[2018 Gib LR 54]

ROYAL BANK OF SCOTLAND INTERNATIONAL LIMITED v. MAGNER and T&T TRUSTEES LIMITED

COURT OF APPEAL (Rimer, Smith and Goldring, JJ.A.):
June 12th, 2018

Trusts—constructive trusts—dishonest assistance—bank's appeal against finding that dishonestly assisted client firm to misappropriate clients' funds allowed—judge made seriously mistaken findings as to bank employee's dishonesty—serious procedural irregularity, rendering trial unfair, for judge to find employee lied about matters not raised by claimant

The respondents claimed compensation in the Supreme Court for dishonest assistance in fraudulent breaches of trust and knowing receipt.

The respondents' claim was made in the wake of frauds committed on clients by Marrache & Co., a firm of solicitors. Some of the client accounts were held with the appellant bank. The individual culprits were the three Marrache brothers, Isaac, Benjamin and Solomon, of whom the first two were the firm's sole partners and the third its finance director. The first respondent, Mr. Magner, was a client of the firm and a victim of the thefts. The second respondent was the trustee of two trusts established by the first respondent. The respondents asserted that the Marrache brothers stole from them between February 2007 and May 2008 (they were both claimants as it was uncertain whose money had been stolen). Their loss was estimated at about £6.9m., plus interest. The respondents sued the appellant for its alleged dishonest assistance in the thefts and claimed that it was accountable to them based on its knowing receipt of the money and a proprietary or tracing claim.

The firm had five relevant accounts with the appellant: (i) sterling office account no. 293; (ii) sterling client account no. 294; (iii) US$ client account no. 149; (iv) CAN$ client account no. 201; and (v) euro client account no. 135. The firm's relationship manager at the bank from June 2005 to July 2007 was Mr. Shaw. (Relationship managers had no general

duty to monitor customers' accounts; their role was to act as a point of contact; prepare credit applications for consideration by the credit management team; and to receive excess reports and "selective today's posting" reports.) The Marrache family was wealthy, with excellent connections in Gibraltar. The relationship between the Marrache brothers and the appellant, however, was poor. The brothers were arrogant and bullying. They were reluctant to provide financial information or accounts and persistently exceeded their overdraft on office account no. 293.

In August 2005, shortly after his appointment as relationship manager, Mr. Shaw carried out an analysis of transactions from client account no. 294 to office account no. 293 (he produced a spreadsheet showing those transfers). He stated ". . . I need to understand how they manage their/clients' cash. I need to ensure they are not cross-firing/misusing clients' funds." Mr. Shaw said that he had spoken to a Mr. Cartwright, the head of the appellant's corporate and financial institutions, about an earlier investigation by a Mr. Bautista into potential cross-firing, in which nothing was proved. Mr. Shaw also said that around September 13th, 2005 he had a meeting with Baker Tilly (the firm's auditors), which gave him comfort. Mr. Shaw noted that the firm did not segregate client accounts, which was best practice, but that segregation was not required under Gibraltar legislation at that time.

The parties were permitted to instruct experts. The experts agreed inter alia that competent bankers, like relationship managers, could be expected to be aware of the need for separation of client and own moneys by solicitors, and that a reasonably competent banker would not be expected to police the separation of client and office moneys. If a banker became aware of matters which raised a suspicion that a customer was misusing client funds, he would be obliged to investigate the suspicion.

The Supreme Court (Jack, J.) summarized the requirements of a dishonest assistance claim, namely that (a) there was a trust; (b) there was a breach of trust by the trustees; (c) the defendant assisted the breach; and (d) did so dishonestly. There was no dispute that (a) and (b) were satisfied: the money in the client accounts was trust money and the Marrache brothers breached their trust when they stole it. There was no material dispute about (c): the appellant permitted the banking transactions that enabled the breaches to be committed. The critical issue was (d), namely whether the appellant had acted dishonestly. The judge said that there were two sorts of relevant dishonesty, namely actual dishonesty, where a manager at the bank authorized payments knowing that the Marraches were misappropriating money, and blind-eye (or Nelsonian) dishonesty, where a manager had suspicions of the Marraches' misfeasance but made a conscious decision not to investigate. The judge considered whether the appellant bank, by one or more of seven employees, had dishonestly assisted the Marrache brothers to steal from the client accounts. He rejected the case against six of the employees but found it proved against the seventh, Mr. Shaw, which entitled the respondents to judgment.

The judge rejected Mr. Shaw's evidence that he had had a conversation with Mr. Cartwright about the Bautista investigation, finding that Mr. Shaw lied in this matter ("the Bautista lie"). The judge found that Mr. Shaw lied about making a note following the meeting with Baker Tilly, and the judge did not accept that this meeting took place. The judge found that it was "woefully inadequate" for Mr. Shaw to have limited his inquiry to client account no. 294. The judge asked himself why Mr. Shaw should have behaved dishonestly, and started with "the striking fact" that Mr. Shaw never made an STR in respect of his suspicions of the firm, and noted that reporting the issue of misuse of client funds would have been a courageous thing to do. The judge found on the balance of probabilities that Mr. Shaw did analyse the other client accounts for the period January to August 2005, discovered evidence that the firm was misusing client moneys and thereafter assisted the firm to continue to misuse clients' funds, which was dishonesty on his part. Alternatively, even if Mr. Shaw did not carry out a full analysis of the other client accounts, nonetheless on the balance of probabilities he would have started some further investigation into the other client accounts and would have quickly realized that there was evidence raising a suspicion that the firm was misappropriating client moneys, and stopping his investigation would have been dishonest. The judge found proved the case that Mr. Shaw had dishonestly assisted the Marraches' misappropriations.

On appeal, the appellant challenged the judge's finding that Mr. Shaw was dishonest. There were five grounds of appeal: (1) It had not been the respondents' case that Mr. Shaw had lied about the Bautista conversation or the making of a note of his meeting with Baker Tilly, nor had any suggestion of such lying been put to Mr. Shaw, but the judge had made the two findings of lying. It followed that his findings were tainted by a serious procedural irregularity, rendering them and the trial unfair. (2) There was no evidential basis on which the judge could have found that Mr. Shaw had lied about the Bautista conversation. (3) There was no evidential basis on which the judge could have found that there had been no meeting with Baker Tilly around September 13th, 2005 from which Mr. Shaw had drawn comfort. (4) There was no evidential basis for the judge's findings that Mr. Shaw had analysed accounts other than the 294 account and the 293 account and had so discovered a misuse by the firm of client funds. (5) The judge's overall conclusion that Mr. Shaw dishonestly assisted the Marraches' misappropriation of client money was objectively unjustified, against the weight of the evidence and contrary to the probabilities.

In reply, the respondents submitted, with respect to the alleged procedural irregularity, that the critical question was whether the trial was fair. By way of cross-appeal, they submitted that there were additional reasons for finding that Mr. Shaw was dishonest.

Held, allowing the appeal and setting aside the order:

(1) The court would uphold Ground 1. Civil litigation was required to

be conducted fairly. The requisite fairness included that each side was entitled to know what the other side's case was so that each had a proper opportunity of meeting it at the trial. The function of the judge was to decide between the cases respectively advanced. Parties to litigation, their lawyers and judges should not make serious imputations or findings in any litigation when the person against whom such imputations or findings were made had not been given a proper opportunity to deal with the imputations and defend himself (the *Vogon* principle). It was no answer to an infringement of that principle that an objective analysis of the evidence might show the finding to be justified. There was a higher consideration, one of natural justice, that no serious imputation against a witness should be made in circumstances in which the witness was not first given a chance to answer it. The impact that a judge's infringement of the principle had on the outcome of the appeal ultimately turned on the fairness of the trial. Infringement of the principle would always involve an element of unfairness, although its impact on an appeal would be likely to vary with the circumstances. One type of case was where, in breach of the principle, a judge made a finding of lying by a defendant on a matter collateral to the central issues and which, on analysis, could be seen to have no impact on an unimpeachable set of reasons for deciding the case against the defendant. There would have been an unfairness to the defendant, but not in the overall decision. In such a case, the infringement would not justify a reversal of the judge's order. On the other hand, it would still be open to the appellate court, while dismissing the appeal, to say expressly that the judge's finding of lying should not have been made and was unjustified. Another type of case was where the infringement of the principle could be seen to go to the heart of the adverse decision against the defendant, so tainting it by material unfairness. In such a case, there was likely to be a compelling argument that the defendant's appeal against the adverse order should be allowed. In the present case, the appellant was entitled, at least, to a statement by the present court that the judge's findings of lying by Mr. Shaw in the two respects were unjustified and should not have been made. Given the court's overall view on the other grounds of appeal, however, it was unnecessary to express a view as to whether, had Ground 1 stood alone, it would have justified allowing the appeal (paras. 122–123; paras. 133–137).

(2) The court would uphold Ground 2. The court was satisfied that the judge's finding that Mr. Shaw lied about the Bautista conversation was unjustified and wrong. The judge had wrongly found that there was an issue between the parties as to whether the conversation had taken place. The judge appeared to have misunderstood the cross-examination. The judge manifested a comprehensive misunderstanding that there was an issue about the conversation and then found that Mr. Shaw had lied about it. Not only did this finding infringe the *Vogon* principle (*i.e.* that a judge should not make a serious imputation or finding of fact against a party where the party had not had a proper opportunity to deal with the imputations and defend himself) it was also a finding that was not open to

the judge. The judge was seriously wrong to find that Mr. Shaw had dishonestly invented the Bautista conversation. The finding of the lie was of primary importance in the judge's overall determination of the case against Mr. Shaw and in turn the appellant. It was impossible to conclude that without that element of the judge's findings the outcome of the trial would have been the same. Subject to considering the cross-appeal, the court regarded the judge's wrong finding as to the Bautista conversation as, by itself, sufficient for the appellant's appeal to succeed (para. 138; paras. 144–147).

(3) The court would uphold Ground 3. With respect to the Baker Tilly meeting, the judge erred in finding that Mr. Shaw had lied in stating that he had made a note of the alleged meeting. In fact, Mr. Shaw's evidence was that he could not recall whether or not he made a note. The judge's error in finding that Mr. Shaw made a statement that he prepared a note meant that it was not open to him to find that Mr. Shaw had lied. This was a serious mistake and could only have served, wrongly, to fortify the judge's assessment of Mr. Shaw as a dishonest witness. Subject to one consideration, the court was in no position to disagree with the judge's conclusion that he did not accept that there was a meeting with Baker Tilly around September 13th, 2005 which gave Mr. Shaw comfort. Mr. Shaw's evidence about the meeting was inconsistent, imprecise and apparently unimpressive, and the judge's overall conclusion that Mr. Shaw did not have a meeting with Baker Tilly at which he was given comfort was the sort of finding by a trial judge with which an appellate court had no business to interfere. The qualifying consideration, however, was that the exercise the judge was performing was a finding as to the evidence given by someone he had already wrongly found to be a liar with regard to, inter alia, the Bautista conversation (a lie to which he attached a particularly dishonest motive). The mistaken findings as to Mr. Shaw's truthfulness must have materially coloured the judge's determination of whether Mr. Shaw's evidence that he had had a meeting with Baker Tilly from which he derived comfort was truthful or reliable. In these circumstances, the court would simply say that in its judgment the judge's rejection of Mr. Shaw's evidence that he derived comfort from the meeting was unsafe. If the upholding of the judge's order depended on this finding, the court would not have been prepared to uphold the finding (paras. 148–150; paras. 156–157).

(4) The court would uphold Grounds 4 and 5. The judge's findings as to Mr. Shaw's investigation of the client accounts were unsatisfactory in material respects. First, there was no evidence that Mr. Shaw had analysed client account no. 294. The judge assumed he had but appeared to have overlooked that it was probable that the only source for his schedule was office account no. 293. Secondly, there was no evidence that Mr. Shaw investigated any of the other accounts to which the judge referred, and he denied it. Thirdly, the judge was not entitled to find that any of the 294/293 transfers during the period upon which he focused should have

raised Mr. Shaw's suspicions. It was not open to the judge to assume the mantle of an expert in banking practice and attach the weight he did to "bunching" of payments. There was nothing in the fact of the transfers from client account no. 294 and office account no. 293 to raise Mr. Shaw's suspicions. It was accepted that as a relationship manager, Mr. Shaw was under no obligation to monitor his customers' accounts for illegal or suspicious activity. It could not be said that Mr. Shaw's omission to investigate more widely was dishonest even if it might be said that the narrow extent of his chosen investigation was inadequate. He did not know then what was known now about the Marrache brothers' dishonesty and there was no basis for any conclusion that he deliberately did not investigate further in case he discovered something sinister about the firm's activities. There were compelling reasons to doubt the soundness of the judge's finding that Mr. Shaw in fact conducted a wider investigation, including the other client accounts, discovered the fact of the firm's misappropriation of client funds and chose to remain silent about it. There was a real risk that the judge's rejection of Mr. Shaw's evidence that he did not investigate beyond the 294/293 transfers was influenced by the findings the judge had, wrongly, made against Mr. Shaw that he was a liar bent on perverting the course of justice. When considering Mr. Shaw's state of mind, the judge considered a good starting point to be the fact that Mr. Shaw had not made an STR in respect of his suspicions of the firm. The court disagreed. Mr. Shaw's investigation had been to satisfy himself that there was no misuse of client funds. As he found no evidence of a suspicious transaction, the court could not see how he could or should have made an STR. The court did not understand the basis on which the judge considered that Mr. Shaw, a very experienced and apparently very tough banker, would not have had the courage to perform his duty and report dishonest banking transactions. The judge's findings were built entirely on unsupported speculation. The speculation was at odds with the evidence as to the banking relationship with the firm at the time that Mr. Shaw was assumed to have discovered the Marrache brothers' misappropriation. The appellant viewed the Marraches unfavourably as customers. The court also did not understand on what basis the judge thought it appropriate to suggest that Mr. Shaw would have been able to see the firm's stealing of hundreds of thousands of pounds as "dipping," and as "taking monies for immediate liquidity purposes rather than stealing the monies with no prospect of ever making repayment." Mr. Shaw was unswerving in his evidence that he knew that solicitors were not entitled to help themselves to clients' money which was not due to them for fees or disbursements. In the circumstances, the judge's speculation that Mr. Shaw would have chosen to keep his discovery of the firm's misappropriation to himself was incredible. On the contrary, the evidence invited a compelling conclusion that, if Mr. Shaw had discovered any misuse of client money by the firm, he would not have hesitated to make a prompt disclosure of it. He had nothing to gain by not doing so; but, if and when the truth came out, he had plenty to lose: his job, his reputation and

his career. The judge's speculation was not only unsupported by any evidence, but contrary to the probabilities, unjustified and wrong. The court would therefore uphold Grounds 4 and 5, allow the appeal and set aside the judge's order (paras. 170–183; paras. 190–194).

(5) The cross-appeal did not advance any basis upon which the judge's order could be upheld. In relation to any "non-segregation" of moneys by the Marraches, such difficulties would not, or not necessarily, involve any dishonest misuse. There was no evidence of instances in which the firm did mix office money and client money in a single account. There was, of course, evidence of transfers from client accounts to the office account, but such transfers, if in satisfaction of money due to the firm for invoices or disbursements, would not involve a "non-segregation" of client and office money: upon the transfer, the money would cease to belong beneficially to the client and become beneficially owned by the firm. Transfers of money that did not represent money lawfully due to the firm but were instances of dishonest appropriation were also not naturally or properly described as "non-segregation" of client and office money. The court did not understand why the judge considered (or might have considered) that Mr. Shaw used a reference to non-segregation to mean dishonest misuse of client money. While it was uncertain what Mr. Shaw meant when referring to "non-segregation," it was far from clear that he in fact meant anything dishonest. The court was in no position on the cross-appeal to make its own finding that Mr. Shaw's evidence about the non-segregation issue was untruthful. On reading the written evidence and the transcript, the court was uncertain as to what the references to non-segregation meant. The judge's findings of dishonesty against Mr. Shaw were flawed from beginning to end, and without them the judgment could not be maintained (paras. 198–209).

Cases cited:

(1) *Abbey Forwarding Ltd.* v. *Hone*, [2010] EWHC 2029 (Ch), referred to.

(2) *Assicurazioni Gen. SpA* v. *Arab Ins. Group*, [2002] EWCA Civ 1642; [2003] 1 W.L.R. 577; [2003] 1 All E.R. (Comm) 140; [2003] 2 C.L.C. 242; [2003] Lloyd's Rep. I.R. 131, considered.

(3) *B (Children) (Care Proceedings: Standard of Proof)*, *In re*, [2008] UKHL 35; [2009] 1 A.C. 11; [2008] 3 W.L.R. 1; [2008] 4 All E.R. 1; [2008] 2 FLR 141; [2008] 2 F.C.R. 339, referred to.

(4) *Chen* v. *Ng*, [2017] UKPC 27; [2018] 1 P. & C.R. DG2, considered.

(5) *H (Minors) (Sexual abuse: Standard of proof)*, *In re*, [1996] A.C. 563; [1996] 2 W.L.R. 8; [1996] 1 All E.R. 1; [1996] 1 FLR 80; [1996] 1 F.C.R. 509, referred to.

(6) *HMRC* v. *Dempster*, [2008] EWHC 63 (Ch); [2008] STC 2079; [2008] B.T.C. 5150, referred to.

(7) *Haringey L.B.C.* v. *Hines*, [2010] EWCA Civ 1111; [2011] H.L.R. 6, referred to.

(8) *Mortgage Agency Servs. Number One Ltd.* v. *Cripps Harries LLP*, [2016] EWHC 2483 (Ch), referred to.
(9) *Otkritie Intl. Inv. Mgmt. Ltd.* v. *Urumov*, 2016 Gib LR 359, considered.
(10) *R.* v. *Lucas*, [1981] Q.B. 720; [1981] 3 W.L.R. 120; [1981] 2 All E.R. 1008; (1981), 73 Cr. App. R. 159; [1981] Crim. L.R. 624, referred to.
(11) *Rowlandson* v. *National Westminster Bank Ltd.*, [1978] 1 W.L.R. 798; [1978] 3 All E.R. 370; [1978] 1 Lloyd's Rep. 523, considered.
(12) *Vogon Intl. Ltd.* v. *Serious Fraud Office*, [2004] EWCA Civ 104, considered.

A. Mitchell, *Q.C.* and *N. Medcroft* for the defendant/appellant;
S. Moverley Smith, *Q.C.* and *C. Simpson* for the claimants/respondents.

1 **RIMER, J.A.:**

Introduction

This appeal is against Jack, J.'s order of August 10th, 2017, made after an 11-day trial, requiring the defendant/appellant, Royal Bank of Scotland International Ltd. ("RBSI"), to compensate the claimants/respondents for what he held was (i) RBSI's dishonest assistance in fraudulent breaches of trust involving the misappropriation of the respondents' money; and (ii) its knowing receipt of part of that money. The respondents are Jim Magner and T&T Trustees Ltd. ("the trustees"). The amount of their compensation was to be determined by an account. The judge also ordered RBSI to pay 90% of their costs of the claim.

2 The claim was made in the wake of frauds committed on clients by a firm of solicitors, Marrache & Co. ("the firm"). The individual culprits were the three Marrache brothers, Isaac, Benjamin and Solomon, of whom the first two were the firm's sole partners and the third its finance director. The brothers stole from the firm's client accounts, some of which were held with RBSI. The first respondent, Mr. Magner, was a client of the firm and was a victim of the thefts.

