as he trusted his brothers. I am satisfied that he did receive it and that he was well aware of the reality of M & Co.'s financial position.

280 He claimed not to have received it or not having read emails of February 13th, 2009 and of March 17th, 2009. Both provided information about the parlous state of M & Co.'s finances.

281 Mr. McGuinness gives further examples which I shall not set out here. In my judgment Mr. McGuinness's point is valid. IM's evidence is unacceptable.

Halle

282 Mrs. Halle was a widow who inherited money from her late ex-husband. The funds were in Gibraltar. She instructed M & Co. to act for her and paid their fees in advance. Jeevan Daswani dealt with the matter. M & Co. received her inheritance, £27,039.96, on June 18th, 2009. She should have received her money relatively shortly after that. It was on August 18th that Daswani sent a *billet-doux* to the accounts department requesting that Mrs. Halle be paid. It was not acted upon. She was not sent her money until October 13th, 2009. She had been "fobbed off" for four months, which included sending her a post-dated cheque. The cheque was sent on September 29th, 2009 but dated October 29th, 2009. It was signed by SM, although drawn on a client account. That account was not the account into which her money had originally been paid. Her money had been dissipated.

283 Mrs. Halle complained. The Registrar of the Supreme Court forwarded her complaint to the Attorney-General in his capacity as the Chairman of the Admissions and Disciplinary Committee ("ADC"). On October 14th, 2009, M & Co. sent a letter of explanation to the Attorney-General. The reason given for the post-dating of the cheque was that there was a postal strike in England and M & Co. feared that the cheque might fall into the wrong hands. As Mr. Provasoli said, this explanation made no

sense. An electronic transfer would have avoided any delay. Post-dating the cheque would not prevent it falling into the wrong hands.

284 Mr. Provasoli was a member of the committee of the ADC who dealt with this complaint and with a second complaint by Mrs. Halle that M & Co. staff had harassed her.

285 Various complaints are made about the conduct and motives of the members of the ADC. They are irrelevant for the purposes of this judgment. The ADC wrote to M & Co. asking for the correspondence between M & Co. and Mrs. Halle, the bank account details from June 2009 for the account used to pay Mrs. Halle and details of the general client account from June 1st–October 20th, 2009.

286 IM in evidence accepted that Mrs. Halle should have been paid straight away, but adopted the postal strike/wrong hands explanation for the cheque. He said he became involved in October to deal with the complaint. Carol Haw was also brought in and Keith Azopardi from Attias & Levy was instructed to advise. IM brought in YZ. There was a legal argument as to the powers of the ADC to demand this material and concerns that to disclose it might jeopardize client confidentiality.

287 I make no comment on the legal issues. What is absolutely clear is that—

(i) everyone involved, and that included IM, BM and SM, must have been aware that what the ADC actually needed was evidence that M & Co. had dealt with Mrs. Halle's inheritance as required by the Solicitors' Accounts Rules and that the reason for the post-dated cheque was not that M & Co. had insufficient funds at the time; and

(ii) YZ knew of the exact requirements of the Solicitors' Accounts Rules. It would take but minutes to check the bank account. Everyone involved must have appreciated that Mrs. Halle's money had gone. IM said in evidence that he did not look at the bank account. I find that claim astonishing but, even if true, he must have been made aware of the true position, namely that Mrs. Halle's money had been taken and that this was another example of the abuse of the client account.

288 M & Co. could have simply taken a principled stand on the legal issues. What actually happened illustrates that each of the Marrache brothers realized that the true picture could not be disclosed.

289 In my judgment, YZ was brought in to disguise the truth, not to disclose it. IM was responsible for bringing in YZ, which gives a real indication of the true relationship between YZ and M & Co. in general, but IM in particular.

290 By a letter dated November 13th, 2009, M & Co. sought to delay the enquiry by asserting that YZ were conducting a review of client

accounts and preparing a report. No such report was ever produced. YZ would have known that any investigation into the client accounts would have resulted in the closing of M & Co. and the suspension of the partners.

291 M & Co. submitted two certificates of compliance with the Solicitors' Accounts Rules. They did not cover the relevant period. They sent a letter which YZ had sent to M & Co. on December 3rd, 2009 which was positively misleading and considered sending a second equally misleading letter dated January 11th, 2010. Daniel Tavares was instructed to prepare redacted accounts which were designed to disguise M & Co.'s true position and mislead the ADC.