3 Earlier in 2017, Jack, J. had tried claims against Jyske Bank (Gibraltar) Ltd. ("Jyske") brought on behalf of other clients of the firm who had lost money from its client accounts held with Jyske. They were similarly based on the assertion that Jyske had dishonestly assisted in the theft of clients' money and knowingly received part of it. By his judgment of May 17th, 2017 (*Lavarello* v. *Jyske Bank (Gibraltar) Ltd.*), the judge held Jyske liable under both heads.

4 Jyske appealed against his order. This court (Kay, P., Smith, J.A. and I) handed down its judgment on January 15th, 2018. For reasons given in my judgment, with which Smith, J.A. and Kay, P. agreed, the court allowed the appeal, set aside the judge's order and ordered a retrial. The court

considered that the judge had misdirected himself as to the relevance of the expert and other banking practice evidence and had made further errors in his assessment of the alleged dishonesty of the bank employee whose conduct was in question. The reasons for allowing Jyske's appeal do not also mandate the allowing of this one, which falls to be decided on its own merits, although in summarizing the legal background to it I shall refer to this court's judgment in *Jyske*. RBSI's appeal challenges the judge's finding of liability. In case it were to fail in that challenge, it also mounts a separate challenge to his costs order.

5 By way of introducing the firm, I said in my judgment in *Jyske*:

> "4. Isaac, Benjamin and Solomon Marrache are brothers. In August 1985, Isaac founded [the firm]. Shortly afterwards, Benjamin was admitted to the Bars of England and Gibraltar. Isaac and Benjamin practised together as the sole partners of the firm and Solomon became the finance director. By this century, the firm had offices in Gibraltar, London, Lisbon and Sotogrande and was well-regarded. Its main bank was [RBSI] but it also had accounts with SG Hambros Bank (Gibraltar) Ltd, Barclays Bank plc and Jyske. Its activities were not confined to the services of solicitors. It also engaged in the acquisition of properties in Gibraltar by single purpose vehicle companies . . . owned and controlled by the brothers.
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> 5. On 2 July 2014, Grigson, Ag J found the brothers guilty of conspiracy to defraud. All three had stolen from the firm's client accounts with its bankers. The firm's total deficit exceeds £28m. These proceedings concern thefts from the Jyske client accounts.
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> 6. On 17 March 2010, the Supreme Court ordered that the firm be wound up as an unregistered company. The claimants were appointed liquidators. Bankruptcy petitions were presented against the brothers. On 26 November 2010, bankruptcy orders were made against each of them and Mr Lavarello was appointed the trustee of each."

6 For this judgment to be intelligible on a freestanding basis, I must explain the claims, the judge's self-directions and his findings. For any readers of this court's judgment in *Jyske*, paras. 8 to 21 below will convey a sense of *déjà vu*.

The claims

7 The first respondent, Mr. Magner, is an internet entrepreneur who set up Sports Interaction in 1997, which in 1999 obtained an online sports betting and casino business licence and expanded into online poker. He became a client of the firm in 2001. By deeds of January 31st, 2002 he established two trusts: the Greene and the Lamotte settlements. The trustee, successor to Cabor Trustees Ltd. ("Cabor"), is the second

respondent. The respondents asserted that the brothers stole from them between February 2007 and May 2008 (the reason why both respondents were claimants is that they were uncertain whose money had been stolen). They estimated their loss as the sterling equivalent of about £6.9m. plus interest. They sued RBSI for its alleged dishonest assistance in the thefts, claiming also that it was accountable to them for part of the money, the latter claims being based on (i) RBSI's alleged knowing receipt of it, and (ii) a proprietary or tracing claim.

Dishonest assistance

8 The judge summarized the requirements of a dishonest assistance claim, namely that: (a) there was a trust; (b) there was a breach of trust by the trustees; (c) the defendant assisted the breach; and (d) did so dishonestly. There was no dispute that (a) and (b) were satisfied: the money in the client accounts was trust money and the brothers breached their trust when they stole it. Nor was there any material dispute about (c): RBSI permitted the banking transactions that enabled the breaches to be committed. The critical issue was (d), namely whether, in doing so, RBSI had acted *dishonestly*.

9 The judge summarized the nature of the required dishonesty by reference to his judgment in *Jyske*. He correctly identified the principles. In this court's judgment in *Jyske*, I summarized them as follows:

> "20. In *Royal Brunei Airlines Snd Bhd* v. *Tan* [1995] 2 AC 378, the Privy Council, in a judgment delivered by Lord Nicholls of Birkenhead, held that dishonesty was a necessary, and a sufficient, ingredient for accessory liability for breach of trust . . . The judge took his guidance as to what constitutes dishonesty from *Singularis Holdings Ltd* v. *Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 Ch, [2017] 2 All ER (Comm) 445, in which Rose J referred to various well-known authorities. In *Twinsectra Ltd* v. *Yardley and others* [2002] 2 AC 164, the House of Lords endorsed the principle established in *Royal Brunei* and stated by a majority, per Lord Hutton (para 36) that:
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> > '. . . dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.'
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> 21. The judge noted the clarification of this provided by Lord Hoffmann in *Barlow Clowes International Ltd* v. *Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 146, namely, that it was not necessary to show that the alleged dishonest assister had

> turned his mind to the ordinary standards of honest behaviour and that his conduct fell below those standards. Lord Hoffmann said that all that it was necessary to show was that the defendant's knowledge of the transaction rendered his participation in it contrary to normally acceptable standards of honest conduct. The judge noted that, in *Royal Brunei*, Lord Nicholls also made it clear that wilful blindness will satisfy the test for dishonesty . . ."

10 As to this last point, the judge said in his judgment in the present case:

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

He expanded this by explaining that head (b)—

> "includes recklessness in the *Derry* v. *Peek* sense of not carrying out investigations because the party accused of dishonesty neither knew nor cared what an investigation might uncover: see *Derry* v. *Peek* (1889) 14 App Cas 337."

Knowing receipt

11 So far as material, and by reference to *Lewin on Trusts*, 19th ed., para. 42–023, at 2061 (2015), the judge identified the requirements of such a claim as: (i) property subject to a trust; (ii) its transfer; (iii) the transfer is in breach of trust; (iv) the property, or its traceable proceeds, is/are received by the defendant; (v) the receipt is for the defendant's own benefit; and (vi) the defendant receives the property with knowledge that it is trust property and has been transferred in breach of trust.

A proprietary or tracing claim

12 The respondents' proprietary or tracing claim focused on money transferred from the client accounts to the firm's overdrawn office account. The judge summarily dismissed it. There is no cross-appeal against that decision.

Burden and standard of proof

13 The judge said there was no dispute about his summary in *Jyske* as to the burden and standard of proof in relation to serious allegations. He cited from *In re B (Children) (Care Proceedings: Standard of Proof)* (3),

in which Lord Hoffmann affirmed that there is only one civil standard of proof, namely ([2009] 1 A.C. at 20) "proof that the fact in issue more probably occurred than not." *In re B* included a quotation of Lord Nicholls's observation in *In re H (Minors) (Sexual Abuse: Standard of Proof)* (5) ([1996] A.C. at 586) that—

> ". . . the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

This court, in *Jyske*, agreed with the judge's summary.

Motive

14 The judge said there was no issue about his summary in *Jyske* as to the relevance of motive. He there held that it is not a legal requirement that the person accused of dishonesty had a motive so to act. He noted, however, by reference to Mann, J.'s decision in *Mortgage Agency Servs. Number One Ltd.* v. *Cripps Harries LLP* (8) ([2016] EWHC 2483 (Ch), at para. 88), that the potential motive of the person alleged to have dishonestly assisted is relevant in determining whether he was honest or dishonest. This court, in *Jyske*, agreed.

Rowlandson

15 The judge referred to what he had said in *Jyske* as to the general duties of a banker in relation to trust accounts. He there cited a passage from Paget, *Law of Banking*, 14th ed., para. 6–19, at 144–145 (2014), which he said was approved in *Rowlandson* v. *National Westminster Bank Ltd.* (11) ([1978] 1 W.L.R. at 805), a decision of John Mills, Q.C., sitting as a Deputy Judge of the Chancery Division. The passage approved in *Rowlandson*, from an earlier edition of *Paget*, is as follows (there is no material difference):

> ". . . [I]f the banker has notice, however received, that an account is affected with a trust, express or implied, that the customer is in possession or has control of the money in a fiduciary capacity, it must regard the account strictly in that light . . .
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> When once the banker is fixed with the fiduciary nature of the account, he has to bear in mind two somewhat conflicting influences. He has to consider the interests of the person beneficially entitled, indirectly involving his own, and he has to recognise the right of his customer to draw cheques on the account and have them honoured. This divided duty has led to complications. The banker obviously must not be a party or privy to any fraud on the beneficiaries, any

misapplication of the trust fund. He could not, on the mere instruction of the customer, transfer trust funds to funds to private account, to wipe out or reduce an overdraft . . ."

16 Neither in *Jyske* nor in his judgment in this case did the judge discuss *Rowlandson* in any detail. Drawing on my judgment in *Jyske*:

"26 . . . [*Rowlandson*] was a case in which cheques were paid into an account with the bank in circumstances in which the bank knew the account was a trust account, although the deputy judge rejected the case that the bank was a trustee of the money in the account. As, however, the bank knew the account to be a trust account, the judge held the bank to be subject to the [*Paget* principles]. He held that the circumstances affecting the drawing of a cheque and a debit instruction on the account manifested a dishonest and fraudulent design by the trustee account holders, of which the bank was on notice requiring it to question or prevent the withdrawals. It did not do so and was held answerable to the defrauded beneficiaries for what, in the then (pre-*Royal Brunei*) state of the law, was called 'knowing assistance'. I do not read the case as one in which the judge found the bank was acting dishonestly and so it is questionable whether the case was correctly decided by reference to the principles clarified in *Royal Brunei*."

17 Another distinguishing feature of *Rowlandson* was that the trust account with which it was concerned, unlike the bank accounts with which *Jyske* and this case were concerned, was not a solicitor's client account. The imposition on bankers of like duties in relation to client accounts would subject them to onerous obligations. This is recognized in England and Wales by s.85 of the Solicitors Act 1974, which makes special provision for banks in relation to solicitors' client accounts. As in *Jyske*, the judge turned next to s.85.

Section 85 of the Solicitors Act 1974

18 Section 85 provides:

"Where a solicitor keeps an account with a bank or a building society in pursuance of rules under section 32—

(a) the bank or society shall not incur any liability, or be under any obligation to make any inquiry, or be deemed to have any knowledge of any right of any person to any money paid or credited to the account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it; and

> (b) the bank or society shall not have any recourse or right against money standing to the credit of the account, in respect of any liability to the solicitor to the bank, other than a liability in connection with the account."

19 An issue in *Jyske* was whether s.85 applied in Gibraltar, which turned on the interpretation of s.3 of the English Law (Application) Act 1962. The judge accepted Jyske's arguments that it does so apply. On Jyske's appeal, the claimants cross-appealed on various grounds, all of which were dismissed, including that the judge was wrong to hold that s.85 applies in Gibraltar. That question was also in issue at the trial in this case but the judge applied his earlier decision in *Jyske*, which this court has since upheld. The respondents have not sought on this appeal to challenge that decision.

20 The judge's view of the effect of s.85 was as follows:

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

21 In his *Jyske* judgment, the judge referred repeatedly to what he called "*Rowlandson* liability," although this court regarded his reliance on *Rowlandson* (11) as unhelpful in determining the issues in *Jyske* (para. 79 of our judgment). First, *Rowlandson* was not apparently based on a finding of dishonest assistance by the bank. Secondly, it was not concerned with bankers' duties towards solicitors' clients with money in client accounts, as to which the court said that "section 85 provides banks with a layer of exonerating legislative protection that had no application in *Rowlandson*." In dealing with one way in which the judge had applied *Rowlandson* in *Jyske*, I said:

> "80 . . . The sense of section 85(a) is that, as between the solicitor's client and the bank, the bank is entitled to treat instructions from the solicitor relating to the client account as if they related to an account belonging beneficially to the solicitor; and that, vis-à-vis the client, the bank is under no duty to consider, or inquire into the propriety of, such instructions. It is therefore only the solicitor, and not the bank, who owes the duties of a trustee towards the client. It is agreed (and I too agree) that there is a qualification to this namely, that if a bank dishonestly assists the solicitor to breach his trust it will be liable to the client as a constructive trustee. That is not, however, to dilute the substantive purpose and effect of section 85. It amounts to no more than a recognition that, whilst the bank does not itself owe duties in

> the nature of a trustee to the clients, it must not dishonestly assist a breach by those who do; and it would, in my view, be astonishing if an alleged accessory could plead section 85 as a defence to a claim in respect of his dishonest conduct. Subject to this, however, section 85's apparent legislative purpose is to relieve bankers of the burden of acting as watchdogs for the clients, let alone as bloodhounds; and, save in cases of dishonest assistance to a solicitor's breach of trust (or, no doubt, other dishonest acts injurious to the client) it provides banks with a complete defence to complaints that they have been party to the misapplication of client account money."

22 That said, and whilst this court considered that s.85 had led to the adoption by the judge of, in part, an illogical approach to the issues in *Jyske*, the heart of the debate in the *Jyske* appeal was whether he had been correct to find that the single Jyske employee whose conduct was in question had been *dishonest*. In the present case, having referred to *Rowlandson* (11) and s.85 in the terms he did, the judge made no further reference to either. He rightly focused on the critical question, namely whether RBSI, by one or more of seven employees, had dishonestly assisted the Marrache brothers to steal from the client accounts. The outcome was that he rejected the dishonesty case levelled at six of them but found it proved against the seventh, Howard Shaw, which entitled the respondents to judgment. By its appeal, RBSI challenges the judge's findings of dishonesty against Mr. Shaw. There is no cross-appeal against the judge's rejection of the dishonesty case against the other six employees.

23 I now summarize the judge's findings of fact, in part verbatim. When I come to his findings in relation to Mr. Shaw, I shall have to explain them more fully.

RBSI and the firm's accounts

24 The Royal Bank of Scotland plc ("RBS") was incorporated in 1724. National Westminster Bank plc ("NatWest") was incorporated in 1968. RBS and NatWest merged in 2000 but they continued to use their respective legacy computer systems. They had a shared computer programme called a Relationship Manager Platform ("RMP"). At about the time of the merger, RBS's corporate subsidiary for its operations in Gibraltar (as in Jersey, Guernsey and elsewhere outside the United Kingdom) was RBSI, which was incorporated in Jersey. Following the merger, NatWest's Gibraltar operations were transferred to RBSI.

25 In Gibraltar, RBSI's payment functions were carried out by the payment processing team. Its functions were almost entirely administrative. So long as payments appeared to be validly authorized by a customer and were within the authorized credit limits, the team would make the

payment. They were not expected to query the purpose of payments and transfers. RBSI had money-laundering officers ("MLOs") in Gibraltar, to whom suspicious transaction reports ("STRs") could be made. For most of the relevant period, the MLO was Amanda Ecclestone. RBSI's credit managers were based in Jersey.

26 Each RBSI customer had a relationship manager based in Gibraltar. Prior to about 2002, the firm's relationship manager was Lino Brydges. The dishonesty alleged against RBSI was said to have occurred between January 2004 and May 2008, when the relationship managers were successively Bianca Lester (January 2004 to June 2005), Mr. Shaw (June 2005 to July 2007) and Jordan Ramagge (July 2007 onwards). Mrs. Lester and Mr. Ramagge were newly promoted relationship managers when they assumed that function with the firm. The judge regarded Mr. Shaw's position as different, describing him as "an outsider with decades of experience." Mrs. Lester, Mr. Shaw and Mr. Ramagge reported to Marvin Cartwright, the head of RBSI's corporate and financial institutions. The overall head of RBSI in Gibraltar was Kerry Blight, the regional manager. The Gibraltar relationship managers used the RMP to communicate with RBSI's credit management team in Jersey, of which the relevant members were Kenny Maclean, Kelvin Heward, Bryan Simpson, Ian Nash and Tony Quayle.

27 The firm had five relevant accounts with RBSI (I give just their last three numbers): (i) sterling office account 293; (ii) sterling client account 294; (iii) US$ client account 149; (iv) CAN$ client account 201; and (v) euro client account 135.

The Marraches' relationship with RBSI

28 There was no dispute as to RBSI's knowledge of the Marrache family. They were long-established and wealthy, with excellent connections in Gibraltar. Until its collapse in 2010, the firm had a good reputation. RBSI used it in its role as proposing mortgagee in Spanish property purchases. Coutts & Co., RBS's private banking arm in London, recommended it to its customers for Gibraltar-related work. The brothers presented themselves as men of great personal wealth. Apart from the firm, they had a trust and company administration business, Gibland Secretarial Services Ltd. ("Gibland"); the corporate trust firm, Cabor; an estate agency, Canon Real Estate; and a tobacco wholesaler, A.S. Marrache & Son Ltd.

29 The relationship between the brothers and RBSI was poor. The brothers were arrogant and bullying. Benjamin Marrache was prone to what the judge called *braggadocio*. When the credit function moved to Jersey, RBSI started to insist on financial information which the brothers were reluctant to provide. It was only with difficulty that they could be

persuaded to provide accounts, which led to repeated showdowns: RBSI would refuse to extend the firm's facilities unless it agreed to manage its credit relationship better, threats usually achieving a temporary improvement.

30 The brothers presented to RBSI as chaotic. They persistently exceeded their overdraft on the 293 office account. They explained this as the result of billing clients but failing to transfer the money paid from client accounts to 293. The judge found they were apparently keeping two sets of books, which he said was not consistent with chaotic cash management, but he also found that RBSI thought they were chaotic. Of the three relationship managers, the judge found that Mr. Shaw took the toughest line with them, in particular at an early meeting he and Marvin Cartwright had with them on September 13th, 2005.

The relationship manager's role

31 Relationship managers had no general duty to monitor customers' accounts. Their role was to (i) act as a point of liaison with the customer; (ii) prepare credit applications for consideration by the Jersey credit management team; and (iii) receive two types of report on which they needed to act.

The excess report

32 This was one of the two reports. If a customer exceeded his overdraft limit it would be reported on the day's "excess report." The relationship manager had to consider it and decide what to do. In principle, all excesses had to be referred for approval to the credit team in Jersey via the RMP.

The selective today's posting ("STP")

33 The other report was directed at assuaging money-laundering concerns that might arise about bigger transfers. All transfers above the relevant limit would be the subject of an STP. It would go to an assistant relationship manager, who would consider it and, if satisfied it was fit for approval, would endorse on it "Satisfied this transaction is in line with normal business activity." A relationship manager would then countersign it. There were different limits for different types of transaction. The judge said that only a limited number of STPs had survived, all from 2007. It appeared from them that, prior to October 2007, STPs were generated for all transfers of more than US$25,000 or £25,000. By October 2007, only transfers for more than £100,000 generated STPs. The oral evidence offered a more confused explanation, which the judge summarized:

> "56. . . . Doing the best I can with this oral evidence, my conclusions are these. Until the change in 2007, the STPs generated by the

> Kapiti system were for sums in excess of £25,000 (and probably 25,000 of other currencies). Relationship managers and assistant relationship managers, however, paid only cursory attention to sums of less than £100,000."

The chronology

34 Between paras. 58 and 129 the judge summarized the story from January 2000 to March 2008. I shall summarize its essence, again in part verbatim (in addition to the acknowledged quotations). The story is long but it is material to one aspect of the appeal, namely that relating to the judge's finding as to Mr. Shaw's motive, or reasons, for the dishonesty of which he found him guilty.

35 The earliest credit application in evidence, prepared by Mrs. Lester, was dated January 19th, 2000. It sought authorization for a £75,000 overdraft for the firm's 293 office account. Mrs. Lester, then an advances assistant, was assisting Mr. Brydges, the relationship manager. She made a contemporaneous note that the firm had improved its collection of money owed and the overdraft was authorized. In May 2001, Mr. Brydges applied for its increase to £100,000, which was also authorized. A September 2001 facility letter described it as for "assisting with working capital." At the same time, a £140,000 overdraft was granted to Gibland.

36 In November 2001, Barclays returned the firm's cheque for £6,000 drawn in favour of RBS. A note relating to this read "Looks like 'cross-firing' back in 2001." It is unclear who wrote it and there was no evidence that any of the firm's relationship managers ever saw it.

37 Mr. Maclean of the Jersey credit team told Mr. Brydges in November 2001 that an annual review of the firm was due in January 2002. He proposed pre-drawdown conditions, including the provision of the firm's 1999 and 2000 accounts. A file note of August 5th, 2002 reflected the credit team's exasperation with the firm, referring to the excesses on the personal and firm accounts, the hardcore nature of its overdrafts, the lack of financial information and an outstanding review. It noted that RBSI would be justified in refusing the then credit application until the review had been undertaken and the issues addressed but it also said that "This would no doubt cause a breakdown in the relationship which we would perhaps not have any qualms about were it not for the number of referrals they make to the branch." It added, however, that the facility looked affordable from the limited information to hand and it recommended its sanction. It referred to the late production of the 1999 and 2000 accounts, which were still only in draft.

38 On December 2nd, 2002, Mr. Maclean noted that "the operation of the Marraches' practice a/c is unacceptable and the lax handling of excesses by the branch over the past year or so contradicts an explicit 'no

excesses' instruction from credit." On December 21st, 2003 he emailed Mr. Nash, his colleague, saying that excesses were unacceptable in any form and that "They must sort this out immediately or we will bounce . . . They need to fully satisfy us as to the financial strength of the firm or we will enforce limit reductions or term out facilities." The email was copied to Mr. Cartwright, in Gibraltar, who replied that he would take "a firm stance." He wrote to Solomon Marrache on December 30th, 2003 asking for up-to-date financial information, a letter which the judge said did not adopt a firm stance.

39 On January 15th, 2004, Mr. Cartwright and Mrs. Lester (now the relationship manager) visited the firm and, the judge found, "thought they had made progress." By March 18th, however, nothing material had happened and Mr. Cartwright was pressing Mrs. Lester to sort matters out: the firm's overdraft had hit £180,000. On April 20th, she emailed Solomon Marrache, seeking a meeting "to discuss the facilities and the way forward."

40 On May 20th, Mrs. Lester made an excess referral: the office account was overdrawn at £132,727. She asked whether to permit or refuse withdrawals of £5,360.37. On the basis that the 2003 accounts were nearly ready and that fees to cover the excess were expected shortly, Mr. Maclean authorized the excess.

41 Mrs. Lester met the brothers on June 8th and wrote to them on July 7th, confirming the need for the 2003 accounts, for information from Baker Tilly (the firm's auditors) on working capital requirements and for a fresh valuation of the brothers' properties. She said she felt little progress had been made despite mutual goodwill. Benjamin Marrache replied on July 15th, saying that Baker Tilly would shortly have the accounts and disputing the need for the valuation.

42 On July 16th, the credit team extended the firm's £100,000 overdraft to the end of August in the expectation of the provision of the promised financial information. It required a reduction in the £27,000 excess on the overdraft. On July 29th, Benjamin Marrache wrote to Mr. Cartwright (acting as relationship manager whilst Mrs. Lester was on holiday), promising the payment of £400,000 of fees the following week, to which Mr. Cartwright replied by agreeing to give the firm a breathing space until the receipt of the £400,000 but saying the overdraft should not exceed £140,000. By August 6th, no money had been received and he emailed Mrs. Lester as follows:

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

43 On August 10th, the 293 office account was brought just within its £100,000 limit. On September 27th, there was a transfer from Jyske to it of £279,500, said by Solomon Marrache to have represented fees and putting it well into credit. Its formal overdraft facility was removed in September but within weeks it was again overdrawn and on October 15th Mrs. Lester made an excess report for permission to pay four cheques totalling just over £11,000. On October 29th (when the account was in credit for more than £30,000) she authorized the payment of £13,854.64 in cash from the 294 sterling client account for salaries. She sought no explanation as to why the payment was from the client account.

44 By January 2005 the office account was again overdrawn. Mrs. Lester chased for payments in and for financial information. On May 25th, she told Solomon Marrache that she was liaising with the credit team to finalize a renewed £100,000 credit facility. On June 22nd, he replied that the firm would like to arrange a £250,000 facility. Nothing was finalized before Mrs. Lester's role as relationship manager was taken over by Mr. Shaw.

45 On July 29th, Mr. Shaw made an excess report. He noted that whilst the last formal overdraft facility had been removed in September 2004, the firm had continued to borrow as if it still had it. On the day of his report the balance was £121,540.30 but he reported that funds were in transit that would reduce it below £100,000. He noted that draft accounts to June 2004 had been received and shared on the RMP. He made a further excess report on August 26th. The overdraft was going to hit £117,000, but he reported that funds were expected from another bank. He added:

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

46 I quote from what the judge then said:

> "89. Around this time, Mr Shaw analysed transfers from the 294 sterling client account to the 293 office account from January 2005 to August 2005. I shall return to the question whether it was Mr Shaw or one of his colleagues who prepared the analysis. The first transfer was noted as one of £15,000 on 15th February 2005. (In fact, this was an error: this transfer was of £25,000, but little turns on this.) On 21st February 2005 there was a transfer of £25,000 and on 30th March 2005 £20,000 [the March 30th date was another error: the correct date was March 3rd]. After a transfer of interest earned on the 294 account, there were transfers of £27,555 on 7th April 2005, £30,575 on 13th April 2005, and of £20,000, £10,000 and £20,000 on 5th, 10th and 13th May 2005. Following these large round-sum

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

90. Mr Shaw says that he did not examine the other client accounts, but that this may have been an 'oversight'; transcript, day 3 page 145 line 21. Nor did he make any physical or electronic note of the many transfers from the 294 account to Kirsty [*sic*: should be 'Kristy,' Kristy Secretarial Services Ltd., a Marrache-owned company that handled the firm's payroll and was the subject of a compulsory winding-up order dated January 28th, 2010], starting with £15,000 on 7th January 2005. I shall return later to the significance of these payments and what I conclude as to Mr Shaw's approach to reviewing the accounts."

47 On September 7th and 8th, 2005, Mr. Shaw made an excess report: the overdraft had gone to £119,000 on September 6th but £85,000 was received in uncleared effects on September 7th. He made a note that he had a meeting booked with the brothers on September 13th to "assess future needs/agree parameters for future operation of the account" and that his stance on striving to maintain a maximum balance of £100,000 had met with "serious unrest from clients." He wrote that "they require a 'clear the air' meeting. I am not certain whether this is progress or not!!!" On September 22nd, Adam Moon, a premium banking manager's assistant, warned Mr. Shaw that Benjamin Marrache "didn't seem very happy that this [a property purchase] had to go through you."

48 An email string on October 5th and 6th reflected a consultation between Messrs. Cartwright, Smith and Shaw about the continuing difficulties of the Marrache connection, including the ongoing excesses and the failure to formalize facilities. On October 27th, Mr. Shaw submitted a credit proposal.

49 In para. 95 the judge referred to a review "of around the same time" and quoted part of it. The review recorded that, whilst the firm's partners were considered proficient in the supply of legal services:

". . . [T]he manner in which they manage the bank accounts of the various entities, and their personal accounts, has always been a concern for the bank . . . *It would also appear that on occasions client and office accounts are not segregated but segregation is not a requirement under current Gibraltar legislation and Marrache do not follow UK best practice adopted by some local competitor practices*." [Emphasis supplied.]

50 The judge noted the use of the present tense in the phrase "are not segregated." He then quoted a further passage in the review reading:

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

51 The judge (at para. 97) said it was unclear where the notion came from that segregation was not a legal requirement. It was such a requirement under the Gibraltarian Solicitors' Accounts Rules 1973 and RBSI had in-house lawyers who could have been consulted. In the last sentence he said: "Why Mr Shaw did not raise the segregation issue with them in a similar way is a mystery."

52 The judge's reference in para. 95 to the "review of around the same time" does not identify its author although the inference from his quoted observation in para. 97 is that he correctly understood it was Mr. Shaw. It is apparent, however, that in preparing his judgment the judge had originally misunderstood the date of the review and did not know its author. We were shown his draft judgment issued to counsel, para. 83 of which referred to, and made the same quotations from, the review but (a) wrongly described it as prepared on January 28th, 2005, and (b) recorded the judge's inability to find who wrote it. Mr. Shaw was not yet on the scene as the firm's relationship manager and so it could not have been him; and the judge noted that neither Mrs. Lester nor Mr. Cartwright was cross-examined about it. Paragraph 84 of the draft judgment contained the equivalent of para. 97 of the approved judgment, although its final sentence instead observed: "Why no one raised the segregation issue in a similar way is a mystery." The respondents' solicitors informed the judge of his error and that the review must have been prepared after September 2005, following which the judge corrected his reference to the origins of the review in his chronology although, by an oversight, he omitted to correct a wrong reference in para. 179 to "The review of 28th January 2005 . . ." As to the date of the review, Mr. Shaw started work on it on October 1st, 2005 and completed it on October 27th. It was sent to the Jersey credit team at the beginning of November: in the meantime he had submitted it to Kerry Blight, the Gibraltar Regional Manager, who emailed Mr. Shaw on October 31st saying he had read it and asking him to submit it, which he did.

53 Reverting to the chronology, on November 16th, 2005, Mr. Maclean responded to Mr. Shaw's October 27th credit proposal on a sanction summary sheet, *i.e.* one recording the conditions of and reasons for the authorization of an application. He said it was an "extremely challenging request based on the poor behaviour of this connection over a considerable

period" but that it had to be balanced against the good relationship in connection with the Spanish mortgage business. He said:

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

54 Mr. Shaw made an excess report on January 3rd, 2006. Mr. Simpson approved the excess. Mr. Shaw informed Mr. Maclean he was due to see the Marraches on January 27th, following which he reported that progress was being made. Mr. Quayle agreed a further extension pending the formalization of the firm's facilities, and in the meantime Mr. Shaw had lodged a fresh credit application, which, the judge said, "included the familiar details about absence of segregation."

55 On February 14th, Mr. Shaw offered facilities to the Marraches: an increase of the firm's £100,000 overdraft to £250,000 and a continuation of the £140,000 Gibland overdraft. The negotiation for their grant was protracted. On May 25th, Mr. Shaw noted that they were to be secured against tangible assets, but on June 27th reported that there had been no progress. On August 11th, however, he informed Mr. Heward that the brothers were to give security over two identified properties valued at £1.2m., to cover facilities totalling £590,000, split between the firm, the brothers personally and Gibland.

56 On September 18th, Mrs. Lester authorized the withdrawal of £20,000 in cash from the sterling client account. The reason was described as "normal business transactions." On September 26th, the firm transferred US$96,929.46 from the 149 US dollar client account to its 293 office account. This emptied that client account. The transfer would have appeared on an STP. On October 1st, Mr. Shaw carried out his annual review. He repeated the wording of previous credit applications as regards segregation but added:

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

57 Mr. Shaw made a further credit application on October 11th. Mr. Heward prepared the sanction summary sheet and, on October 18th, agreed to extend facilities of £250,000 to the firm on the basis of full security. He noted:

> "This is a difficult position to manage. We are asked for mainly fully secured facilities for prominent local customers, with good means

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

58 Mr. Shaw issued a facilities letter to the firm on October 26th, providing for an overdraft of £250,000 against the giving of specified security. On the same day he sent an email to Ms. Eccleston, the MLO, which he copied to Mr. Cartwright. Its thrust was that Gibland had asked RBSI to open an account for it in the name of its unidentified ultimate beneficial owner. Upon RBSI's investigation it had emerged that the shares were in the name of a Swiss trust. RBSI had asked Gibland to identify the principals behind the trust by producing an extract of the trust deed, which Gibland declined to do, following which it withdrew its request to open the account. Mr. Shaw reported that the position was therefore suspicious and asked Ms. Eccleston whether he should make an STR or whether the email was sufficient. He added that "My main concern is the fact that this is the 3rd occasion in the last 6 months where Marrache/Gibland had withdrawn a new account request following our standard request for disclosure of information." Ms. Eccleston said an STR was required. Mr. Cartwright advised Mr. Shaw by saying "Howard, if this is indeed the third time surely we should be picking up with the senior people at Marrache's." Ms. Eccleston's evidence was that this STR was the only one made prior to the firm's crash.

59 On December 29th, Mr. Ramagge (as assistant relationship manager) submitted an excess report. The firm had not provided the promised security for a £250,000 overdraft and had exceeded the old overdraft limit of £100,000 by £9,000. The excess report was repeated on March 2nd, 2007.

60 The Marraches had still not signed the facilities letter sent out on October 26th, 2006 and on January 16th, 2007 Mr. Shaw sent them another copy. Isaac and Benjamin Marrache signed it on January 18th but as the promised security was not provided, the facility did not come into effect. On February 8th, Mrs. Lester authorized a cash withdrawal of £10,745.81 from office account 293 for what was said to be a "normal business transaction." By May 3rd, the promised security had still not been provided and Mr. Shaw made a further credit application. He provided an update on June 28th, noting the failure to provide a particular

security and that the facility remained at £100,000. On May 29th, 2007, Mrs. Lester authorized the withdrawal of £12,000 cash from the 294 client account. No commission was charged, and the reason for the withdrawal was again given as "normal business transaction." Mr. Shaw queried this with her. She said that because the cash was sterling, no commission was payable and that, at the end of the month, it was normal for the firm to pay salaries in this way.

61 At the end of June 2007 there were internal bank emails discussing the Marraches' failure to provide the security. Mr. Shaw drafted an email threatening to withdraw all facilities for the firm and Gibland unless the security was forthcoming. Mr. Cartwright responded to what he called the "very strong" text of his draft by suggesting that a telephone call by Mr. Brydges to Solomon, reading "him the riot act in an arm over shoulder way??" might be a better approach. He was expressly conscious of the potential risk to the Spanish mortgage business if the relationship with the Marraches was terminated. Mr. Brydges spoke to Solomon, who promised to sort matters out by July 6th.

62 On July 9th, Mr. Shaw submitted his last credit application. It reproduced verbatim much of the content of previous credit reports. It noted that accounts for the firm and Gibland were now available, which he said was "a major achievement."

63 By July 19th, Mr. Ramagge had become the firm's relationship manager in place of Mr. Shaw. He recorded that the firm no longer needed a £250,000 facility and was content with one for £100,000. On August 8th, however, he prepared a sanction summary sheet for what the judge referred to as the proposed £250,000 facility. It required the provision of specified accounts by specified dates and confirmation as to the segregation of client and office money. The summary sheet was followed by an updated credit application dated August 13th. On August 9th, Mr. Ramagge told Mr. Shaw that the Marraches were proposing to deposit £100,000 into the bank in Jersey as security for the firm's overdraft in that amount. It appears they were also proposing to make a like deposit of £140,000 in respect of the Gibland overdraft. In the event it appears that by the end of the year neither deposit had been made, but Mr. Ramagge was hopeful they would be made by January 18th, 2008.

64 On January 14th, 2008, following a conversation, Mr. Ramagge emailed Solomon Marrache saying that RBSI required a letter from the firm in these terms:

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

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

65 Solomon Marrache so wrote to RBSI on January 18th. Mr. Ramagge, on the same day, emailed Mr. Simpson telling him he had received the 2006 draft accounts for the firm and a letter "confirming segregation of funds." On March 6th, Mr. Ramagge issued a facilities letter to the firm to continue the £100,000 overdraft, secured by a cash deposit in Jersey. The letter was countersigned on March 28th.

The witnesses of fact

66 The judge heard oral evidence from Mr. Magner and read an agreed statement from Mr. Caldwell and an unchallenged statement from Mr. Lombard, a director of the trustees. For RBSI, he heard oral evidence from Mr. Shaw, Mr. Heward, Mr. Ramagge, Mrs. Lester, Mr. Cartwright and Mr. Maclean. He had four unchallenged statements, including from Ms. Eccleston, whose evidence was that no concerns about the Marraches or the firm had been flagged on RBSI's internal monitoring system and only one STR had been made.

The expert evidence

67 Permission had been given for expert evidence. The respondents instructed Robin Bryant. RBSI instructed Richard Palette. They were agreed on almost all matters and did not give live evidence. The judge was given a statement of their agreements and disagreements. I quote what he said about their evidence:

> "134. Both experts agreed:
>
> (a) Bankers were not expected to have knowledge of the relevant Solicitors' Account Rules.
>
> (b) Competent bankers, like relationship managers, can be expected to be aware of the need for separation of client and own monies by solicitors.
>
> (c) Until 2007, banks were under no obligation actively to monitor customers' accounts. From 2007 they did come under an obligation, but a bank was entitled to adopt a risk-based approach. Only if suspicions were aroused would there be more of a need to monitor a solicitor's accounts.

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

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

A limitation defence?

68 The respondents' money was deposited with the firm between February 6th, 2007 and February 8th, 2008 and was stolen from the client accounts shortly after arriving there. RBSI advanced a defence resting on the assertion that Mr. Magner knew that something was wrong with the firm by September 17th, 2008 at the latest, which was more than six years before the issue of the claim form on September 17th, 2014. It relied on the six-year limitation period prescribed by s.26(2) of the Limitation Act 1960. The respondents disputed that s.26(2) applied and relied on s.26(1), which prescribes no limitation period. Alternatively, they claimed that their time was extended under s.32.

69 After referring to Mr. Magner's oral evidence, which on relevant matters he accepted, the judge found it was only following a meeting on September 18th, 2008 with Benjamin Marrache that Mr. Magner was on notice that his money might have gone missing. He found that it was only then that time began to run and the claim form was issued within six years. The claim was therefore not statute-barred. There is no appeal against that decision.

70 At para. 154, the judge embarked upon the case for asserting relevant dishonesty against each of seven RBSI employees. He dealt with each as follows.

Mrs. Lester

71 The judge said the respondents faced the "major problem" that their original pleaded case asserted that the RBSI relationship managers had a much more detailed knowledge of the movements of money in and out of customers' accounts than was the case. Much of the case against

Mrs. Lester fell away because many suspicious transactions either would not have come to her attention or else would have been the subject of only cursory inspection. He said the strongest part of the case against Mrs. Lester was her willingness to approve cash withdrawals from client accounts. He referred to her cross-examination about one such withdrawal, said by the Marraches to have been for the payment of salaries, and accepted her evidence that either she would have thought it was from the office account or that, if she had realized it was from the client account, "would have queried it, for sure." He found her a convincing witness who believed the Marraches to be chaotic in their cash flow management and that throughout her time as relationship manager there were fees owed to the firm that had not been moved from client to office account. That would, said the judge, justify a payment out of a client account for salaries. He accepted Mrs. Lester's evidence that she would check such payments with the firm to satisfy herself that they were legitimate. He noted that she was still a fairly junior manager, and, in light of her reasonably limited experience, did not consider she was dishonest. She was entitled to rely on the firm's reputation and the assurances given to her. The judge rejected the case against her.