292 I have grave doubts as to the truthfulness of IM's account of frog-marching his brothers to the offices of YZ in September 2009. I can see no purpose in such a trip. IM was the senior partner. He did not need BM and SM present in order to instruct YZ to look into the drawings and expenses. There is no evidence that YZ ever undertook this enquiry. There is no satisfactory evidence to support IM's claim that his expenses and drawings were being artificially increased.

293 Whilst accepting that David Cervinka's evidence was less than satisfactory, and accepting that M & Co. had investments in the Czech Republic (Mr. Hyde sold them to Cervinka), I find it impossible to accept IM's evidence that Cervinka owed M & Co. substantial sums of money by way of fees and interest on investments. Had Cervinka owed M & Co. money, there would be written evidence of it and given the severe cash flow problem in London that money would have been called in. The documentary evidence produced by IM was less than conclusive. His explanation that he trusted Cervinka is unconvincing. For the same reasons, I am satisfied that BM's claim that there were substantial funds in the Czech Republic was false.

294 I shall only deal with two other matters.

The boardroom meeting on December 18th, 2009

295 IM told how LT came to see him on December 16th, 2009 and told him about David Doyle, Portino and the missing €1.7m. He already knew that the firm (or rather Kristy) owed the Government approximately £1.3m. following his meeting with the Chief Minister. He decided to call a meeting of the family and the senior staff, Carol Haw, LT and Gabriel Garcia Benavides. He had told AM he was going to "have it out" with BM.

296 Carol Haw gave evidence that IM had told her that BM had been defrauding the company. He was an embezzler. Later he included SM in this allegation. He told her that he intended to confront BM at the family meeting.

297 Carol Haw said that AM did most of the talking. They discussed the debt to the Government, the money needed to pay stamp duty, the money owed to clients and the Halle complaint. Both IM and BM said that they were trying to arrange loans. She had said that unless something was done about the "hole" (the deficit), there would be very serious consequences. IM and BM could go to prison. At the end of the meeting, IM asked her to go with AM to his office. She replied that there was no point as there had been no confrontation.

298 I accept Carol Haw's account as accurate. The failure of IM to confront his brother is further evidence of complicity. To have confronted BM in front of witnesses would have been to run the risk of counter charges, not a risk IM could afford to take.

Cabor and Gibland

299 IM admits that in January 2010 he sought to sell Cabor and Gibland to W. He presented this sale to BM and to Carol Haw as a genuine sale. It was nothing of the sort. He had agreed with W that, when the dust had settled, he would buy back the two companies. IM said that his motive was to preserve the licences. Others described it is asset-stripping. Whatever his motive, this is an example of IM being both unscrupulous and dishonest. It sheds further light on the conduct and standards of W and the nature of his relationship with IM.

300 I am satisfied that IM permitted the overt acts alleged in Count 1 and did so dishonestly.

301 I intend to deal with Count 2 in respect of IM very briefly. My analysis of what the Crown need to prove against him is the same as for LT. To secure a conviction in respect of Count 2, the Crown must prove that he knew that—

(i) M & Co. had no right to offer 431 Watergardens and 34/4 Cornwall's Lane to Jyske Bank as security,

(ii) M & Co. had no right to mortgage 77 Ragged Staff Wharf, and

(iii) he had this knowledge before the facility letter was signed.

302 It is important to remember that, from July 2009, BM was becoming increasingly alienated from IM and AM. I am not prepared to assume that BM would share with IM the details of his financial dealings. It is more likely than not that he would not have done so. Steven Daultrey confirmed IM's account of a telephone call between IM and BM in September 2009 when, among other things, BM had screamed down the phone that Gibraltar was his.

303 I find it difficult to believe that he did not know that 34/4 Cornwall's Lane was Rebecca's property, but she did not live there, and he asserts that

he did not know. There is no reliable evidence that he did. I cannot see any evidence that could make me sure that he knew 77 Ragged Staff Wharf belonged to Jim Magner. The emails which the Crown rely on to prove knowledge and which IM denies receiving and/or reading are not sufficient in themselves to achieve the criminal standard of proof.

304 The prosecution have failed to prove Count 2 against IM.

Judgment accordingly.