The case against Mr. Ramagge

72 The judge found that this case faced similar difficulties. Moreover, Mr. Ramagge "was entitled to assume that Mr Shaw had sorted out the difficulties with the Firm over segregation of client monies." I comment that whatever understanding of the references to "segregation" or "non-segregation" the judge attributed to Mr. Ramagge, it cannot have been that Mr. Shaw had discovered that the firm was stealing from its clients: had he understood that, he could hardly have regarded the references as mere "difficulties" that Mr. Shaw had sorted out. The judge said that Mr. Ramagge was even less experienced than Mrs. Lester. As evidence, the judge referred to his draft sanction summary of August 8th, 2007, which he said reflected a complete failure to understand the credit team's condition. What the team wanted was confirmation of the segregation of office and client money, whereas the judge said Mr. Ramagge:

> "163. . . . took this to be a requirement of section 31 of the Financial Services (Accounting and Financial) Regulations 1991 for a solicitor to confirm that a bank had no right of set-off against monies in a client account. In fact of course what was required was confirmation from Baker Tilly that the Firm segregated client monies. In my judgment this is inexperience rather than evidence of dishonesty."

73 The judge rejected the case in dishonesty against Mr. Ramagge.

The case against Mr. Maclean, Mr. Heward and Mr. Simpson

74 They were the members of the Jersey credit team. The judge said the case against them was equally bad. He disposed of it in these terms:

> "166. . . . There is a short answer to the claims against these three men. The credit applications and excess referrals make it clear that issues of segregation were being dealt with. It was entirely reasonable for the credit managers to rely on those assurances from the relationship manager. As the documentation in the chronology shows, Credit were thoroughly fed up with the Marraches and would have had no hesitation in severing the connection if they had sufficient grounds to do so.
>
> 167. Indeed Mr Moverley Smith [leading counsel for the respondents] in closing said that Mr Maclean was 'the only straightforward witness of the bank'. Mr Maclean thought that Gibraltar would sort matters out and in due course had sorted them out. In my judgment Mr Heward and Mr Simpson would have thought the same. I do not find any dishonesty on the part of these men."

75 I make the like comment as in relation to Mr. Ramagge: the judge cannot have understood these individuals to have regarded the "issues of segregation" as reflecting a discovery that the firm was stealing from its clients.

The case against Mr. Shaw

76 The judge dealt with this at paras. 168 to 212. He said the heart of the case turned on the view he took of Mr. Shaw's investigation into the concern raised in his excess referral of August 26th, 2005 (para. 45 above):

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

77 The judge said that Mr. Shaw's evidence as to the steps he took was: (i) at Mr. Cartwright's suggestion, to talk to Joe Bautista about an earlier Marrache investigation; (ii) to examine transfers from the 294 sterling client account to the 293 office account in the period January to August 2005; and (iii) to have a meeting with Baker Tilly, which gave him reassurance. RBSI's case was that this was adequate. The respondents' case was that it was so obviously inadequate that the court should infer that Mr. Shaw "had realised something was seriously wrong or deliberately decided not to make any further investigations because he feared that he might discover something seriously wrong."

78 Before dealing with these steps, the judge first dealt (paras. 171–174) with more general matters under the sub-heading "Mr Shaw and segregation of client monies." He said that Mr. Shaw's August 26th, 2005 excess report was the only one in which he used the expression "misusing clients' funds." After that, the judge said, the expression used was "non-segregation." The judge referred to an early passage in Mr. Shaw's oral evidence in which he explained that he understood the principle to be that a legal firm could not meet a lack of funds in its office account by taking money from a client account unless any money so taken was due to it. He said he could not remember from whom he learnt that Gibraltarian legislation did not require segregation. He said, in a further quoted passage of his oral evidence that, irrespective of the legislative requirements, both RBSI and the FSC required segregation, and that if he saw any non-segregation he would report it. He was referred to his credit application of October 27th, 2005 and it was put to him that he was there reporting that "on occasions client and office funds *are* not segregated" and that "whilst Marrache generally [segregates] this *is* not always the case." [Emphasis supplied.] He replied "Not at the time when I was responsible for the account" and he explained that he was there talking in generic terms. He could not remember why he used his particular choice of words. He said:

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

79 In a further passage in his evidence, when asked why he did not make an STR, he made clear that he did regard it as "dishonest and against the law" for a firm to dip into client funds. He again denied that in the October 2005 review he was saying that the Marraches had been misusing client funds, although he accepted that perhaps his choice of words had not been good. It was put to him that non-segregation of client funds was a misuse of client money, to which he replied:

> "Um, does non-segregation mean that they are then going to misuse the funds? If we had one account with £100 in it, and there was £50 of client funds and £50 of office funds does that in itself mean they are misusing client funds because they have not segregated them? I am not sure it does, does it?"

80 The judge concluded this part of his judgment by saying:

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

81 The judge did not, in that section of his judgment, make a finding that Mr. Shaw *knew* that the firm was "dipping" into the client accounts.

The Bautista investigation

82 The judge turned to the first step of Mr. Shaw's investigation, the Bautista discussion. His findings are of central importance and I must explain what he found. He did not provide any introduction as to what Mr. Shaw's evidence in relation to this discussion was, or to what aspect of his inquiries it was directed (*i.e.* whether to cross-firing or to misuse of client money). He started by saying:

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

83 The judge (para. 176) summarized RBSI's case by saying that following the RBS/NatWest merger it had become possible to see how the firm had been using its client accounts with both banks. The judge said that, in his oral evidence, Mr. Shaw gave the following account of RBSI's investigation, elaborating on what he had said in para. 101 of his witness statement. The judge did not quote from that paragraph (I shall later) but it was exclusively about the investigation into the "cross-firing" issue—not the "misusing client funds" issue. The judge then quoted this passage of Mr. Shaw's oral evidence (which said essentially the same about the Bautista conversation as had his para. 101):

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

84 The judge then referred to, and quoted the bulk of, para. 56 of Mr. Cartwright's statement, one directed exclusively to the different question of the concern about the firm's failure to segregate client and office funds: it made no reference to cross-firing or, therefore, to the Bautista conversation. The thrust of what he said was that he had no recollection of any concern about a failure by the firm to segregate being brought to his attention and that such lack of recollection suggested either (i) that it was not brought to his attention; or (ii) that it was but was satisfactorily resolved. The judge said that Mr. Cartwright was cross-examined on his para. 56 evidence and he quoted from the cross-examination. The part he quoted was exclusively as to whether Mr. Shaw had raised with Mr. Cartwright a concern about a misuse of client funds. Mr. Cartwright was firm that he had no recollection of Mr. Shaw raising any such matter with him.

85 The judge concluded his summary of the evidence relating to the Bautista conversation by saying this:

> "179. No written record of Mr Bautista's investigation was produced at trial. Nor is there any indirect record of any such investigation having taken place. There is no evidence that the note regarding cross-firing on the letter of 8th November 2001 has any connection with an investigation by Mr Bautista. (Indeed, the note says: 'Looks like "cross-firing".' This is not consistent with what the Bautista investigation is said to have concluded.) The review of 28th January 2005 does not mention such an investigation [*sic*: this sentence reflects an uncorrected error in the judge's draft judgment, see para. 52 above]. Indeed the reference in the review to non-segregation is arguably inconsistent with the alleged conclusion of the Bautista investigation.
>
> 180. I shall have to consider whether the accounts given by Mr Shaw and Mr Cartwright are capable of reconciliation, and if not, whose account I prefer, when I come to my holistic appraisal of the evidence."

Mr. Shaw's investigation into the client accounts

86 The judge turned to Mr. Shaw's investigation of the firm's client accounts. The only documentary evidence of it was a single spreadsheet showing the transfers from the 294 sterling client account to the 293 office account during part of 2005. The judge said it reflected the period January to August 2005 (a reference to its manuscript heading "Jan/Aug 05") but that Mr. Shaw said in cross-examination that it reflected the period February 15th to August 22nd, 2005. The entries did cover only that period but the judge considered it improbable that Mr. Shaw chose this

arbitrary period for his investigation. He said that "The contemporary heading, in Mr. Shaw's own handwriting, is more likely to be accurate."

87 That spreadsheet showed large round-sum transfers of £15,000 (an error: as the judge noted, it was in fact £25,000) on February 15th; £25,000 on February 21st; £20,000 on March 30th (as earlier noted, another error: the correct date was March 3rd); £27,555 on April 7th; £30,575 on April 13th; £20,000, £10,000 and £20,000 on May 5th, 10th and 13th respectively; £10,000 on July 5th; and £30,000 and £20,000 on August 10th and 17th. There were also some 18 other transfers for smaller sums, most of which were not for round sums: the largest was for £10,909.65 on July 12th.

88 The judge said (para. 182) that it was sensible for Mr. Shaw to investigate this account over just an eight-month period: if there was any misuse of client money, it would have manifested itself in that period. But he also said (para. 183) that it was obviously inadequate for Mr. Shaw to investigate only one client account. He should have looked at all the active client accounts. The work involved would not have been great. He also said (para. 184) that the investigation of the 294 account threw up potentially suspicious matters. The occasional round-sum transfer was not in itself suspicious (it could reflect that the firm had quoted a fixed price for a conveyancing transaction). Here, however, there were nine round-sum transfers, for sums that were large for single conveyances. The bunching of them into short time frames called for investigation. The judge noted that the experts had agreed that transfers of round sums were not suspicious, but he said they had not addressed the bunching point.

89 Moreover, said the judge (paras. 185–186), the investigation into the 294 account was grossly defective. There were four transfers (ranging from £1,100 to £15,000) shown to be to Kristy, which Mr. Shaw knew was the firm's payroll company. In para. 187 he said that a cursory examination of the 135 euro client account would also have thrown up concerns. That showed a transfer to Kristy of €67,888.30 on January 26th, 2005, two transfers to the 293 office account totalling just under €324,000 on February 1st and 2nd, 2005. Then on February 3rd, 2005, €10,315.39 was transferred to Penzance Holdings Ltd., which Mr. Shaw knew was a Marrache property company. The judge also summarized further large transfers in February to Kristy, Penzance and Marrache & Co.

90 The judge said:

> "188. Thus in less than four weeks €563,587.00 (c. £383,400) had been transferred from the euro client account to Marrache-related entities. Mr Shaw knew that the Firm had a turnover between £1.3 and £1.8 million: transcript, day 3, page 137 line 20 to page 138 line 2. This equates to £110,000 to £150,000 turnover a month, so the £384,400 represented double or treble the normal monthly turnover.

> Further it will be recalled that there were transfers of £25,000 on each of 15th and 21st February from the 294 client account to the 293 office account as well, so the total transfers in this four week window were potentially nearly quadruple the normal monthly turnover. There are four aspects of these transfers from 135 which in my judgment would have put any banker on notice of potential malfeasance: (a) the absolute level of transfers (b) in such a short period (c) from the euro account (d) to entities including Kristy and Penzance which would have had no entitlement to client monies, still less from a euro account.
>
> 189. Investigation of the 149 US dollar client account would also have raised concerns. The printouts show payments to American Express of $1,395.75 on 6th April, $200.00 on 19th May, $1,765.79 on 7th June, $25,861.39 on 15th July and $1,391.84 on 12th August 2005. Such payments would be unusual from a client account. An investigating banker such as Mr Shaw could have easily obtained the customer's instructions to make these transfers. These would have shown that all these payments were for Isaac Marreche's [*sic*] AmEx card. Payment of an individual solicitor's credit card from a client account are highly suspicious."

The meeting with Baker Tilly

91 The judge turned to Mr. Shaw's evidence as to his meeting with Baker Tilly. He quoted from para. 100 of Mr. Shaw's witness statement, which reads as follows:

> "I recall that I attended at the offices of Baker Tilly at Regal House. From a review of the documents, it seems this would have been shortly after 13 September 2005 when Solly requested Ian Wood of Baker Tilly to provide me with certain information [23 of HS1]. I saw Ian Wood, who explained to me that they dealt with the preparation of the Marrache accounts. I also understand [*sic*] that he had undertaken the audit of the client account which allowed them to certify that it was correctly operated and audited. My meeting with Ian Wood assisted me in concluding that Marrache & Co were segregating client and office funds."

92 The judge then said:

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

piece was a one-off discussion in 2005': transcript, day 4, page 150 lines 20 to 22."

93 After quoting from the Solicitors' (Practising Certificate) Rules 2005, which came into force on May 1st, 2005, the judge said finally:

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

The judge's conclusions as to Mr. Shaw

94 The judge came to his conclusions on the case against Mr. Shaw. In para. 194 he referred to "a clash of evidence" between Messrs. Shaw and Cartwright about the Bautista conversation. In paras. 195 to 197 he considered that "clash," namely whether Mr. Shaw had obtained the confirmation he was said to have obtained from Mr. Cartwright's conversation with Mr. Bautista. The judge said it was theoretically possible that Mr. Cartwright had simply forgotten calling up Mr. Bautista but said it was very unlikely. He emphasized how "strikingly unusual it is for a bank to have concerns about the treatment of client monies by an outwardly respectable firm of solicitors. It is a once-in-a-professional-lifetime experience." He did not accept that Mr. Cartwright would have forgotten it. He regarded Mr. Cartwright as a straightforward witness and explained why he regarded Mr. Shaw as an unsatisfactory one. He gave his conclusion in para. 198:

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

95 That wrongly suggested that Mr. Shaw had said it was he who had spoken to Mr. Bautista. I regard that as a slip: the judge had, in para. 195, correctly recorded that his evidence was that Mr. Cartwright had made the call.

96 The judge then gave himself a *Lucas* direction (*R.* v. *Lucas* (10)) in relation to that finding of lying. He concluded that the lie so found was proved, deliberate and not told for a reason unconnected with Mr. Shaw's liability. He said (para. 200) that "When I consider the evidence against him holistically, I shall consider whether it is appropriate to use the lie as some support for the claimants' case."

97 The judge turned to the claimed meeting with Baker Tilly. He said (para. 201) there was no corroboration for Mr. Shaw's account, that "The file note, which Mr Shaw says he made, has not been disclosed" and that no reason for the failure to disclose it had been proffered. The judge said that he could properly infer that Mr. Shaw made no post-meeting note after his claimed meeting with Mr. Wood and that Mr. Shaw had also lied about making a note. He said it was possible, but unlikely, that Baker Tilly had conducted an audit of the client accounts by September 13th, 2005. He would consider, as part of a holistic assessment of Mr. Shaw's evidence, whether he accepted his account of the claimed meeting.

98 The judge turned (para. 202) to Mr. Shaw's investigation of the accounts. He found that for Mr. Shaw to limit his inquiry to the 294 sterling client account was "woefully inadequate." He did not believe that Mr. Shaw could have thought that that limited investigation would be sufficient to dispel any worries about misuse of client funds. Nor was this likely to have been an "oversight," as Mr. Shaw suggested in his oral evidence. "Further, the significant number of round-sum transfers in short time-frames from the 294 account, whilst not themselves proof of misuse, would spur an experienced banker to continue with his investigations." The judge then said:

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

99 I admit to a failure of confident comprehension of the first three words of the [third] sentence, but presume their intended sense was "If . . ." The judge does not appear, at any rate expressly, to have made a finding in paras. 202 and 203 that Mr. Shaw did look at accounts other than 294.

100 The judge then said that "before putting all these points together," he should ask himself: why should Mr. Shaw behave dishonestly? He discussed this between paras. 204 and 208. The Marraches disliked him and he saw them as a professional challenge. Their relationship was not such as to induce him to suppress the evidence of misuse of client money.

The judge then, however, noted that the determination of a man's state of mind is always difficult to answer but he said that a good starting point was "the striking fact that Mr Shaw never made a STR in respect of his suspicions of the Firm." He said (para. 205) that as soon as Mr. Shaw "identified the issue of misuse of client funds, he was justified (and indeed probably obliged as a matter of strict law) to make one." He was well aware of the sensitivities surrounding the Marraches, and that if he made an STR it would go to the top of RBSI and "open a can of worms." It would have been a courageous thing for Mr. Shaw to do; and the judge said that "it is a sad fact of life that whistleblowers are not always thanked."

101 The judge then said this:

> "206. The downside of not reporting the results of his investigation into the client accounts was likely to have appeared to him to be fairly small. Back in 2005, the Marraches presented as extremely wealthy men with a large—but in the nature of things illiquid—property portfolio. The misuse of client funds looked to be in the hundreds of thousands, not in millions, still less the tens of millions. Mr Shaw would have been able to see it as 'dipping'. In other words, he would have seen the Marraches taking monies for immediate liquidity purposes rather than stealing the monies with no prospect of ever making repayment. The fact that the 2005 review said that segregation was not a requirement of Gibraltarian law would have given him some protection against personal consequences. (He knew that in England some professions like travel agents and insurance brokers were not required to segregate client funds: transcript, day 5 page 52 lines 9 to 18.)
>
> 207. Mr Shaw could realistically have hoped that, if he persuaded the Firm to run its accounts properly, the monies borrowed for liquidity purposes would in due course come back and matters could be put on an even keel. If that was his state of mind, then he would have been disabused of it. For example, on 26th September 2006 the Firm cleared the US dollar 149 client account of all the money in it, some $96,929.46. That transfer to the 293 office account would have generated an STP. It was highly suspicious. Notwithstanding the general rule that transfers under £100,000 were ignored for STP purposes, Mr Shaw would, as I have found, have been on notice of issues of misuse of funds by the Firm. Thus, he would have kept an eye out for suspicious transfers, even if they were under £100,000. However, once Mr Shaw had brushed the issue of non-segregation under the carpet in August 2005, it would have been difficult for him to revive the issue.

208. Further at the time of his investigation, the prospect of the Firm's malfeasance coming to light in the near future must have been low. Events bore this out. It was another four and a half years before the Firm collapsed. By then Mr Shaw had left RBSI . . ."

102 "The reason why" discussion in paras. 204–208 appears to *assume* knowledge by Mr. Shaw of the brothers' dishonest appropriations of client money; there has not yet been any finding that he did have such knowledge.

103 The judge then said this:

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

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

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

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

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

(e) I do not accept that there was a meeting with Baker Tilly around 13th September 2005 'which gave him comfort'. It is, for the reasons I have given, improbable that Baker Tilly would have assured him that they had already carried out an audit of the Firm's client accounts. There is no contemporaneous record of the meeting.

210. I remind myself of what I said about the burden and standard of proof in para 21 above. In my judgment, on balance of probabilities, Mr Shaw did look at the other client accounts. The likelihood is, and I find on balance of probabilities as a fact, that he did an analysis

> of the other client accounts for the period January to August 2005. He discovered the evidence that the Firm was misusing client monies. In my judgment he did have actual knowledge of the Firm's misuse of client monies. Thereafter he assisted the Firm to continue to misuse clients' funds. That in my judgment is dishonesty on his part.
>
> 211. Even if I am wrong on that and he did not carry out a full analysis of the other client accounts, nonetheless I find on balance of probabilities that he would have started some further investigation into the other client accounts. After starting them he would have realised very soon that there was evidence raising a suspicion that the Firm was misappropriating client monies. Stopping his investigation at that point would in my judgment be a classic example of Nelsonian blind-eye knowledge. That too would be dishonest."

104 Having made these findings, the judge (para. 212) found proved the case that Mr. Shaw had dishonestly assisted the Marraches' defalcations. He also held there was sufficient causation of loss to satisfy a test that Mr. Medcroft, for RBSI, had identified. I say no more about causation: it was not in issue in the appeal.

The case against Mr. Cartwright

105 The judge said it followed from his finding that Mr. Cartwright was unaware of the misuse of client funds that he too was innocent of any dishonesty. To summarize the rejection of the case against him so shortly perhaps conveys a distorted picture of the course of the trial. The respondents' case had been that there was a culture of dishonest tolerance at RBSI towards the Marrache brothers and that it was Mr. Cartwright who had dictated it. However, that case failed and the judge instead found that, within a couple of months of arriving at RBSI, Mr. Shaw alone discovered the brothers' thefts and thereafter tacitly connived in their continuation and told no one about them.

The overall outcome

106 The judge held RBSI liable for Mr. Shaw's dishonest assistance of the Marraches' misappropriations of client money. He held that Mr. Shaw's state of mind meant that RBSI was also liable for knowing receipt, although as the dishonest assistance claim included the sums claimed under the latter head, that finding was only of academic interest. On the appeal, no distinction was drawn between the two heads on which the claims succeeded. It was implicitly agreed that the outcome of the appeal would be that they either stand or fall together.

RBSI's appeal

107 RBSI's appeal challenges the judge's finding that Mr. Shaw was dishonest. Its skeleton argument noted that s.25 of the Court of Appeal Act 1969 provides that the appeal "shall be by way of re-hearing." The court did not of course rehear the evidence and I understood it to be agreed that our function was to approach the appeal as if it were a *review* of the judge's decision. Section 25 mirrors the language of the old RSC O.59, r.3(1) formerly applicable in England and Wales, which is to be contrasted with the language of the current CPR Part 52.21(1) (formerly 52.11(1)) which provides that (subject to immaterial qualifications) every appeal "will be limited to a review of the decision of the court below." In *Assicurazioni Gen. SpA* v. *Arab Ins. Group* (2), the English Court of Appeal considered what, if any, impact the change in the rules had upon the way in which the court should approach appeals against findings of fact. The answer was none. Clarke, L.J. (as he then was) gave the leading judgment but I shall refer only to a passage from the concurring judgment of Ward, L.J., who summarized the position thus ([2003] 1 W.L.R. 577, at para. 195):

> "Our task is essentially no different from what it was—we consider the judgment testing it against the evidence available to the judge and we ask, as we used to ask, whether it was wrong. The Court of Appeal can only interfere if the decision of the lower court was wrong and in deciding whether or not the findings of fact were wrong, we take a retrospective look at the case and do not decide it afresh untrammelled by the judge's conclusion."

108 Mr. Mitchell, Q.C., for RBSI, submitted that the judge's findings as to Mr. Shaw's dishonesty *were* wrong. Before considering the soundness of his attack, I record that the court is well aware of the familiar cautionary judicial words as to the deference that appellate courts must show towards a trial judge's findings of fact; and Mr. Moverley Smith, Q.C., for the respondents, rightly emphasized such caution. In *Otkritie Intl. Inv. Mgmt. Ltd.* v. *Urumov* (9), to which he referred us, I gave the leading judgment (with which Potter, J.A. and Kay, P. agreed) for dismissing an appeal on fact against another decision of Jack, J., and I cited (2016 Gib LR 359, at paras. 44–46) the leading authorities explaining why an appellate court will rarely be justified in overturning findings by the trial judge turning on the credibility of a witness. I reminded myself of that guidance in my judgment in the *Jyske* appeal (para. 68), as I did when preparing this one.

109 That said, there are of course cases where appeals on fact will succeed. Success will ordinarily require the appellant to show a material error of approach by the judge, for example the suffering or committing of a procedural error rendering the trial unfair; or demonstrable errors

underlying the basis on which he made the challenged findings. It will not be enough to persuade the appellate court that, had it been the trial court, it might have arrived at a different factual conclusion from that favoured by the judge. The appellant has to show the judge was wrong.

110 RBSI has five grounds of appeal against the finding of liability. First, it had not been the respondents' case that Mr. Shaw had lied about the Bautista conversation or the making of a note of his meeting with Baker Tilly, nor had any suggestion of such lying ever been put to Mr. Shaw. Despite this, the judge made the two findings of lying that he did. It is said that it follows that his findings were tainted by a serious procedural irregularity rendering them, and the trial, unfair. Secondly, there was no evidential basis entitling the judge to find that Mr. Shaw had lied about the Bautista conversation. Thirdly, there was no evidential basis entitling him to find that there was no meeting with Baker Tilly around September 13th, 2005 from which Mr. Shaw had drawn comfort (a ground including a challenge to the finding of lying about the meeting note). Fourthly, there was no evidential basis for the judge's findings that Mr. Shaw had analysed accounts other than 294 and 293 and had so discovered a misuse by the firm of client funds. Fifthly, his overall conclusion that Mr. Shaw dishonestly assisted the brothers' misappropriation of client money was objectively unjustified, against the weight of the evidence and contrary to the probabilities.

111 Mr. Moverley Smith submitted that the claimed procedural irregularity was not automatically determinative of the outcome of the appeal. He said that must depend upon the particular facts, the critical question being whether the trial was fair. Whilst in his skeleton argument he defended the judge's findings that Mr. Shaw had lied in relation to the Bautista conversation and as to making a note of the Baker Tilly meeting, in his oral address he conceded that the judge was wrong to make both findings although he maintained his defence of the judge's other findings relating to the Baker Tilly meeting. He disputed that there was substance in the fourth and fifth grounds of appeal and, under a notice of cross-appeal, devoted the bulk of his address to submitting that there were additional grounds supporting the judge's finding that Mr. Shaw was dishonest. I turn to the five grounds of appeal.

Ground 1: serious procedural irregularity

112 In advancing RBSI's argument under this head, Mr. Mitchell focused primarily on the judge's finding as to the Bautista lie. Paragraph 209(c) and (d) of the judge's judgment (quoted at para. 103) show how important that finding was in relation to his determination of Mr. Shaw's honesty or otherwise. Ground 1 does, however, apply also to the finding of the Baker Tilly "meeting note" lie and RBSI's skeleton argument outlines

the case. I shall therefore refer to both findings in dealing with this ground. I first set out some background.

113 The respondents' original particulars of claim made no case of dishonesty against RBSI. It simply made a proprietary claim, which was dismissed. The dishonest assistance claim was first advanced by the amended particulars of claim. Paragraph 30 alleged that from at least 2005 to February 2010 RBSI had dishonestly assisted the firm to misappropriate client money by continuing to provide banking facilities in circumstances in which it had actual or Nelsonian blind-eye knowledge of the firm's dishonest conduct. Paragraph 31 gave particulars. They opened by alleging that throughout the relevant period RBSI "was able to, and did, monitor" the firm's relevant client accounts and its 293 office account; and, in purported support, the respondents provided further particulars over several pages, which included references to (i) Mr. Shaw's excess referral report of August 26th, 2005 (with his statement that he needed to "ensure they are not cross firing/misusing client funds"); (ii) the sanction summary sheet of October 1st, 2005 (with the statement that the "lack of segregation between client/office funds is worrying . . . Hopefully the next [Annual Review] can confirm separation of funds (it will need to) . . ." (the sanction summary sheet *is* dated October 1st, 2005, but the quoted remark, by Mr. Maclean, was made on the same document some weeks later: the judge found it was November 16th, 2005 and so post-dated item (iii) next referred to)); (iii) the credit application generated on October 27th, 2005 recording that "on occasion client and office funds are not segregated"; (iv) the sanction summary sheet dated October 1st, 2006 stating that there "were some doubts about the extent to which clients funds are properly segregated . . ."; and (v) a credit application of August 12th, 2007 (made by Mr. Ramagge) stating:

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

The quoted passage was preceded by the statement that "Historically, it appeared that on occasions client and office funds were not segregated but segregation was not a requirement under Gibraltar legislation and Marrache did not follow UK best practice adopted by some local competitor practices."

114 I refer also to the particulars given under para. 31(h), which alleged in part that—

> "The disclosure provided by RBS has established that from at least August 2005 to the date of any transfers having been made by the

> claimants to Marrache, RBS knew that Marrache was not segregating client and office monies; that it was accordingly acting in breach of trust and that a failure to segregate client and office monies in circumstances when the office account into which client monies were paid was overdrawn (as was, at all material times, the case) ipso facto resulted in a misappropriation of client monies . . ."

115 The amended particulars of claim did not level any allegation of dishonesty against Mr. Shaw individually, although in their amended reply the respondents referred to its para. 31 as identifying him (and six others) "as having the requisite knowledge or notice on the part of [RBSI] of the Fraudulent Conduct and/or as having been put on enquiry as to the Fraudulent Conduct." As explained, the judge said (para. 168) that "at the heart of the case is the view I take of the investigation which Mr Shaw carried out into the concern raised in his excess referral of 26th August 2005." There was, however, no pleaded case against Mr. Shaw in relation to the scope of his investigation, or that he had buried its results or true scope, or that it went beyond the sterling client and office accounts. There was no pleaded case as to what he was said to have learned from it.

116 Mr. Shaw made his witness statement on April 27th, 2017. Paragraph 54 referred to his excess referral of August 26th, 2005, including his statement as to "wanting to ensure that Marrache & Co were not cross firing or misusing client funds." In para. 55 he said he could not recall what had caused him to raise those concerns. It is important to recognize, as the judge apparently did not, that they were two separate concerns. Mr. Shaw dealt with the former, under the heading "Cross firing," in para. 101, which referred to the Bautista conversation. He said:

> "101. There is reference in an Excess Referral filed by me on 26 August 2005 to 'cross firing/misusing client funds'. See Pages 12–13 of HS1. A lack of segregation could in my mind lead to misuse of client funds and I deal with segregation separately above at paragraphs 94–96. 'Cross-firing' is a term used in the banking world which is intended to describe circumstances where a customer will issue a cheque from one account knowing that there are unlikely to be sufficient funds to cover it. Prior to its presentation the customer will issue a further cheque from an account in another bank. The delay in clearing will avoid the first relevant cheque being returned unpaid for lack of funds. *Following the RBSI merger with NatWest there had been an opportunity to check that there had been no cross-firing of cheques between Marrache & Co accounts held with NatWest and Marrache & Co accounts held with RBSI. Following the merger of the two banks all of the NatWest accounts were closed. In my presence, the former NatWest RM for Marrache, Joe Bautista, was asked by Marvin Cartwright whether Nat/West had investigated the cross firing suspicions by the Marraches. He confirmed that an*

> *exercise had been undertaken and NatWest had satisfied themselves that no cross firing had been established. My concerns were therefore allayed*." [Emphasis supplied.]

117 There was no dispute as to Mr. Shaw's explanation of cross-firing (the experts agreed it is "a colloquial banking term for the issuance of cheques on one account for the credit of another account at a different bank, thereby taking advantage of the delay in the cheque clearing system"). It is *not* the same as a misuse of client funds and whilst it is a practice that banks view seriously and against which they warn their customers (and which, if repeated, could result in the closure of their account), it is not (or not without more) unlawful. The emphasized evidence is essentially what Mr. Shaw also said in cross-examination, which the judge quoted at para. 176 (para. 83 above). It had been no part of the respondents' case hitherto presented to the court that what Mr. Shaw had said about the Bautista conversation in his witness statement was untrue, let alone a lie. Nor, when Mr. Shaw said what he did about it in answer to the judge, did Mr. Moverley Smith challenge it, or suggest to him that it was mistaken or otherwise untrue, let alone that it was a lie. Yet the judge found it was a lie (para. 198); and, moreover, that it was deliberately conceived in order to "bolster his case" that it was reasonable for him to stop his investigation into the issue of the misuse of client accounts after analysing only the 294/293 transfers (para. 209(a) to (d)).

118 The second limb of this ground is the judge's finding that Mr. Shaw also lied in relation to what the judge said was his evidence that he had made a note of the Baker Tilly meeting. His Baker Tilly evidence in his witness statement did not relate to cross-firing, but to the possibility that the firm was not segregating client and office money. He dealt with it in the two paragraphs of a section headed "Baker Tilly." I shall set out both:

> "99. I recall that there was a point (probably during September 2005) at which I saw Baker Tilly to obtain additional information from them in respect of Marrache & Co. This involved obtaining additional information in relation to their business activity, their financial performance, their accounting practices and the management of their client account. This would have been as part of the routine process of completing the Annual Review for Marrache & Co and following an issue that arose in respect of reduction in their turnover as represented in the draft accounts compared to the final accounts for the year ending June 2004 (Page 40 of HS1). Getting an understanding of their business activity was relevant to issues of credit worthiness. As a result I arranged to see Baker Tilly, their auditors. This was at the invitation of Solly, in response to questions by me when carrying out the annual review. It also enabled me to gather information from their Auditors in relation to the operation of the client account.

> 100. I recall that I attended at the offices of Baker Tilly at Regal House. From a review of the documents, it seems this would have been shortly after 13 September 2005 when Solly requested Ian Wood of Baker Tilly to provide me with certain information [23 of HS1]. I saw Ian Wood, who explained to me that they dealt with the preparation of the Marrache accounts. I also understand [*sic*] that he had undertaken the audit of the client account which allowed them to certify that it was correctly operated and audited. My meeting with Ian Wood assisted me in concluding that Marrache & Co were segregating client and office funds."

119 After citing para. 100, the judge summarized Mr. Shaw's oral evidence on the topic. In para. 193 he expressed the view that, and why, it was unlikely that Mr. Wood had informed Mr. Shaw that he had undertaken the audit of the client account. In para. 201 he said there was no corroboration of Mr. Shaw's evidence and made the finding that Mr. Shaw had lied about the meeting note "which Mr. Shaw says he made." In para. 209(e) he said he did not accept that there had been a meeting around September 13th, 2005 which "gave [Mr. Shaw] comfort." He did not there, at any rate expressly, find that Mr. Shaw had also lied about there having been such a meeting. The only lie he expressly found in relation to the meeting was as to Mr. Shaw's evidence that he had made a note of it. Again, it had at no stage been put or suggested to Mr. Shaw during his evidence that any aspect of his account of the Baker Tilly meeting was a lie. RBSI submitted that it was implicit that the judge was also finding that Mr. Shaw had lied about what had been said at the alleged meeting. That may be right, but the judge did not say so expressly and, for the purposes of Ground 1, I proceed on the basis that the only lies found by the judge are (i) the Bautista lie and (ii) the meeting note lie.

120 The judge's finding that Mr. Shaw had lied in these two respects, in particular that of the Bautista lie, represented a serious slur on Mr. Shaw's integrity. The Bautista lie was found (para. 209(c)) to have been one he had deliberately cooked up in order to bolster his case "so as to show that it was reasonable to stop his investigation after analysing the transfers only from [294 to 293]" and, as the judge said in para. 209(d):

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

Further, given the judge's further findings in paras. 210 and 211, presumably the judge regarded the concoction of the Bautista lie as also directed at concealing that Mr. Shaw had made a wider investigation that had unearthed the firm's thefts of client money. The finding of the Bautista lie

was therefore a finding that Mr. Shaw had deliberately set out to commit perjury and pervert the course of justice.

121 RBSI's Ground 1 complaint about these two findings of lying is not that they were wrong (that is the subject of Grounds 2 and 3) but that the judge made them without having first given Mr. Shaw any forewarning that the possibility he was lying was something he was even considering. No suggestion that Mr. Shaw was lying about these two matters had at any point been put to him. He had, therefore, never been given the chance to answer the unlevelled charges that he had so lied.

122 The legal basis of Ground 1 is not novel. Civil litigation is required to be conducted fairly. The requisite fairness includes that each side is entitled to know what the other side's case is so that each will have a proper opportunity of meeting it at the trial. The function of the judge is to decide between the cases respectively advanced. There is also an important sub-principle to the overall requirements of fairness, one perhaps best expressed in the English Court of Appeal by May, L.J. (with whose judgment Lord Phillips of Worth Matravers, M.R. and Jonathan Parker, L.J. agreed) in *Vogon Intl. Ltd.* v. *Serious Fraud Office* (12) ([2004] EWCA Civ 104, at para. 29):

> "29. . . . It is, I regret to say, elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves. In the absence of such an opportunity, it is of little consequence to examine details of the evidence given to see whether the judge's findings might have been justified."

123 Mr. Mitchell drew our attention to the last sentence in particular, which he said underlines the importance of the principle ("the *Vogon* principle"). It is no answer to its infringement that an objective analysis of the evidence might show the finding to be justified. There is a higher consideration, one of natural justice (*audi alteram partem* captures it), that no serious imputation against a witness should be made in circumstances in which the witness is not first given a chance to answer it.

124 The *Vogon* principle is well-recognized. It was applied by Briggs, J. (as he then was) in *HMRC* v. *Dempster* (6) ([2008] STC 2079, at para. 26); by Lewison, J. (as he then was) in *Abbey Forwarding Ltd.* v. *Hone* (1) ([2010] EWHC 2029 (Ch), at paras. 46–49); and by the English Court of Appeal (Pill and Rimer, L.JJ. and Peter Smith, J.) in *Haringey L.B.C.* v. *Hines* (7) ([2010] EWCA Civ 1111, at paras. 39–40). This court applied it in its *Jyske* judgment, where, at para. 166, it held that the same judge had made findings of lying against a Jyske employee for which there was no

justification, nor had any suggestions of lying been put to him so as to give him an opportunity to answer them.

125 Mr. Moverley Smith did not question the application of the *Vogon* principle in the circumstances described but did submit that its impact on an appeal against an order made after a trial where the principle has been infringed will depend on the overall fairness of the trial. We were referred to the judgment of the Privy Council in *Chen* v. *Ng* (4).

126 That litigation followed a 2011 transaction by which Mr. Ng purportedly sold and transferred a controlling shareholding in Peckson Ltd. to Madam Chen for US$40,000 (which was not paid), a transaction resulting in her becoming the registered owner of the shares. In 2012, Mr. Ng sued Peckson and Madam Chen, claiming the transfer was void and seeking the rectification of the share register to show him as again the owner. His case was that she was to warehouse the shares for him for six months and then retransfer them. His claimed reason for the transaction was that he was proposing to carry out a major development, the obtaining of permission for which would stand a better chance if it were Madam Chen rather than he who applied for it as he had been the victim of bad publicity. If, however, she was to apply for the permission, she would need to show substantial assets, which was why he had proposed a temporary transfer of the shares. Madam Chen disputed his case.

127 Bannister, Ag. J., in the High Court of the British Virgin Islands, dismissed the claim. Two factors were central to his decision. First, he declined to accept Mr. Ng's reasons for the claimed warehousing arrangement and he relied in particular on two passages in a feasibility report which emphasized the importance of Mr. Ng's personal involvement in the project and which, the judge held, showed that it was a Ng project and not a Chen one. Importantly, the judge also noted that the two passages had not been put to Mr. Ng in cross-examination or relied upon specifically by Madam Chen's counsel, although he said they illustrated the submission that counsel had made. Secondly, the judge added that, if his story was true, Mr. Ng would not have transferred the shares to Madam Chen without ensuring that she gave him a blank transfer, which he could use to retransfer them after the six months. Mr. Ng had said in his witness statement that it had not occurred to him to obtain such a transfer, nor had he been advised to; but, again, the point was also not put to him in cross-examination.

128 The Eastern Caribbean Court of Appeal allowed Mr. Ng's appeal on three grounds and ordered the rectification of the share register. First, because (save for a possible contention in closing) Madam Chen had not pleaded or argued that she had acquired the legal and beneficial ownership of the shares. Secondly, because as the US$40,000 had not been paid, she held them on a resulting trust for Mr. Ng. Thirdly, because it had not been

open to the judge to reject Mr. Ng's evidence on the two grounds referred to above, when neither had been put to him in cross-examination.

129 The different outcome of Madam Chen's appeal before the Board was that Mr. Ng's claim was remitted for a retrial. I need not refer to the Board's consideration of the first two points that succeeded below but, as to the third point, the Board agreed that as neither of the two grounds had been put to Mr. Ng in cross-examination, it was unfair for the judge to have relied upon them as reasons for disbelieving Mr. Ng. I quote from the Board's judgment, prepared by Lord Neuberger and Lord Mance ([2017] UKPC 27, at paras. 52–55 and para. 57):

> "52. In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it.
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> 53. Mr Parker [leading counsel for Mr. Ng] relies on a general rule, namely that 'it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted', as Lord Herschell LC put it in *Browne v Dunn* (1893) 6 R 67, 71. In other words, where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party to the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment. A relatively recent example of the application of this rule by the English Court of Appeal can be found in *Markem Corpn v Zipher Ltd* [2005] RPC 31.
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> 54. The Judge's rejection of Mr Ng's evidence, and his reasons for rejecting that evidence, do not infringe this general rule, because it

> was clear from the inception of the instant proceedings, and throughout the trial that Mr Ng's evidence as to the basis on which the Shares were transferred in October 2011 was rejected by Madam Chen. Indeed, Mr Ng was cross-examined on the basis that he was not telling the truth about this issue. The challenge is therefore more nuanced than if it was based on the general rule: it is based on an objection to the grounds for rejecting Mr Ng's evidence, rather than an objection to the rejection itself. It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.
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> 55. At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points that were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds.
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> . . .
>
> 57. In the instant case, the Board is of the view that it would not be fair to let the rejection of Mr Ng's evidence stand, given that the two grounds upon which the Judge reached his decision were not put to Mr Ng. The ultimate factual dispute between the parties in the litigation was the basis upon which, and the circumstances in which, the Transfer of the Shares took place, and therefore the issue on which Mr Ng was disbelieved was central to the proceedings."

130 *Chen* (4) was thus a dispute in which the essence of Mr. Ng's case as to the reasons for the transfer was at all times challenged by Madam Chen, with Mr. Ng's complaint being that the judge had rejected his case on two grounds not put to him. The issue on which Mr. Ng was disbelieved was, however, central to the case and fairness demanded that those grounds should have been put to him.

131 Here it was the respondents' case that Mr. Shaw had acquired actual or Nelsonian knowledge that the firm was stealing from the client accounts and dishonestly allowed it to continue. It was not, however, part of that case that he had lied about the Bautista conversation or making a note of the Baker Tilly meeting and Mr. Moverley Smith neither put any such suggestion to him nor sought to make a case to either effect. The judge nevertheless made the findings he did that Mr. Shaw had lied about both matters; and at least the finding as to the Bautista lie apparently represented a material building block in the judge's finding that Mr. Shaw dishonestly assisted the firm's theft of the client money.

132 Mr. Mitchell did not dispute that, as in *Chen*, the impact that the judge's infringement of the *Vogon* principle has on the outcome of the appeal ultimately turns on the fairness of the trial. In his submission, however, for the reason just summarized, that consideration pointed to the conclusion that the trial of the case against Mr. Shaw was manifestly unfair.

133 Coming to my conclusions, the principles discussed in *Vogon* (12) and *Chen* are close relatives and an infringement of either will result in unfairness. There is, however, a difference in character between them in that the *Vogon* principle is specifically focused on the levelling of an accusation, or the making by a judge of a finding, involving a serious imputation against an individual who has not first been given the opportunity to answer it. Its infringement will always involve an element of unfairness, although its impact on an appeal will be likely to vary with the circumstances.

134 One type of case will be where, in breach of the principle, a judge makes a finding of lying by a defendant on a matter collateral to the central issues and which, on analysis, can be seen to have had no impact on an unimpeachable set of reasons for deciding the case against the defendant. There will still have been an unfairness to the defendant, but not in the overall decision. In such a case, the infringement of the principle would not justify the reversal of the judge's order. On the other hand, it would still be open to the appellate court, whilst dismissing the appeal, to say expressly that the judge's finding of lying should not have been made and was unjustified. That is what happened in *Vogon* (12), where the appeal was dismissed but the judge had made a finding of dishonesty in breach of the principle. May, L.J. said ([2004] EWCA Civ 104, at para. 31):

> "Although, in my judgment, for the reasons which I have given, the substantive appeal should be dismissed, as should the appeal as to costs, Vogon and Mr Sear are entitled to a finding by this court which they can hold out in support of their reputations that the judge's

adverse findings as to their intentions and honesty were unjustified and should not have been made."

135 Another type of case will be where the infringement of the *Vogon* principle can be seen to go to the heart of the adverse decision against the defendant, so tainting it by material unfairness. In such a case, there is likely to be a compelling argument that the defendant's appeal against the adverse order should be allowed.

136 Mr. Mitchell submitted that the present case is of the second type. He said the judge's findings of these lies, in particular of the Bautista lie, tainted his approach to the determination of Mr. Shaw's honesty or otherwise and contaminated his findings, so resulting in his decision against RBSI being unfair and wrong. He said it followed that the findings resulted in an unfair trial with the consequence that RBSI's appeal should be allowed.

137 I would uphold Ground 1. Its success entitles RBSI, at least, to a statement by this court that the judge's findings of lying by Mr. Shaw in the two respects were unjustified and should not have been made. Given the overall view that I shall later express after considering the issues raised by the other grounds and the cross-appeal, I find it unnecessary to express a view on whether, had this ground stood alone, it would have justified the allowing of the appeal.

Ground 2: the Bautista conversation

138 I summarized the judge's findings at paras. 82–85 and 94–96 above. I am satisfied that his finding of the Bautista lie was unjustified and wrong and would so hold. In his oral address, Mr. Moverley Smith conceded that the judge was wrong to make this finding. He was right to do so.

139 The judge opened by saying (para. 175) that "There is a serious issue whether this [the Bautista] discussion in fact ever took place." He was, however, wrong that there was such an issue, let alone a serious one. Mr. Shaw's statement as to the Cartwright/Bautista conversation in relation to cross-firing was not in issue between the parties.

140 It is right first to notice what Mr. Cartwright said in his witness statement about this matter. At para. 70 he referred to Mr. Shaw's excess referral report of August 30th, 2005 (it is actually dated August 26th: August 30th was when Mr. Heward typed his response to it) and quoted Mr. Shaw's "cross firing/misusing clients funds" statement. In para. 71 he said he did not recall seeing this document and that he would not ordinarily see excess referrals. In para. 72, he said: "I do not recall any issues regarding transfers between client accounts and the office account, management of client funds *or cross firing* or misusing client funds being brought to my attention." [Emphasis supplied.] His evidence in these

respects was not a denial that (inter alia) a cross-firing issue had ever been drawn to his attention. It was evidence that he had no recollection that it had.

141 The parties' respective experts recorded in their joint statement that Mr. Shaw "despite not remembering why the subject was raised . . . satisfied himself in August 2005 that there had been no cross firing (see HS Paragraph 101) by speaking to a previous NatWest Relationship Manager." That was a reference to Mr. Shaw's evidence of the Bautista conversation. The experts would not have agreed that if his evidence had been in issue. When Mr. Shaw said what he did in cross-examination about it, his evidence was not challenged. Indeed, the judge, in the second sentence of his para. 175, appears to have understood the respondents to have accepted that it took place. Where the judge went wrong in that sentence was to say that much of Mr. Moverley Smith's cross-examination of Mr. Cartwright was "intended to show that the conversation did happen . . ." a statement premised on the judge's mistaken assumption that in his oral evidence Mr. Cartwright was denying that the conversation had taken place.

142 The judge misunderstood the cross-examination. Mr. Cartwright was not cross-examined about the Bautista conversation. The part of the cross-examination to which the judge referred related to what Mr. Cartwright had said in para. 56 of his witness statement, which had nothing to do with cross-firing but was exclusively about the different concern as to non-segregation of office and client accounts. The judge's quotation from the cross-examination was of a passage in which all that Mr. Moverley Smith was putting to Mr. Cartwright was that he knew that Mr. Shaw was making an investigation into the possible *misuse of client funds*. The judge, it appears, erroneously conflated the different concerns of cross-firing and misuse of client funds and treated Mr. Cartwright's denial of any recollection of a concern about the latter as a denial of the Bautista conversation about the former.

143 When, in para. 194, the judge embarked upon his conclusions as to Mr. Shaw, he referred first to there having been "a clash of evidence" on the Bautista conversation between Mr. Shaw and Mr. Cartwright. But there was no such clash: neither individual was cross-examined about it. In para. 195, the judge made another error. He there advanced as a reason why he should prefer Mr. Cartwright's evidence on the Bautista matter the fact that it was a "once-in-a-professional-lifetime experience" for "a bank to have concerns about the treatment of client monies by an outwardly respectable firm of solicitors" so that it was unlikely that Mr. Cartwright would have forgotten a call about such an unusual investigation. Again, the flaw there is that the Bautista conversation was unconnected with any concern about a misuse of client money. The judge then gave reasons in paras. 196 and 197 as to why he found Mr. Shaw to be an unsatisfactory

witness, none of which went directly to his evidence about the Bautista conversation. By the end of para. 195 the judge had manifested a comprehensive misunderstanding that there was an issue about the conversation. In para. 198 he found that Mr. Shaw had lied about it.

144 In my judgment, in the described circumstances, the judge's finding that Mr. Shaw lied about the Bautista conversation not only infringed the *Vogon* principle, it was one that was not open to him. There was no issue between the parties as to that part of Mr. Shaw's evidence and so the judge's resolution of what he wrongly said was a "serious" issue on it was misdirected. It follows that he was also wrong, and seriously so, to find in para. 209(c) and (d) that Mr. Shaw had dishonestly invented the Bautista conversation so as to bolster his case for the dishonest purpose he there explained. Not only was that in the nature of speculation for which there was no evidential basis, it might also be regarded as distinctly odd: why might Mr. Shaw think that to invent an investigation that had nothing to do with the misuse of client funds would show why it was reasonable for him not to have investigated the client account transactions more fully?

145 I would therefore uphold RBSI's Ground 2. I shall now also consider the seriousness of the judge's mistaken finding about the Bautista conversation.

146 The judge's discussion in paras. 204 to 208 as to why Mr. Shaw should have behaved dishonestly precedes his finding that he did so behave. The explanation of those paragraphs is that they were directed to providing an explanation in the nature of a motive as to why Mr. Shaw should have behaved in the dishonest way the judge was shortly to find or, perhaps more accurately, as an explanation of the reasons why he did so behave. But the judge's ultimate findings are clear enough and the judgment must be read as a whole. It is one in which he found Mr. Shaw to have been thoroughly dishonest. He found him to have lied about the Bautista conversation and about the Baker Tilly meeting note. Without saying so expressly, he must also have found him to have lied about not investigating beyond the 294/293 transfers: if Mr. Shaw had done so and had, as the judge found, learnt of the firm's dishonest activities, he could not have forgotten it. I regard as irresistible the inference that the finding as to the Bautista lie played a material part in the judge's arrival at his overall decision as to Mr. Shaw's dishonesty; and Mr. Moverley Smith accepted that it must have had at least some influence. The reason the judge gave himself the *Lucas* direction in relation to that lie was so that he could decide whether he could use it as circumstantial support for the respondents' case as to Mr. Shaw's dishonest suffering of the brothers' continuing defalcations of client money. He held it did support that case.

147 That, in my view, promotes the finding of the Bautista lie to one of primary importance in the judge's overall determination of the case

against Mr. Shaw and, in turn, RBSI. I regard it as impossible to conclude that, without that element of his findings, the outcome of the trial would have been the same. Subject to considering the cross-appeal, I would regard the judge's wrong finding as to the Bautista conversation as, by itself, sufficient to entitle RBSI's appeal to succeed. But RBSI has further grounds which it says support a reversal of the judge's order. I turn to them.

Ground 3: The Baker Tilly meeting

148 The judge, in para. 201, found that Mr. Shaw had lied in his evidence that he had made a file note of the Baker Tilly meeting. In para. 209(e), the judge said it was improbable that Baker Tilly would have assured Mr. Shaw that they had already carried out an audit of the firm's client accounts; and he concluded that he did not accept there was a meeting with Baker Tilly around September 13th, 2005 which gave Mr. Shaw comfort. Ground 3 challenges these findings.

149 As for the finding of the lie about making the file note, the judge made another error. According to the judge, Mr. Shaw's evidence was that he had made "a file note . . . post the Baker Tilly visit." The judge was quoting from his evidence on Day 4, p.68, lines 14 and 15. In fact, that passage of Mr. Shaw's evidence, lines 13 to 16, read in full:

> "As to the reasons why we paid an account overdrawn, I have not been [*sic*: should perhaps be 'seen'] exhibited a copy of a file note that I did post the Baker Tilly visit, *and I really cannot recall whether one was prepared or not*." [Emphasis supplied.]

150 Thus Mr. Shaw's evidence was not that he had made a meeting note, but that he could not recall whether or not one was prepared. In finding, in para. 201, that Mr. Shaw had lied when he said that he had made a note, the judge (i) found him to have made a statement he did not make; and (ii) found he had lied in making it. His error in (i) meant it was not open to him to make his finding in (ii). This was, from Mr. Shaw's and RBSI's viewpoint, another serious mistake. It can only have served, wrongly, to fortify the judge's assessment of Mr. Shaw as a dishonest witness. Mr. Moverley Smith, in his oral address, also conceded that the judge's finding of this lie was one he should not have made. Again, he was right to do so. The concession did not, however, extend to the judge's overall finding in relation to the Baker Tilly meeting, namely that in para. 209(e).

151 The judge also found that Mr. Shaw's evidence (para. 100 of his witness statement) that Mr. Wood had told him that he had "undertaken the audit of the client account" by the time of the September 2005 meeting was possible but unlikely (paras. 193, 201 and 209(e)). This finding is criticized. Mr. Mitchell said the judge had taken no account of Mr. Shaw's

clarification about the meeting in his oral evidence. He said in cross-examination, Day 4, p.27, line 23 *ff.*:

> "I absolutely can't remember the details of the discussion but I know we talked about the rules that were going to become effective, with which I guess we'll come on to later. They were going to be required to issue an audit certificate with effect from 2006. I spoke to the accountants about the operation of the account, about the accounting practices. We talked about taxation. There's lots of references to the way in which the Marraches undertook their accounting within my credit report of October, and part of the discussion I had with the accountants was around those issues, but we also talked about client funds . . .
>
> I cannot remember exactly what they told me, but I came away from that meeting comforted that their accountants had provided me with some comfort. Now, what the nature of my exact question was, and what the exact response was, I really cannot recall, but the overriding principle was I came away with third party independent confirmation."

152 It is said that made clear that Mr. Shaw was not saying that Mr. Wood had told him he had already undertaken an audit of the client account. It is said to have clarified that what he had really been saying in para. 100 was that Baker Tilly would be carrying out an audit in the future, when they would need to issue an audit certificate. The judge, in para. 192, referred to the Solicitors' (Practising Certificate) Rules 2005, which were in force on May 1st, 2005, and which required a firm's auditors to produce a *certificate* that the firm had complied with the Solicitors' Accounts Rules for the previous year. He noted in para. 193 that the new Rules did not require an audit, merely certification, where he also noted that Mr. Shaw had known that, and he referred to what Mr. Shaw had said in his credit application of June 28th, 2007, namely that there would be forthcoming "Accountant's confirmation . . . to the best of their knowledge (there is no audit requirement) office and clients' funds are now being separated."

153 Mr. Mitchell also criticized the judge's finding in para. 209(e) that he did "not accept there was any meeting with Baker Tilly around 13 September 2005 which 'gave him comfort'." He said the judge ignored the contemporary documents, which suggested it was likely that Mr. Shaw did have a meeting with Mr. Wood at around this time. On September 13th, 2005 Solomon Marrache emailed Mr. Wood (and copied it to Mr. Shaw), informing Mr. Wood that Mr. Shaw required further information on various matters and asking him to "assist him in clarifying." And on September 14th, 2005 Mr. Shaw emailed Mr. Marrache saying he "would contact [Mr. Wood] later today." Mr. Mitchell's complaint about para.

209(e) was ultimately, however, not that the judge made a finding that Mr. Shaw did not obtain the comfort from Baker Tilly that he claimed he had, but that the judge had, in that paragraph, impliedly made a finding that Mr. Shaw had lied as to having obtained comfort, whereas again no suggestion had been put to him that he had been lying about the meeting.

154 I agree it would have been better if, in his review of Mr. Shaw's evidence about the meeting, the judge had referred to the passage of his evidence in cross-examination I have quoted. But I am not sure it takes the matter of the meeting much further. In place of Mr. Shaw's written evidence to the apparent effect that he had understood that Baker Tilly had already carried out an audit "which allowed them to certify that it was correctly operated and audited," Mr. Shaw was saying in cross-examination that what he understood was that they would be required to issue an audit certificate in the future. If so, he did not acknowledge that his written evidence to different effect was a mistake. He simply gave oral evidence that was inconsistent with it and was anyway hardly evidence of an exchange that could have given him any obvious comfort about what he was investigating. He also made it clear that he could not remember the details of the discussion.

155 The judge's ultimate finding, in para. 209(e), was that he "did not accept that there was a meeting with Baker Tilly around 13th September 2005 'which gave [Mr. Shaw] comfort'." There may be an element of ambiguity in that, namely, whether he was finding (i) that there was no meeting with Baker Tilly at that time, or (ii) that any meeting there may have been was not one at which Baker Tilly gave relevant comfort to Mr. Shaw. Mr. Moverley Smith supported the latter view and I agree with him. As to whether, as Mr. Mitchell submitted, the judge was impliedly finding that Mr. Shaw had lied about the meeting, I regard that as possible but am unable to conclude with confidence that he was.

156 Subject to one consideration, I would consider that this court is in no position to disagree with the judge's conclusion in para. 209(e). Mr. Shaw's evidence about the meeting was, with respect, inconsistent, imprecise and apparently unimpressive (although, in fairness to him, it is important not to forget that he was giving evidence about undocumented matters that had happened 12 years earlier); and the judge's overall conclusion that Mr. Shaw did not have a meeting with Baker Tilly at which he was given comfort is just the sort of finding by a trial judge with which an appellate court has no business to interfere.

157 The qualifying consideration, however, is that the exercise the judge was performing in para. 209(e) was a finding as to the evidence given by a man he had already wrongly found to be a liar about the Bautista conversation (a lie to which he attached a particularly dishonest motive) and whom he had also wrongly found to have lied about making a note of

the meeting. He was also about to find (impliedly, but there can be no doubt about it) that he had also lied as to the extent of his investigations into the client accounts; and, as I shall explain, I would also regard that finding as unjustified. These mistaken findings as to Mr. Shaw's truthfulness must have materially coloured his determination of whether or not Mr. Shaw's evidence that he had had a meeting with Baker Tilly at which he derived comfort was truthful or reliable. I would simply say that, in these circumstances, it is my judgment that the judge's rejection of Mr. Shaw's evidence that he had derived comfort from the meeting is unsafe. If the upholding of his order were to depend upon his finding in para. 209(e), I would not be prepared to uphold that finding. I would also uphold Ground 3.

Ground 4 (Mr. Shaw's investigation into the accounts) and Ground 5 (the assertion that the judge's finding of his dishonest assistance was plainly wrong)

158 I take these grounds together because they are sufficiently closely linked to make that a convenient approach. The criticism here is that it is said that the judge was wrong to find that Mr. Shaw had carried out an investigation of client account transactions other than those between the 294 sterling client account and the 293 office account; that he was therefore wrong to find that Mr. Shaw discovered from such wider investigation evidence that the brothers were (or were potentially) misusing client funds; that he was wrong to find Mr. Shaw did not (or would not) report the evidence of misuse he was found to have discovered because he did not want to "open a can of worms" or be seen as a whistleblower; and that, overall, his findings that Mr. Shaw discovered what he did and dishonestly acted as he did were against the weight of the evidence and the probabilities and were wrong.

159 Mr. Shaw's investigation was not part of the respondents' pleaded case but he explained in para. 102 of his witness statement what he had done:

> "102. During August 2005 and following the comment made by me in the Excess Referral regarding cross-firing and misuse of client funds I undertook an exercise to note the number of payments that had been transferred across from client account to office account during the previous 6 month period. All of these payments are identified in a typed note of mine which is undated but which contains my handwriting across the top [Page 14 of HS1]. It is undated but the last payment referred to in the schedule is dated the 22nd August 2005. Consequently I believe it was prepared at some point shortly after 22 August 2005. The total amount of the payments from client account to the office account during the course of the previous 6 months had been £279,271.20. I concluded at the time

> that the Marrache practice had a turnover of between £1.3M to £1.8M. The transfer of £279,271.20 from client account to office account, which so far as I understood was intended to settle fees and disbursements, was consistent with the level of business that was being undertaken and was not concerning."

160 Mr. Shaw there made no suggestion that he had carried out an analysis of client account transactions other than between client account 294 and office account 293. The limit of what he there said he did is also consistent with his contemporaneous note in his excess referral of August 26th, 2005: "I am also investigating a number of transfers between client and office account . . ." The typed note is headed (in his manuscript): "Trfs Clts to Office Jan/Aug 05." A typed sub-heading reads "funds into 293 account from 294 acc." Thus the schedule purports to show only payments from client account 294 to office account 293.

161 The schedule covers payments from February 15th to August 22nd, 2005. Despite the manuscript heading, it includes no January payments. Mr. Shaw, in cross-examination, was unable to explain why his heading was for a "Jan/Aug 05" period. He said (Day 3, pp. 139–143) that the period was a six-month one and he suggested that the printout was the fruit of a search of the bank statements for transactions between certain dates. That explanation is not comprehensively satisfactory and leaves unexplained the "Jan" start date. The judge (para. 181) found that Mr. Shaw would not have chosen this arbitrary period for his investigation but would have investigated for the whole period suggested by his heading, namely the eight-month period from January to August. He said that to choose such a period was sensible: any misuse of client money would manifest itself in it. This finding presumes that Mr. Shaw's analysis was therefore based in part on the printout and in part on a separate consideration of pre-February 15th transactions on the bank statements. I agree with Mr. Moverley Smith that this was a finding the judge was entitled to make.

162 The judge, in para. 183, then said that "just investigating one client account is in my judgment obviously inadequate. All active accounts should have been looked at." In para. 184 he found that the investigation of the 294 account transactions anyway threw up potentially suspicious matters, and I have summarized his reasons in paras. 88 and 89 above.

163 The finding that the 294/293 transfers were potentially suspicious was criticized by Mr. Mitchell. Payments from a client account to an office account are not *per se* suspicious. The experts agreed that they were permitted under the Solicitors' Accounts Rules for the collection of fees and disbursements; that "this was an established understanding and normal banking practice regardless of the Rules"; and that whether the amounts were rounded or not would make no difference to a banker

considering the transfers. Mr. Shaw's evidence was that he considered the payments to the 293 account to be for fees and disbursements and that they were consistent with the level of the firm's turnover. He said he had no suspicions about them. The fact that 293 was often overdrawn was not a feature that appears to have reinforced the judge's suspicions. The firm's original overdraft application was explained as reflecting tax advice to run their account in overdraft (see Mr. Brydges' credit application to Jersey of January 19th, 2000, to which the judge referred in his chronology).

164 Why did the judge nevertheless regard the 294/293 transfers during the eight-month period as having suspicious features? First, in para. 184, he said that whilst occasional round-sum transfers were not suspicious, the "bunching of nine large sums into short time-frames calls for investigation." The "bunching" he there identified was in fact of only five payments, namely (i) three payments totalling £50,000 on May 5th, 10th and 13th, 2005; and (ii) two totalling £50,000 on August 10th and 17th, 2005. He noted that the experts had agreed "that transfers of round sums were not suspicious, *but do not address the bunching point*." [Emphasis supplied.] Mr. Mitchell advanced three criticisms of the "bunching" point: (i) it was not part of the respondents' case; (ii) it was not put to Mr. Shaw; and (iii) it was not one to which the experts attached significance (they had not in fact considered the printed schedule of transfers) and so it was not for the judge to assume the role of an expert in relation to it.

165 The judge then, in para. 185, said that "the investigation of the 294 client account itself is grossly defective" and I have summarized why in para. 89. He referred in particular to transfers from 294 to Kristy, the firm's payroll company, including two payments in January (the judge had found that Mr. Shaw had investigated a full eight-month period). He then, in paras. 187 and 189, made findings as to what Mr. Shaw would have discovered from an investigation of client accounts 135 and 149.

166 As for the judge's criticism of Mr. Shaw's assumed investigation of 294, there was in fact no evidence that he made *any* analysis of it, as Mr. Moverley Smith acknowledged. The creation of the schedule required no more than an analysis of 293, not of 294. Moreover, since two material columns in it are those showing 293's balance before and after each transfer from 294, there is a strong inference that it was the 293 statements, not the 294 statements, which were the schedule's source. Mr. Mitchell's first point is that there was no evidence entitling the judge to find that Mr. Shaw looked at the 294 statements.

167 Secondly, it is said that the Kristy payments from 294 that the judge identified were four low value payments (the largest was £15,000) in January, March and May. There was no evidence that any was fraudulent and the judge did not explain why Mr. Shaw (had he in fact seen them in his investigation) would or should have regarded them as suspicious.

Mr. Mitchell suggested it was unclear whether, as at August 2005 (just two months after taking up his post as relationship manager), he yet knew that Kristy was the firm's payroll company. Mr. Moverley Smith, however, pointed out that in his oral evidence (Day 3, p.59) Mr. Shaw appears to have accepted that he had known that.

168 Thirdly, it is said that it was no part of the respondents' pleaded case that Mr. Shaw had become aware of these payments to Kristy. On the first day of the trial, when the respondents made what the judge treated as an application to amend their pleadings to expand their claim, he ordered them to serve a revised schedule of payments to Kristy out of various client accounts, identifying "those transfers which it is said which relationship manager saw" (para. 17 of his ruling of June 28th, 2017). The revised schedule was served on June 29th. None of the Kristy payments relied on by the judge in para. 186 was alleged to have involved, or been seen by, Mr. Shaw. The judge was, therefore, making findings adverse to him on the basis of payments which were not part of the case pleaded by amendment on the very day he started giving evidence. Whilst RBSI accepts that the cross-examination of Mr. Shaw went beyond the pleaded case and suggested to him that he must have seen the payments, it is said that, in the circumstances described, it was not open to the respondents to do so, nor to the judge to rely on them.

169 In para. 187, the judge then said that *if* Mr. Shaw had looked at the 135 client account, that would have thrown up other concerns; and in para. 189 he said that "Investigation of the 149 dollar client account would also have raised concerns." There was no evidence that Mr. Shaw looked at either account, nor did the judge there find he had. It was only in para. 210 that the judge made a finding that Mr. Shaw looked at accounts other than 293 and 294, where he also found that Mr. Shaw "discovered evidence that the Firm was misusing client monies." The judge did not there describe what that evidence was, but I presume its essence was that explained by the judge in paras. 187 to 189. The finding in para. 210 was made with what appears to have been less than total confidence: and, in case he was wrong, in para. 211, the judge made an alternative, lesser finding as to the extent of Mr. Shaw's wider investigation.

170 In my judgment, the judge's findings as to Mr. Shaw's investigation of the client accounts, and in paras. 210 and 211, are unsatisfactory in material respects. First, there was no evidence that Mr. Shaw had analysed 294. The judge assumed he had but appears to have overlooked that it was probable that the only source for his schedule was 293.

171 Secondly, there was no evidence that Mr. Shaw looked at any of the other accounts to which the judge referred, and he denied it. If he had decided to investigate them, it might be thought the exercise would have generated some documentary evidence comparable to the typed schedule,

yet there is none. In addition, Mr. Shaw's contemporaneous note as to the extent of his investigation points away from his having investigated beyond the 294/293 transfers.

172 Thirdly, the judge, in para. 202, gave two reasons why it was probable that Mr. Shaw had investigated beyond the 294 account, again overlooking that he had probably not investigated that account at all. The first was that Mr. Shaw, as an experienced banker, would not have thought that an investigation of the 294 account would be sufficient to dispel any worries about misuse of client money; the second was that the round-sum "bunching" point thrown up by his schedule of 294/293 transfers "would spur an experienced banker to continue with his investigations."

173 Taking the second point first, the judge was not entitled to find that any of the 294/293 transfers during the 2005 eight-month period upon which he focused ought to have raised suspicions in Mr. Shaw's mind. First, it was not open to him to assume the mantle of an expert in banking practice and attach the weight he did to the claimed "bunching" of certain payments. There was therefore nothing in the fact of the transfers from 294 to 293 to raise Mr. Shaw's suspicions. As for the Kristy payments, Mr. Mitchell had a fair pleading point about them but as no objection was raised by RBSI to Mr. Shaw's cross-examination about these payments, I would not criticize the judge for taking account of them. But they still did not take the respondents very far. Mr. Shaw did not, as I follow his cross-examination, accept that he had looked at or seen the Kristy payments as part of his investigation, nor would he have done if the only account he investigated was 293. In addition, it was accepted that, as a relationship manager, he was under no obligation to monitor his customers' accounts for illegal or suspicious activity.

174 Taking now the first point in the judge's para. 202, it is all very well for him to say that, as an experienced banker, Mr. Shaw would not have thought that an investigation only of 294 (more accurately of the 294/293 transfers) would dispel his concerns. But his own contemporaneous statement of what he was doing at the time shows he had set himself only a relatively narrow investigatory task. It can of course be said that, if he was going to do an investigation intended to reassure himself that there was no misuse of client funds, he should have investigated more widely, and Mr. Shaw accepted as much in his oral evidence: that, I interpret, is what he meant by saying that it was an "oversight" not to do so (Day 3, p.145). He may therefore have been in error in deciding to do such a limited analysis. But if there was nothing in his 294/293 analysis to excite suspicion, there would have been no spur for him to carry out a wider investigation.

175 More relevantly, it cannot be said that his omission to investigate more widely was *dishonest* even if it might be said that the extent of his

chosen investigation was inadequate. He did not know then what is known now about the brothers' dishonesty and there is no basis for any conclusion that he deliberately did not investigate further in case he did discover something sinister about the firm's activities. As he said in cross-examination (Day 4, p.18): "But, you know, we are carrying out this detailed analysis now, that I would certainly not have carried out at the time. I was dealing with a respectable firm of solicitors who I had no doubt to question." To the rejoinder that he did have doubts, as he was carrying out an investigation, he replied: "Yes, but it's a degree, you know. Is it a forensic investigation? I needed to satisfy myself that—all right, and did that. Now whether you agree with what I did or disagree, I carried out the investigation, I had a result and I reached a conclusion." Later (Day 4, p.23) he said: "I must have been [happy with what I saw], because I didn't take matters further."

176 These considerations collectively raise a serious question as to the soundness of the judge's ultimate finding, in para. 210, that Mr. Shaw *did* investigate the other client accounts. Moreover, I consider there is also a real risk that the judge's rejection of Mr. Shaw's evidence that he did not investigate beyond the 294/293 transfers was probably, by the time he reached para. 210, materially influenced by the findings he had, wrongly, made against Mr. Shaw that he was a liar bent on perverting the course of justice. These findings must inevitably have contaminated his assessment as to whether Mr. Shaw was being truthful in denying that his investigation went beyond the 293/294 transfers.

177 There is, I consider, also a further, compelling reason for doubting the soundness of the judge's finding that Mr. Shaw made a wider investigation of the client accounts, discovered the fact of the firm's defalcations and chose to remain silent about it whilst dishonestly allowing the defalcations to continue. Before making his finding to that effect in para. 210, and his consequential finding in para. 212 as to Mr. Shaw's dishonest conduct in assisting the brothers' thefts, the judge apparently had in mind his correct self-direction that, whilst there is no legal requirement that a person accused of dishonesty must have a motive so to act, the existence or otherwise of a motive is relevant in deciding whether or not a person has in fact acted dishonestly.

178 That consideration was the explanation for paras. 204–208 of the judge's judgment. He had, by that stage, found that Mr. Shaw had lied about the Bautista conversation, given himself a *Lucas* direction about that lie, found that he had also lied about the Baker Tilly meeting note and expressed the views that he could not have thought that an investigation into only the 294 client account would be sufficient to dispel any worries about misuse of client funds and that this consideration, plus the "bunching" point, "would spur an experienced banker to continue with his investigations." He had not, however, yet found that Mr. Shaw *did* make

any wider investigations. Before doing so, he first considered, in paras. 204–208, why Mr. Shaw might wish, dishonestly, to keep secret any discovery he might have made as to the firm's misuse of its clients' money. His theory there explained as to how Mr. Shaw would have responded to a discovery by him of the firm's misuse of client money is, as I follow it, a reference to what is at that stage no more than an assumed such discovery.

179 One response to such an assumed state of affairs is that it would be likely to have spurred Mr. Shaw to make an early disclosure to his superiors of what he had found. Relations between the Marraches and Mr. Shaw were unhappy. They disliked him and he regarded them as a professional challenge. In addition, he was at the same time taking a tough line with them, by way of making demands of them intended to improve the banking relationship. The judge rightly noted this in para. 204, where he said that their relationship "was not such as to induce him to suppress the evidence of misuse of client monies." I agree.

180 The judge did not, however, stop there. In para. 205 he said a good starting point as to Mr. Shaw's state of mind was that he never made an STR in respect of his suspicions of the firm, which he said he was "probably obliged" to do as soon as he identified the issue of misuse of client funds. I respectfully disagree with that. Mr. Shaw's investigation was apparently directed at satisfying himself that there was *no* misuse of client funds. He was not investigating either actual or suspected such misuse and his evidence was that he never saw evidence of any such misuse. Unless and until he did see evidence of a suspicious transaction, I cannot see how he could or should have made an STR. What "suspicious transaction" was he supposed to report? The judge, however, said that the making of an STR would go to the top of the bank and open up a can of worms. To make one, said the judge, would have been a courageous thing for Mr. Shaw to have done. "It is a sad fact of life that whistleblowers are not always thanked."

181 The judge concluded, therefore, that Mr. Shaw would not have made an STR. Moreover, the judge found he would not have done so even on the assumption (as the judge explained in para. 206, quoted in para. 101) that Mr. Shaw had discovered that the firm was stealing from the clients to the tune of "hundreds of thousands" of pounds. The judge appears to have attached relative modesty to the magnitude of such plundering by saying it was not in millions, let alone tens of millions. By most people's standards, however, it was assumed plundering on a massive scale, albeit of a nature that the judge said Mr. Shaw "would have been able to see as 'dipping'." He would, therefore, have seen it, said the judge, as "the Marraches taking monies for immediate liquidity purposes rather than stealing the monies with no prospect of ever making repayment." He continued by saying that—

> "The fact that the 2005 review said that segregation was not a requirement of Gibraltarian law would have given him some protection against personal consequences. (He knew that in England some professions like travel agents and insurance brokers were not required to segregate client funds: transcript, day 5 page 52 lines 9 to 18.)"

He concluded this section of his judgment with paras. 207 and 208, which I have also set out at para. 101.

182 With respect to the judge, I regard his case theory in these paragraphs as surprising and implausible. I remind myself again of the deference an appellate court must show to a trial judge's findings of fact. But, so far as I can see, the findings in paras. 204–208 were not founded on any evidence the judge had heard or read. They appear to have been built entirely on unsupported speculation. First, I do not understand on what basis the judge assessed that Mr. Shaw, a very experienced, and apparently very tough, banker would not have had the courage to perform his duty to report dishonest banking transactions by customers. Secondly, his speculation appears to me to have been at odds with the evidence as to the climate of the banking relationship with the firm at the time that Mr. Shaw is assumed to have discovered such plundering. If one winds back to that time, and has regard to the then nature of the relationship, the notion that Mr. Shaw would have kept his astonishing discoveries to himself is one I would regard as incredible.

183 The documentary evidence shows how unfavourably RBSI viewed the Marraches as customers. Over the years leading up to Mr. Shaw's time as relationship manager, there was continuing frustration by RBSI with what it regarded as the chaotic way in which they managed their banking relationship. A June 2001 Jersey team document referred to the connection as having "always been troublesome. Behaviour has improved of late and the branch's tough line is appreciated." Mr. Maclean's observation on a sanction summary sheet of November 23rd, 2001 was that he had "no appetite for further lending to this connection given we effectively remain in a pawnbroke situation against the brothers' asset base and reputation."

184 On December 1st, 2003, Mr. Maclean emailed his colleague, Mr. Nash, in response to the latter's list of complaints about the Marraches, saying: "Frankly Nasher, I've had more than enough of the Marraches. We've only put up with them in the past because of the strongest possible branch representations. This won't wash for much longer and I'll enforce a tougher line whether or not these strong representations continue." Mr. Cartwright, in the email chain, acknowledged the issues with the Marraches, and proposed a meeting, with which Mr. Maclean agreed, saying: "Agree that the meeting should come before the whip and trust that the verbal lashing will prove adequate."

185 On July 16th, 2004, David Holdstock (an analyst), wrote a document critical of the firm as a client, saying it was a "high priority for us to sort out this connection" and that "we have advised the Marraches we will not entertain any restructure, renewal or granting of facilities until we are satisfied there exists an ability to repay." Mr. Maclean agreed with the suggested strategy, adding his own expression of frustration at the firm's dilatory attitude in sorting out their affairs to RBSI's satisfaction, and saying that "Failure to deliver will constitute a breakdown in the relationship and will prompt a re-bank request." All this reflected how unhappy the Jersey credit team, who ultimately called the shots, were with the Marraches. The judge understood this perfectly well, noting in para. 166 that ". . . Credit were thoroughly fed up with the Marraches and would have had no hesitation in severing the connection if they had sufficient grounds to do so." Mr. Shaw's assumed discoveries provided grounds in spades.

186 Mr. Shaw arrived in June 2005. He read into the history. He made his first excess referral on July 29th, 2005, noting that—

> "This connection is well known to credit. Historically there have been issues as financial information has not been provided to enable a full credit assessment to be undertaken and even when a view has been taken and limits have been marked they have not been observed."

Mr. Heward's response to his next credit referral of August 26th, 2005 included that "There are clearly relationship issues to be addressed." Mr. Shaw's excess referral of September 7th, 2005 included the reference to his "stance on striving to maintain a maximum balance of £100k has met with serious unrest from clients and they require a 'clear the air' meeting. I am not sure whether this is progress or not!!!"

187 This is the first reference in the documents to the friction between Mr. Shaw and the Marraches. In his oral evidence (Day 3, p.106) he gave a graphic account of the hostility the Marraches displayed towards him at the meeting he and Mr. Cartwright had with them in early September 2005. It was provoked by Mr. Shaw's demands as to the information the bank wanted. Mr. Shaw has by now investigated the 294/293 transfers; and, according to the judge, has also investigated more widely and discovered the massive plundering of client funds in which the Marraches were engaged. The friction between the firm and Mr. Shaw is further shown by an email to Mr. Shaw of September 22nd, 2005 from Adam Moon (he looked after the brothers' personal banking). After asking Mr. Shaw to call Benjamin Marrache about a property purchase, he wrote:

> "Howard, just a word of warning and by way of some feedback—Benjamin didn't seem very happy that this had to go through you. Obviously I'm not aware of the status of your relationship with the

customer, but I thought you should know that he had made comments to this effect."

188 Mr. Shaw's sanction summary sheet of October 27th, 2005 met with familiar critical responses from Mr. Maclean about the bank's relationship with the Marraches, referring to (i) "the poor behaviour of this connection over a considerable period"; (ii) the view that "Account conduct remains unacceptable though it appears as though funds are generally also held at Jyske Bank"; (iii) a suggestion that "If they do step out of line here in terms of a/c conduct, pricing should inevitably be punitive. If they persist a re-bank will be necessary"; and saying (iv) "Overall this is a difficult call to make as from a credit risk perspective there is little to justify continuation of facilities to this connection." The picture painted by the Jersey credit team is, therefore, that it had for long been, and remained, fed up with the Marrache connection and was apparently relaxed about terminating it. Mr. Cartwright, in Gibraltar, appeared similarly unconcerned about terminating it. On October 5th, 2005 he had emailed Graeme Smith (RBSI's Head of Corporate across RBSI—its top man there), and copied it to Mr. Shaw. The message included familiar complaints about "the lack of meaningful financial information we have been able to glean from the customer and the poor way in which they manage their own affairs as opposed to the legal practice." He continued:

"Overall, we have reduced the exposure by some 150k and in terms of risk we do not feel overly concerned other than the fact that they work overdrafts on a hard core basis and they need to be controlled. I am going to have a chat with Kerry [Mr. Blight—the Regional Manager in Gibraltar] to assess any potential damage should we go down the re-bank route but I do not think this is necessary. Neither do Credit as long as we can renew the reasonable levels of borrowing and re-pay an old personal 'hunters' facility granted to the 3 brothers. From the business perspective, the actual reward from this connection is not significant, indeed they probably earn more out of us through the mortgage introduced work but I do not see the point in exiting dramatically. If you want figures etc happy to ask Howard [Shaw] to provide."

189 Thus the possibility of terminating the relationship was voiced yet again, this time by Mr. Cartwright, who, whilst not keen to do so, did not appear to regard a termination as likely to be very significant as regards RBSI. Mr. Shaw was well aware of the attitude of Gibraltar and Jersey towards the Marraches and that the relationship was a fragile one. Mr. Shaw himself, in his credit application of October 27th, 2005, said this under his sub-heading "Future Financial Requirements":

"Prior to considering further facilities we require the connection to evidence a desire and an ability to work within agreed parameters. If

they are unable to demonstrate such ability then this could be the end of the road in terms of lending relationship."

190 Here, therefore, he was foreseeing that, absent the production of evidence satisfying RBSI's requirements, the lending relationship might have to be terminated. This was written by a man whom the judge found has now discovered that the reality of what was going on was that the firm was stealing from its clients to the tune of hundreds of thousands of pounds but did not have the courage to disclose it in case it upset his superiors at RBSI.

191 On what basis the judge thought it appropriate to suggest that Mr Shaw "would have been able" to see such stealing as "dipping," and as "taking monies for immediate liquidity purposes rather than stealing the monies with no prospect of ever making repayment" I do not understand. The Marraches were stealing and I do not know why the judge considered it appropriate to attribute to Mr. Shaw that he "would" have adopted the more charitable, and wrong, interpretation of their actions that he suggested. Mr. Shaw's assumed discovery would have shown him that (i) RBSI's long held perception that the firm was simply chaotic in managing of its own affairs was wrong; (ii) the reality was that it was commercially insolvent; and (iii) it was only able to meet its current liabilities by stealing from clients. Mr. Shaw was unswerving in his evidence that he knew that solicitors were not entitled to help themselves to clients' money which was not due to them for fees or disbursements. He was a very experienced banker, who was taking a line with the Marraches of a toughness that had manifestly antagonized them. Yet now, when he discovers the dishonest charade in which they were engaged, he is found by the judge to have lacked the courage to report it and has instead decided to keep quiet about it.

192 In the circumstances described, I respectfully regard the judge's speculation that Mr. Shaw would have chosen to keep his discovery to himself as incredible. I cannot understand why it should be thought that he would lack the courage to blow the whistle. It is counterintuitive. It was not based on any evidence the judge identified. On the contrary, the evidence invites a compelling conclusion that if Mr. Shaw *had* discovered any misuse of client money by the firm, he would not have hesitated to make a prompt disclosure of it. He had nothing to gain by not doing so; but (when the truth came out, as it usually does) he had plenty to lose: his job, his reputation and his career. As he said in cross-examination, his failure to submit an STR when he had a suspicion to report would result in "making myself personally liable, risking my whole career, my reputation, fines, imprisonment. I understand the potential issues with not reporting suspicions." In my judgment, the judge's speculation in paras. 204 to 208 was not only unsupported by any evidence, it was contrary to the probabilities, unjustified and wrong.

193 The judge was right (para. 210) that the question whether Mr. Shaw made a wider investigation and discovered the extent of the firm's misuse of client money was a matter he had to answer by reference to the balance of probability. Once, however, there is removed from consideration the notion that, had Mr. Shaw made the discoveries that the judge found in paras. 210 and 211, he would probably have remained silent about them, the basis for those findings is exploded. Whilst the standard of proof was the balance of probability, this was a case in which the likelihood that Mr. Shaw had made, and then chosen to remain silent about, a discovery of stealing of the magnitude the judge attributed to him was inherently improbable. For the judge to find otherwise, the evidence that he in fact did so needed to be particularly strong (*In re H* (5), *per* Lord Nicholls, referred to in para. 13). The evidence was, however, not of that order.

194 I would uphold Grounds 4 and 5 and hold that the judge was wrong to make the findings as to Mr. Shaw's dishonesty in paras. 210 to 212 that he did. That conclusion, together with my views on the other grounds of RBSI's appeal I have considered, means that, subject to considering the notice of cross-appeal, I would allow RBSI's appeal and set aside the judge's order.

The notice of cross-appeal

195 The heart of the cross-appeal is directed at asserting that there were additional reasons why the judge should have found that Mr. Shaw was dishonest. This centred on the issue of "segregation" and "non-segregation," to which Mr. Moverley Smith devoted the bulk of his address.

196 The judge dealt fairly briefly with this. I have recorded his findings that Messrs. Ramagge, Maclean, Heward and Simpson, although informed in various documents that there were or had been "non-segregation" issues, were entitled to assume that Mr. Shaw had sorted them out or was doing so. As noted, the judge cannot have regarded them as having understood that the difficulties referred to were instances of the firm stealing client money. If they had had any hint by the "non-segregation" references that the firm was so misusing its clients' money, it is probable that they would have sought an explanation of what was going on.

197 That they should have understood any "non-segregation" difficulties as not, or not necessarily, involving any dishonest misuse is because the ordinary sense of a reference to the "non-segregation" of office and client money is simply that they are mixed in one account. That is no doubt a breach of trust and of the Solicitors' Accounts Rules and so can in one sense be regarded as a "misuse" of client money. A reference to any such "non-segregation" does not, however, necessarily mean that client money has been or is being misappropriated, at any rate so long as the firm uses

only its share of the mixed money for its own purposes. Where a trustee mixes his own money with trust money in a single account, the presumption is that, when he draws on it for his own purposes, he is drawing his own money out first.

198 In this case there was, so far as I am aware, no evidence of instances in which the firm did so mix office money and client money in a single account. There was of course evidence of transfers from client accounts to the office account, in particular those between 294 and 293, the subject of Mr. Shaw's schedule. Such transfers, if in satisfaction of money due to the firm for invoices or disbursements, do not involve a "non-segregation" of client and office money: upon the transfer, the money ceases to belong beneficially to the client and becomes beneficially owned by the firm. It is now known that the brothers also transferred money from client accounts to the office account that did not represent money lawfully due to the firm, but were instances of a dishonest appropriation of the client money for the firm's own purposes. That is also not naturally or properly described as an example of "non-segregation" of client and office money. So to describe it cannot even be regarded as a euphemistic explanation of what was happening: it would be a simple misuse of language calculated to conceal rather than to explain that what was actually happening was that the brothers were stealing from their clients.

199 When dealing with the "non-segregation" references in relation to Mr. Shaw, the judge appears, however, to have been ready to attach a sinister sense to them. Thus in para. 171, he said that the August 26th, 2005 excess referral was the only one to use the expression "misusing clients' funds"; and that thereafter the expression used was "non-segregation." The first such reference to "non-segregation" is in Mr. Shaw's report of October 27th, 2005, where he wrote that "It would also appear that on occasions client and office funds are not segregated but segregation is not a requirement under current Gibraltar legislation and Marrache do not follow UK best practice adopted by some local competitor practices."

200 I do not understand why the judge considered (or may have considered) that Mr. Shaw was there using a reference to occasional non-segregation as a reference to a dishonest misuse of client money. His RBSI colleagues did not apparently so understand him. Nor is there any reason, on the face of it, to read him as there saying that there had been occasions when the firm had been stealing from clients. First, as I have said, a non-segregation of client and office money does not, without more, mean that a firm is doing so. Secondly, in saying that "segregation" was not yet a requirement under current Gibraltar law but was going to be, Mr. Shaw can hardly be taken to have been saying, or suggesting, that the occasions of non-segregation referred to were instances of stealing

because he cannot be taken to have believed that a dishonest misuse of client funds was a practice in Gibraltar that was not yet outlawed.

201 It is, however, unfortunate that precisely what Mr. Shaw *did* mean by "segregation" or "non-segregation" is unclear because in his witness statement he did not define what he meant, nor in his oral evidence was he pressed to do so. In para. 101 of his witness statement he observed, correctly, that a lack of segregation "could in my mind lead to a misuse of client funds" which shows he recognized it did not automatically do so. He had also referred to it earlier, in paras. 94 to 96, where he said he could not recall what had prompted him to make the "segregation" and "non-segregation" references he did in the documents. On one view of his witness statement he can perhaps be read as regarding transfers from client to office account as examples of "non-segregation" but that makes little sense since it was lawful to make such transfers in respect of money due to the firm and money so paid ceases to be client money. Indeed, he referred to his credit application in 2006 in which he said that "historically it appeared that on occasion client and office funds were not segregated," observing that by then he regarded any possible issue of non-segregation to have been satisfactorily resolved. He obviously cannot there have meant that the firm no longer transferred money from client to office account for fees or disbursements. Nor can he have meant that he was satisfied that the firm was no longer dishonestly stealing from its clients: that is because he made it clear, in para. 46, that during his time as relationship manager he never once suspected the Marrache brothers "of being involved in fraud or the theft or misappropriation of client funds." His evidence was also (para. 5) that he considered himself familiar with the concept of client accounts and the need "to segregate office funds from both general and designated client funds."

202 Mr. Moverley Smith's stance in his cross-examination of Mr. Shaw was, however, that "non-segregation" was a synonym for instances in which the firm dishonestly appropriated money in a client account to which it had no right (*i.e.* because it did not represent payment for fees or in respect of disbursements). Mr. Shaw was, however, consistent in his oral evidence that his position was that the firm was not entitled to take money from its client accounts unless the money was due to it; and that, whilst it was not his duty to monitor client/office account transfers, if he was alerted to anything suspicious he would be on enquiry. He also said (Day 4, p.31) that "I never proved non-segregation during my time as relationship manager." At p.32, he continued:

> "Okay. So there is commentary that we'll probably come to later about my misunderstanding of the need in Gibraltar to segregate funds. But overriding that principle, the bank's requirement was for legal practices that client funds would be segregated. I am absolutely aware that the FSC requirement was that office and client funds

> would be segregated, so if I became absolutely aware that a client was not segregating funds, then I would be submitting a report to my Compliance Officer and I would be submitting a suspicious transaction report. I would probably have taken guidance first, as to whether I went and approached the client. But it would all depend upon circumstances, because I have the right to still make enquiry with the client, even if I have a suspicion."

203 Mr. Shaw was of course rightly taxed with the fact that, contrary to his evidence that he saw no "non-segregation" during his time as relationship manager, his report of October 27th, 2005 said what it did about funds not being segregated "on occasions." I have explained why I find it difficult to interpret what Mr. Shaw was there saying as a reference to occasional dishonest misappropriations. He was, however, rightly also pressed about his choice of language and it is fair to say that he had no very impressive answers. I will not cite all he had to say on it but the thrust of his explanation is that he could not remember why he had used the words he had, it was a poor choice of words but that what he could remember "is that there is not one point in time where I remember; that is the Marraches using client funds for their own purposes. I really cannot. Because if I had seen that or believed that I would have absolutely reported it immediately." (Day 4, p.44.) He declined to agree with the suggestion that non-segregation was a misuse of client funds and responded with his example of how a mixing of £50 of client money and £50 of office money in one account would not mean that there was necessarily going to be any misuse of the client's £50. I would not fault his example but the judge was unimpressed by it, saying (para. 196) that he "found it an unconvincing attempt to suggest that any references by him to non-segregation might be innocent."

204 The essence of the cross-appeal in respect of the "non-segregation" aspect of the case is that it is said that the judge should have supported his conclusion as to Mr. Shaw's dishonesty by holding as untruthful his evidence that he never suspected the firm of doing anything illegal or improper or believed that it was segregating office and client funds. Reliance was placed on the fact that Mr. Shaw asserted in his witness statement his understanding of the requirement for firms of solicitors to keep office and client funds segregated and that he said in his cross-examination that if he became aware of any non-segregation he would have submitted an STR. Yet he never did so and his report of October 27th, 2005 acknowledged that non-segregation was still happening on occasions.

205 Although the judge made the critical comments about Mr. Shaw and non-segregation to which I have referred, he did not ultimately, at any rate in positive terms, rely on any of the points just summarized in his assessment of Mr. Shaw's honesty. Had he done so, there would have been

no need for the cross-appeal. I have given my reasons for regarding the judge's route to his conclusion that Mr. Shaw acted in the dishonest way he found as flawed at all material stages; and I regard the flaws in his reasoning as having cumulatively undermined his conclusion. In such circumstances, what the cross-appeal is really asking this court to do is to make its own finding that Mr. Shaw's evidence about the non-segregation issue was untruthful, relying in particular on what is said amounts to an admission in the October 27th, 2005 report as to the fact of non-segregation by the firm.

206 I consider that this court is in no position to do that. I admit that my reading of the written evidence and the transcript leaves me in a position of uncertainty as to what the references to non-segregation meant, and I have explained why. As for the particular reference in the October 27th, 2005 report, I find it far from clear that Mr. Shaw was in fact there referring to anything dishonest. Yet the judge appears to have regarded it as a reference to a dishonest misuse of funds. That would appear to me to be an odd conclusion.

207 First, it is not how his colleagues appear to have read it. Secondly, the linking by Mr. Shaw of his non-segregation reference to what he apparently (but mistakenly) believed was a forthcoming change in the law suggests he cannot have been referring to a state of affairs that involved any illegality or dishonesty under the current law. Thirdly, if he had discovered something suspicious about the firm's dealings with its client accounts and (according to the judge) had determined to remain silent about it, it is improbable that he would have chosen in his October 27th, 2005 report to make an obscurely veiled reference to it by his "non-segregation" reference. If the judge was right that he had decided to stay silent, he would be likely to have buried what he had discovered and to have made no outward reference to anything that could be construed as a reference to the firm's dishonest activities. The risk of doing so was that someone would ask for particulars; and that might result in the opening of the can of worms that the judge found Mr. Shaw wanted to keep shut. Moreover, he would then have to explain why he had not opened the can himself.

208 Fourthly, however, in para. 206 of his judgment (quoted at para. 101 above) the judge also appears, as I follow it, to have attributed to Mr. Shaw the foresight that, if the brothers' six-figure stealing were to come to light and a finger of covert conniving assistance were to be pointed at him, he might hope to gain some defensive protection from his statement in the 2005 review that segregation was not yet a requirement of Gibraltarian law. I have referred to what I respectfully regard as the incredible nature of the judge's case theory attributed to Mr. Shaw in paras. 204 to 208; and, if I have correctly understood it, this gloss on that theory based on the language of the 2005 review appears to me to load on

to it a yet further tier of incredibility. This appears to be the judge attributing to Mr. Shaw the decision to make a deliberate, but carefully veiled (and misleading), reference to the six-figure stealing he has just discovered, with a view to providing himself with a defence when his discovery of it was later also discovered. With respect, that suggestion appears to owe nothing to any evidence the judge read or heard but everything to an excess of imagination.

209 Whilst, therefore, the judge made some sideswipes at Mr. Shaw about his non-segregation references, I consider that they ultimately lend no assistance to the respondents. Their difficulty is that the judge's findings of dishonesty against Mr. Shaw were, in my judgment, flawed from beginning to end. Take them away and there is nothing left upon which this court might build some substitute structure enabling the respondents to maintain their judgment. I would decline to hold that the cross-appeal advances any basis upon which the judge's order can be upheld.

Ground 6: costs

210 In case the appeal on liability failed, RBSI has an independent challenge to the judge's order awarding the respondents 90% of their costs of the claim. Its essence was that a discount of 10% was unfairly modest in light of the number of issues on which the respondents failed. As I would allow the appeal and set aside the judge's order of August 10th, 2018, this ground does not arise. I shall not extend an already overlong judgment by considering it.

Disposition

211 We raised with counsel whether, if we were minded to allow the appeal on the basis of RBSI's grounds of appeal, it would be appropriate simply to dismiss the claim or instead order a retrial. Mr. Moverley Smith favoured a retrial and Mr. Mitchell a dismissal of the claim.

212 In my judgment, it would not be just to order a retrial. First, the respondents do not challenge the judge's rejection of their case against RBSI insofar as it was based on the activities of the six RBSI individuals whom the judge acquitted of dishonesty. It would be unjust to direct a retrial that enabled the re-opening of the cases against them. Any retrial would therefore have to be a substantially reconstituted one that confined the respondents to making good, if they could, their case against RBSI via Mr. Shaw.

213 Secondly, I also see no reason why the respondents should be given a second chance to make good their case against RBSI via Mr. Shaw. They adduced what evidence they had against him and he answered it. The judge made the findings of dishonesty that he did against Mr. Shaw. In my

view, for the reasons given, they are unsustainable. I see no proper basis upon which another judge should be asked to retry the same issue.

214 I would allow the appeal, set aside the judge's order of August 10th, 2017 and dismiss the respondents' claim. I add finally that I consider that this court should formally record its finding that the judge's findings of dishonesty against Mr. Shaw were unjustified and should not have been made.

215 **SMITH, J.A.:** I agree.

216 **GOLDRING, J.A.:** I agree.

Appeal allowed.